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## ARTICLE

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# Justice Rabinowitz and Personal Freedom: Evolving a Constitutional Framework

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*This Article honors the contributions former Chief Justice Jay Rabinowitz has made to Alaskan jurisprudence in the areas of individual privacy and freedom of expression. It begins by tracing the development of the Alaska Supreme Court's protection of individual rights above and beyond that provided by the federal courts. The Article then provides a thorough analysis of two decisions authored by Justice Rabinowitz, Breese v. Smith and Ravin v. State, which have laid the foundation for heightened protection of privacy and freedom of expression rights in Alaska. Next, the Article discusses the influence and application of these two cases on other privacy and freedom of expression cases, family law cases, and criminal law cases. The Article concludes that Justice Rabinowitz's seminal and far-reaching decisions have contributed and will continue to contribute to the protection of individual constitutional rights so treasured in Alaska.*

### I. INTRODUCTION

Alaska has a longstanding tradition of respect for individuality. Many of the early settlers and those who traveled north to ex-

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plore for gold were on the run from various forms of trouble, misconduct, and misfortune.<sup>1</sup> Others simply found the fabric of life in the developed cities and communities of nineteenth century America too constricting, and sought refuge at the edge of the frontier.<sup>2</sup> The community values of territorial Alaska evolved to reflect a high level of tolerance for personal idiosyncrasy, unconventional thought and lifestyle, and respect for personal privacy, later to be known as the “right to be left alone.”<sup>3</sup>

Early decisions by territorial judges reflected the value Alaskans place on individual liberty.<sup>4</sup> But the territorial cases were few and their legal analyses were controlled by legal precedent developed by “outside” federal judges, who were influenced and guided by a different culture.<sup>5</sup> After Alaska achieved statehood in 1959, the burden of melding traditional Alaskan values of personal freedom into a theory of constitutional law fell to the newly created state judicial system. In the ensuing four decades, the Alaska Supreme Court has played an important role in fostering tolerance both for individual freedom of expression and the individual right to be left alone. The court has developed a body of law that provides a strong foundation for constitutional protection of these traditional Alaskan values.

As a member of the Alaska Supreme Court for thirty-one years,<sup>6</sup> Justice Jay Rabinowitz participated in dozens of decisions defining the contours of individual freedom in this state. Two opinions he authored early in his tenure form the foundation for much of the state’s jurisprudence on free expression and privacy.<sup>7</sup> These seminal decisions had significant influence far beyond the expected realm of civil liberties’ decisions. This Article examines

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1. See, e.g., Mary C. Mangusso & Stephen W. Haycox, *Introduction to INTERPRETING ALASKA’S HISTORY: AN ANTHOLOGY* 5 (Mary C. Mangusso & Stephen W. Haycox eds. 1989).

2. See *id.*

3. *Messerli v. State*, 626 P.2d 81, 83 (Alaska 1980).

4. See, e.g., *Glover v. Retail Clerk’s Union Local 1392*, 10 Alaska 274 (D. Alaska 1942) (recognizing free speech right in labor picketing); *Smith v. Suratt*, 7 Alaska 416 (D. Alaska 1926) (declining to restrain independent entrepreneur from taking photographs of a polar expedition).

5. Prior to the recognition of Alaska statehood, appeals from the trial courts in territorial Alaska were heard by the U.S. Court of Appeals for the Ninth Circuit in San Francisco.

6. Justice Rabinowitz was appointed to the Alaska superior court in 1960 by Governor Bill Egan. In February 1965, he was appointed to the Alaska Supreme Court by Governor Egan, where he served until his retirement in 1996. During his tenure on the court, he served four terms as Chief Justice.

7. See *Ravin v. State*, 537 P.2d 494 (Alaska 1975); *Breese v. Smith*, 501 P.2d 159 (Alaska 1972).

Justice Rabinowitz's key decisions concerning individual rights and some of the ways these decisions have shaped the case law in diverse areas such as students' rights, election law, child custody and divorce decisions, and the criminal law. Part II of this Article provides the background to the Alaska Supreme Court's protection of personal freedom. Parts III and IV discuss the two cases by Justice Rabinowitz that have shaped protection for free expression and privacy rights in Alaska. Part V elaborates on Justice Rabinowitz's impact on the law of privacy and freedom of expression. Parts VI and VII explore the themes of privacy and free expression rights developed by Justice Rabinowitz and the Alaska Supreme Court in the areas of family law and criminal law.

## II. BACKGROUND: INDEPENDENT ANALYSIS OF THE STATE CONSTITUTION

The earliest decisions of the Alaska Supreme Court tended to apply federal constitutional law to interpret the parallel provisions of the state constitution.<sup>8</sup> Justice Rabinowitz was a relatively new member of the court in 1969 when the Alaska Supreme Court formally began developing its doctrine of independent constitutional analysis. In *Roberts v. State*,<sup>9</sup> the court for the first time explicitly stated, "We are not bound in expounding the Alaska Constitution's Declaration of Rights by the decisions of the United States Supreme Court, past or future, which expound identical or closely similar provisions of the United States Constitution."<sup>10</sup> The court gave fuller expression to its right and obligation to interpret the state constitution independently in *Glasgow v. State*,<sup>11</sup> *Baker v. City of Fairbanks*,<sup>12</sup> and *State v. Browder*.<sup>13</sup>

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8. See, e.g., *Nelson v. State*, 387 P.2d 933, 935 (Alaska 1964) (applying federal due process and equal protection standards to interpret state regulation); *Elison v. State*, 383 P.2d 716, 718-19 (Alaska 1963) (using federal cases to analyze search and seizure issue); *Knudsen v. City of Anchorage*, 358 P.2d 375, 378-79 (Alaska 1960) (expressing the view that the Alaska courts were bound by the U.S. Supreme Court's interpretation of the Sixth Amendment).

9. 458 P.2d 340 (Alaska 1969).

10. *Id.* at 342. In a case predating Justice Rabinowitz's appointment to the Alaska Supreme Court, the majority, in passing, expressed the view that the Alaska court was not required to follow a U.S. Supreme Court decision. See *Matthews v. Quinton*, 362 P.2d 932, 937 (Alaska 1961); see also *State v. Shelton*, 368 P.2d 817, 819 (Alaska 1962) (questioning whether the Alaska court would follow a U.S. Supreme Court decision on grand juries).

11. 469 P.2d 682, 686 & n.6 (Alaska 1970) (rejecting the restriction placed on the court by the *Knudsen* decision).

12. 471 P.2d 386, 401-02 (Alaska 1970) (noting the recent recognition among Alaska state courts of the power to interpret the state constitution independently, provided that minimal national standards required by the U.S. Supreme Court are

The court's decisions in *Roberts*, *Glasgow*, *Baker*, and *Browder* do not reveal explicitly why the court was moved to embark on a theory of independent constitutional analysis at that particular time, but it is likely that the court's direction was responsive to contemporaneous changes in the U.S. Supreme Court. *Roberts*, *Glasgow*, *Baker*, and *Browder* all were decided between 1968 and 1972. During those years, the composition, balance, and judicial philosophy of the U.S. Supreme Court changed dramatically with the appointment by President Richard Nixon of four conservative justices.<sup>14</sup>

As the reconstituted U.S. Supreme Court embarked on dismantling the work of the Warren court,<sup>15</sup> the Alaska Supreme Court was left to act independently in its efforts to protect and further develop the law of individual freedom.<sup>16</sup> The court not only

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met).

13. 486 P.2d 925 (Alaska 1971). Justice Rabinowitz authored this important early decision declaring the independent authority of the Alaska Supreme Court. In determining that an individual charged with criminal contempt was entitled to a jury trial, not just a summary adjudication by the accusing judge, Justice Rabinowitz recognized the duty of Alaska state courts to look beyond the guidance of the U.S. Supreme Court in interpreting the state constitution: "[I]t would be an abdication of our constitutional responsibilities to look only to the [U.S.] Supreme Court for guidance." *Id.* at 936-37. The facts of *Browder* show clearly that Justice Rabinowitz was guided solely by his understanding of constitutional principles, uninfluenced by the politically unsympathetic nature of the claimant who asserted those rights. *Browder* was a member of the Brothers Motorcycle Club, was described as heavysset, long-haired, and bearded, and entered the district courtroom carrying a shotgun. *See id.* at 928 & n.2.

14. Chief Justice Warren E. Burger was appointed in 1969; Justice Harry A. Blackmun was appointed in 1970; and Justice (later, Chief Justice) William H. Rehnquist and Justice Lewis F. Powell were appointed in 1972.

15. *See, e.g.*, *Kirby v. Illinois*, 406 U.S. 682 (1972) (limiting prior cases on right to counsel and holding that no right attaches at pre-indictment line-up); *James v. Valtierra*, 402 U.S. 137 (1971) (declining to apply strict scrutiny to classification based on poverty); *Harris v. New York*, 401 U.S. 222 (1971) (allowing impeachment of defendant using statements obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966)); *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 401 U.S. 154 (1971) (finding no violation of due process or First Amendment in requiring applicants for admission to state bar association to affirm loyalty to the United States and its form of government); *Wyman v. James*, 400 U.S. 309 (1971) (upholding requirement that welfare recipients must submit to warrantless entry into homes as condition of receiving welfare); *Dandridge v. Williams*, 397 U.S. 471 (1970) (finding no violation of equal protection in establishing maximum Aid to Families with Dependent Children grant, regardless of family size).

16. *See generally* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495-502 (1977) (commenting on the then-recent trend of U.S. Supreme Court cases away from protection of indi-

accepted this challenge, it embraced it. Ultimately, the success of the Alaska Supreme Court's efforts was the product of three intersecting factors: the philosophical foundation of the strong Alaskan tradition of respect for individual freedom; the explicit acknowledgment of a right to privacy incorporated in the Alaska Constitution<sup>17</sup>; and the leadership provided by Justice Rabinowitz.<sup>18</sup>

### III. *BREESE V. SMITH*: THE FIRST ALASKA SUPREME COURT DECISION ON FREE EXPRESSION

By 1972, the Alaska Supreme Court's philosophical independence from the U.S. Supreme Court was well established, but untested regarding the state's Article I, section 1 constitutional guarantee of individual liberty in the realm of free expression.<sup>19</sup> In *Breese v. Smith*,<sup>20</sup> Justice Rabinowitz authored the first Alaska Supreme Court opinion on this topic.

Michael Breese was a seventh grade student at a public junior high school in Fairbanks, Alaska. Michael's hair violated a school regulation, which required that male students' hair not be over the ears, eyes, or collar. The principal directed Michael to cut his hair, and when, supported by his father, Michael refused to get a haircut, the school district expelled him for willful disobedience of the hair regulation.<sup>21</sup> The Breeses sought injunctive relief, contending

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vidual rights and the increasing tendency of state courts to expand rights based on state constitutions). As an example of state court cases expanding individual rights, Justice Brennan cited the Alaska Supreme Court's decision in *Baker*, where the Alaska court expanded the right to jury trial beyond that guaranteed by the federal constitution. *See id.* at 500 n.74.

17. *See* ALASKA CONST. art. I, § 22, adopted by initiative in 1972.

18. A fourth factor, the expansion of the Alaska Supreme Court from three justices to five, is related to the impact of Justice Rabinowitz's leadership. The early Alaska Supreme Court, appointed by Governor William Egan after statehood, was dominated by Chief Justice Buell A. Nesbett. The Chief Justice was considerably senior to Justice Rabinowitz when Rabinowitz first joined the court at the age of 37. In this setting, as a member of a small court with a strong Chief Justice, it took time for the young Justice Rabinowitz to find his true voice. The subsequent retirement of Chief Justice Nesbett and the expansion of the supreme court to five members, both in 1970, created a fertile environment for Justice Rabinowitz's intellectual and jurisprudential leadership.

19. Article I, section 1 of the Alaska Constitution provides

This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the [s]tate.

20. 501 P.2d 159 (Alaska 1972).

21. *See id.* at 161.

that the regulation was unconstitutional.<sup>22</sup> The superior court upheld the regulation as “reasonable.”<sup>23</sup> The Alaska Supreme Court reversed.<sup>24</sup>

In the majority opinion, joined by three other members of the court, Justice Rabinowitz surveyed case law from state and federal jurisdictions, noting that the courts had taken several different approaches and had reached conflicting conclusions concerning the validity of school regulations regarding hair.<sup>25</sup> In the absence of uniformity, Justice Rabinowitz determined that the question of whether Michael Breese had a right to wear his hair as he chose and whether the school’s hair-length regulation was valid would be decided strictly under the Alaska Constitution.<sup>26</sup>

Justice Rabinowitz began with the “established premise that children are possessed of fundamental rights under the Alaska [C]onstitution.”<sup>27</sup> He found that public school students in Alaska have a liberty interest, protected by article I, section 1 of the state constitution, to wear their hair in accordance with their personal tastes.<sup>28</sup> He recognized that the right of individual liberty that is often examined as a right of free expression is closely tied to the right of privacy, or the right to be left alone.<sup>29</sup> Justice Rabinowitz’s opinion in *Breese* explains that

[t]he United States of America, and Alaska in particular, reflect a pluralistic society, grounded upon such basic values as the preservation of maximum individual choice, protection of minority sentiments, and appreciation for divergent lifestyles. The spectre of governmental control of the physical appearances of private citizens, young and old, is antithetical to a free society, contrary to our notions of a government of limited powers, and repugnant to the concept of personal liberty. . . . Whatever else

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22. *See id.*

23. *Id.* at 162.

24. *See id.* at 175.

25. *See id.* at 165.

26. *See id.* at 166; *see also id.* at 167 (“[A]lthough sound analysis requires that we look to the various federal precedents that have interpreted provisions of the federal [C]onstitution that parallel Alaska’s constitution, we are not necessarily limited by those precedents in expounding upon Alaska’s constitution.”).

27. *Id.* at 167. Justice Rabinowitz authored one of the two cases cited as authority for this established premise, *RLR v. State*, 487 P.2d 27 (Alaska 1971), in which the court held that juveniles charged with a crime are entitled to a public jury trial. *See id.* at 33. The other case, *Doe v. State*, 487 P.2d 47 (Alaska 1971), also addressed minors’ rights in juvenile delinquency proceedings, and extended to minors certain of the rights guaranteed to adult criminal defendants (such as an adequate time to prepare a defense), but not all of the rights (such as the right to an indictment).

28. *See Breese*, 501 P.2d at 168.

29. *See id.*

“liberty” may mean as used in article I, section 1 of the Alaska [C]onstitution, we hold that the term at least encompasses the fundamental personal right of students to select their own individual hair styles without governmental direction.<sup>30</sup>

The determination that students have a fundamental constitutional right to wear their hair in accordance with their personal tastes was not the end of the analysis for the court. As Justice Rabinowitz wrote in *Breese*, and repeated in later cases, “personal freedoms are not absolute; they must yield when they intrude upon the freedom of others.”<sup>31</sup> The court thus had to decide the applicable standard and burden of proof for evaluating a regulation that infringed upon a fundamental right. The court imposed on the school district the “substantial burden” of establishing that a regulation abridging a fundamental right was justified by a “compelling governmental interest.”<sup>32</sup> To attempt to justify the hair-length regulations, the school district advanced its interest in promoting discipline. The supreme court concluded that the evidence offered by the school district failed to prove any causal relationship between hair length and good behavior. Accordingly, the court declared the regulation invalid.<sup>33</sup>

From an historical perspective, the most significant portion of the *Breese* opinion may not be its holding – although succeeding generations of students have come to take for granted the freedom to wear long hair, shaved heads, pierced noses, and baggy pants. In the ensuing years, *Breese* is most cited, first, for its principles of respect for autonomy and individuality and, second, for its mode of analysis, particularly the standard the courts must apply in evaluating regulations that impair fundamental interests.

*Breese* is cited in virtually every case in the past twenty-five years in which litigants raised arguments about their rights to be left alone and to express themselves free from unwarranted governmental regulation.

#### IV. *RAVIN V. STATE*: THE FIRST DECISION CONSTRUING THE ALASKA CONSTITUTION’S RIGHT OF PRIVACY CLAUSE

In 1972, Alaska voters adopted a constitutional amendment that created an explicit right to privacy.<sup>34</sup> The first Alaska Supreme Court opinion to interpret the meaning of this section was *Ravin v. State*,<sup>35</sup> authored by Justice Rabinowitz.

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30. *Id.* at 169 (footnote omitted).

31. *Id.* at 170 (quoting *Bishop v. Colaw*, 450 F.2d 1069, 1075 (8th Cir. 1971)).

32. *Id.* at 171.

33. *See id.* at 171-74.

34. *See* ALASKA CONST. art. I, § 22.

35. 537 P.2d 494 (Alaska 1975). The first reported supreme court opinion to

Irwin Ravin, a lawyer, was arrested in December 1972 and charged with criminal possession of marijuana.<sup>36</sup> Ravin challenged the constitutionality of the statute, contending that there was “no legitimate state interest in prohibiting possession of marijuana by adults for their personal use, in view of the right to privacy.”<sup>37</sup> The district court upheld the statute, and the superior court granted a petition for review and subsequently affirmed the district court.<sup>38</sup> The Alaska Supreme Court granted Ravin’s petition for review,<sup>39</sup> reversed the lower courts, and remanded the matter to the district court for further factual findings.<sup>40</sup>

The starting point for Justice Rabinowitz’s analysis was to determine the level of scrutiny the court would employ in examining the statute.<sup>41</sup> Relying on *Breese*, Ravin argued that the Alaska Constitution established privacy as a fundamental right, and therefore the state should be required to show a compelling interest in prohibiting personal possession of marijuana.<sup>42</sup> In response, as was typical of Justice Rabinowitz’s decisions addressing new frontiers for Alaska law, the *Ravin* opinion extensively reviewed U.S. Supreme Court jurisprudence and case law from other courts concerning the nature of the privacy right implicated by government restrictions on the right to possess and ingest marijuana.<sup>43</sup> Additionally, the opinion reviewed the types of rights that other courts designated as “fundamental”<sup>44</sup> and reaffirmed *Breese*’s conclusion that choice regarding personal appearance is a fundamental right.<sup>45</sup> Justice Rabinowitz then determined that the right to ingest a par-

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mention the newly adopted privacy amendment was *Gray v. State*, 525 P.2d 524, 527 (Alaska 1974). In *Gray*, the defendant argued that the statutory prohibition of the use and sale of marijuana violated his constitutional right to privacy. Because this issue was raised for the first time on the appeal, the court briefly addressed the matter and remanded for an evidentiary proceeding. *See id.* at 527-28.

36. Ravin was charged under Alaska Statutes section 17.12.010, which, in relevant part, made it “unlawful for a person to manufacture, . . . possess, . . . or distribute in any manner, a depressant, hallucinogenic, or stimulant drug.” ALASKA STAT. § 17.12.010 (repealed 1982). Alaska Statutes section 17.12.150 defined “depressant, hallucinogenic, or stimulant drug” to include marijuana. *Id.* § 17.12.150 (repealed 1982); *see Ravin*, 537 P.2d at 496 n.1.

37. *Ravin*, 537 P.2d at 496.

38. *See id.*

39. *See id.*

40. *See id.* at 513. Ravin also raised due process and equal protection challenges to the statute, which the court rejected. *See id.* at 512.

41. *See id.* at 497.

42. *See id.*

43. *See id.* at 498-503.

44. *Id.* at 501-02.

45. *See id.* at 500.

ticular substance is a right of a different nature and could not be termed “fundamental.”<sup>46</sup> He stated that “[f]ew would believe that they have been deprived of something of critical importance if deprived of marijuana, though they would if stripped of control over their personal appearance.”<sup>47</sup> Therefore, the “compelling interest” test did not apply.<sup>48</sup>

Justice Rabinowitz observed that when government action interferes with individual freedom in an area that is not characterized as fundamental, traditionally the courts have applied a rational basis test.<sup>49</sup> However, Justice Rabinowitz noted that, in prior constitutional law cases, the Alaska Supreme Court had begun to express “considerable dissatisfaction” with the rigid two-tier analysis, where the choice of tier largely determined whether a regulation was stricken or upheld.<sup>50</sup> Therefore, Justice Rabinowitz applied to Ravin’s privacy claims a mid-level analysis similar to the test he employed in an earlier equal protection case, *State v. Wylie*.<sup>51</sup> The court stated the following:

It is appropriate in this case to resolve Ravin’s privacy claims by determining whether there is a proper governmental interest in imposing restrictions on marijuana use and whether the means chosen bear a substantial relationship to the legislative purpose. If governmental restrictions interfere with the individual’s right to privacy, we will require that the relationship between means and ends be not merely reasonable but close and substantial.<sup>52</sup>

The conclusion that the right to smoke marijuana is not a fundamental right did not end the analysis. Applying mid-level scrutiny, Justice Rabinowitz conducted a detailed examination of the right of privacy and the relevance of where the right is exercised. Significantly, this mode of analysis allowed the court to shift focus away from the “right to smoke marijuana” to questions implicated by restrictions on personal behavior in the home.<sup>53</sup>

Drawing on both state and federal case law, Justice Rabinowitz observed that “[i]f there is any area of human activity to which

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46. *Id.* at 502.

47. *Id.*

48. *Id.*

49. *See id.* at 497-98.

50. *See, e.g., Lynden Transport, Inc. v. State*, 532 P.2d 700, 706 n.10 (Alaska 1975); *State v. Wylie*, 516 P.2d 142, 145 n.4 (Alaska 1973) (Rabinowitz, C.J.).

51. 516 P.2d 142 (Alaska 1973); *see Ravin*, 537 P.2d at 498.

52. *Ravin*, 537 P.2d at 498.

53. This shift of focus is especially interesting in light of the fact that, although the circumstances surrounding Irwin Ravin’s arrest are not detailed in the opinion, it was widely known in the legal community that Ravin was arrested in his car and not in the privacy of his home. The court could have disposed of Ravin’s case narrowly on its facts without reaching the constitutional issues.

a right to privacy pertains more than any other, it is the home.”<sup>54</sup> Many activities that are lawful within the privacy of the home may be prohibited in public.<sup>55</sup> Justice Rabinowitz concluded that recognizing the importance of privacy in the home is

consonant with the character of life in Alaska. Our territory and now state has traditionally been the home of people who prize their individuality and who have chosen to settle or to continue living here in order to achieve a measure of control over their own lifestyles which is now virtually unattainable in many of our sister states.<sup>56</sup>

But, Justice Rabinowitz continued, repeating a theme from *Breese*, the freedom to act as one wants, even in the privacy of the home, is not unlimited.<sup>57</sup> He explained that the right of privacy in the home is limited to activities that are purely private and non-commercial and that do not interfere in a serious manner with the health, safety, rights, or privileges of others.<sup>58</sup> Justice Rabinowitz wrote that,

[i]ndeed, one aspect of a private matter is that it is private, that is, that it does not adversely affect persons beyond the actor, and hence is none of their business. When a matter does affect the public, directly or indirectly, it loses its wholly private character, and can be made to yield when an appropriate public need is demonstrated.<sup>59</sup>

Applying this analysis, Justice Rabinowitz concluded that citizens of Alaska “have a basic right to privacy in their homes under Alaska’s constitution. . . . [This right] encompasses the possession and ingestion of substances such as marijuana in a purely personal, non-commercial context . . . .”<sup>60</sup> In the balancing analysis that has become the trademark of Alaska’s constitutional cases, Justice Rabinowitz declared that personal privacy may be restricted by the state only if the state can meet its substantial burden by demonstrating a legitimate state interest in proscribing the private use of marijuana.<sup>61</sup> Furthermore, the state must show a “close and substantial relationship between the public welfare and control of ingestion or possession of marijuana in the home for personal use.”<sup>62</sup>

Significantly, the *Ravin* court rejected arguments that the state could regulate marijuana use even without evidence that the drug

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54. *Ravin*, 537 P.2d at 503.

55. *See id.*

56. *Id.* at 504.

57. *See id.*

58. *See id.*

59. *Id.*

60. *Id.*

61. *See id.*

62. *Id.*

was harmful to the user or to others.<sup>63</sup> The court stated, “We believe this tenet to be basic to a free society. The state cannot impose its own notions of morality, propriety, or fashion on individuals when the public has no legitimate interest in the affairs of those individuals.”<sup>64</sup>

The *Ravin* opinion carefully considered the evidence adduced by both sides regarding the effects of marijuana.<sup>65</sup> The court found the evidence contradictory and inconclusive and held that the state had failed to meet its burden of proving that marijuana was a danger to the user or to others.<sup>66</sup> Without such proof, the court held, the state lacked sufficient basis for breaching the privacy of an individual’s home.<sup>67</sup>

Justice Rabinowitz defined four areas as to which the state provided sufficient evidence to justify restrictions on marijuana use: driving under the influence of marijuana, possession or use of marijuana by minors, possession or use of marijuana in public, and sale or possession of quantities indicative of intent to sell the drug.<sup>68</sup> However, Justice Rabinowitz was careful to stress that the court did not endorse the use of psychoactive drugs. The opinion expresses a philosophy of individual responsibility that must accompany individual freedom:

It is the responsibility of every individual to consider carefully the ramifications for himself and for those around him of using such substances. With the freedom which our society offers to each of us to order our lives as we see fit goes the duty to live responsibly, for our own sakes and for society’s. This result can best be achieved, we believe, without the use of psychoactive substances.<sup>69</sup>

*Ravin*, like *Breese*, has been cited frequently in cases involving issues of privacy and personal freedom.<sup>70</sup> The balancing analysis

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63. *See id.* at 509.

64. *Id.*

65. *See id.* at 504-11.

66. *See id.* at 511.

67. *See id.*

68. *See id.* Subsequent to *Ravin*, the legislature rewrote the criminal laws, decriminalizing adults’ possession of small amounts of marijuana in the privacy of their homes. *See* ALASKA STAT. § 11.71.060 (1982) (amended 1990). The Alaska courts upheld the continuing prohibitions on the sale of marijuana and possession by minors. *See* *Brown v. State*, 565 P.2d 179 (Alaska 1977); *Belgarde v. State*, 543 P.2d 206 (Alaska 1975); *Allam v. State*, 830 P.2d 435 (Alaska Ct. App. 1992). A 1990 initiative re-criminalized all marijuana possession. *See* 1990 Initiative Proposal No. 2, § 1, amending ALASKA STAT. § 11.71.060(a). The constitutionality of the initiative has been questioned widely, but the Alaska Supreme Court has not had occasion to rule on the issue.

69. *Ravin*, 537 P.2d at 511-12.

70. *See, e.g., L.A.M. v. State*, 547 P.2d 827, 834 (Alaska 1976) (citing *Ravin* to

that Justice Rabinowitz elucidated in *Ravin* is employed in virtually all of those cases. In a wide variety of areas, the court has adhered to the position that the government may not impose its standards of morality on the citizens of the state and that individual freedoms may be limited only where there is a sufficient justification.<sup>71</sup>

The following sections of this Article explore certain areas of law in which the principles expounded by Justice Rabinowitz in *Breese* and *Ravin* have shaped the Alaska Supreme Court's decisions during the past twenty-five years. The Article focuses on opinions by Justice Rabinowitz, but also notes key opinions authored by other justices based on Rabinowitz's seminal decisions.

#### V. PRIVACY AND FREEDOM OF EXPRESSION CASES

Many litigants seized on the broad, pro-individual freedom language in *Breese* and *Ravin* to claim they had protected rights to engage in a wide range of activities: the right not to wear a motorcycle helmet,<sup>72</sup> the right to engage in prostitution and nude massage,<sup>73</sup> the right to be a runaway child,<sup>74</sup> and the right to distribute political literature anonymously.<sup>75</sup>

Applying the standards articulated in *Breese* and *Ravin*, the Alaska Supreme Court rejected most of these challenges, finding that the government had a legitimate public welfare rationale for regulating the challenged conduct.<sup>76</sup> In other cases, however, the court took a strong stand protecting free expression regardless of content.<sup>77</sup> Justice Rabinowitz joined in all of these cases, with one

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support state measures that required adult supervision of a chronic runaway minor); *Jordan v. Reed*, 544 P.2d 75, 81 (Alaska 1975) (applying *Ravin* to an alleged infringement of the right to vote).

71. See, e.g., *Anderson v. State*, 562 P.2d 351 (Alaska 1977) (finding sufficient justification in the regulation of adolescent sexual activity); *Belgarde v. State*, 543 P.2d 206 (Alaska 1975) (upholding the state proscription on the sale of marijuana to minors).

72. See *Kingery v. Chapple*, 504 P.2d 831, 835 n.6 (Alaska 1972).

73. See *Hilbers v. Municipality of Anchorage*, 611 P.2d 31, 42 (Alaska 1980); *Summers v. Anchorage*, 589 P.2d 863, 869-70 (Alaska 1979).

74. See *L.A.M. v. State*, 547 P.2d 827 (Alaska 1976).

75. See *Messerli v. State*, 626 P.2d 81 (Alaska 1980).

76. In *Messerli*, the court recognized that there could be instances where an individual's right to free expression could outweigh the public interest in knowing the name, address, and occupation of the person who purchased political advertising. The court directed the Alaska Public Offices Commission to develop appropriate regulations. See *id.* at 88.

77. See, e.g., *Vogler v. Miller*, 660 P.2d 1192 (Alaska 1983) ("*Vogler v. Miller II*"); *Vogler v. Miller*, 651 P.2d 1 (Alaska 1982) ("*Vogler v. Miller I*") (both in-

exception where he wrote a separate concurring opinion.<sup>78</sup> He also authored two other opinions on the periphery of free speech and expression issues, both times protecting the right of expression.<sup>79</sup>

When cases were presented as privacy questions, distinct from free expression cases, the court again applied the balancing analysis developed in *Breese* and *Ravin* to declare the limits of the right of privacy. In *Falcon v. Alaska Public Offices Commission*,<sup>80</sup> the court rejected an appointed public official's claim that he should not be required to disclose the names of any of his private business customers or clients, but held that in some circumstances a medical patient's right of privacy might outweigh the public's right to know the clients and customers of public officials and candidates for public office.<sup>81</sup> In *Doe v. Alaska Superior Court*,<sup>82</sup> the court held that individuals who write letters to the governor concerning potential appointees do not have a protected privacy interest in their letters.<sup>83</sup> In *Luedtke v. Nabors Alaska Drilling, Inc.*,<sup>84</sup> the court held that an individual's private right to smoke marijuana during non-work hours did not preclude an employer from requiring the employee to submit to a drug test designed to detect whether the employee was under the influence of drugs while on the job.<sup>85</sup> Justice Rabinowitz joined the majority in these three decisions.

Justice Rabinowitz also authored two opinions that present articulate examples of the thoughtful balancing of interests commanded by *Breese* and *Ravin*. In *Department of Revenue v. Ol-*

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validating statutes placing restrictions on ballot access by third-party candidates); *Mickens v. City of Kodiak*, 640 P.2d 818 (Alaska 1982) (invalidating ordinance prohibiting nude dancing); *Alaska Gay Coalition v. Sullivan*, 578 P.2d 951 (Alaska 1978) (prohibiting municipality from excluding Gay Coalition from a booklet on city organizations based upon the beliefs of its members); see also *Frank v. State*, 604 P.2d 1068 (Alaska 1979) (holding that the state did not meet its burden of proving a compelling state interest to justify prohibition of Native Alaskans' religious practice of hunting out of season for a funeral potlatch).

78. See *Vogler v. Miller II*, 660 P.2d at 1196 (Rabinowitz, J., concurring).

79. See *Mathis v. Sauser*, 942 P.2d 1117, 1122 (Alaska 1997) (protecting prison inmates' rights of expression by disapproving regulation designed to eliminate litigation that prison officials regard as "frivolous"); *Mount Juneau Enter., Inc. v. Juneau Empire*, 891 P.2d 829, 837 (Alaska 1995) (explaining that Alaska, unlike some jurisdictions, applies "actual malice" standard in defamation cases involving a public issue, even when plaintiff is not a public figure, in order to "protect the free exchange of ideas").

80. 570 P.2d 469 (Alaska 1977).

81. See *id.* at 480.

82. 721 P.2d 617 (Alaska 1986).

83. See *id.* at 629-30.

84. 768 P.2d 1123 (Alaska 1989).

85. See *id.* at 1133-37.

iver,<sup>86</sup> the taxpayer-defendants proffered numerous grounds for why they should not be required to disclose personal financial information.<sup>87</sup> Although Justice Rabinowitz rejected most of the claims, his opinion recognized that individuals do have a protected privacy interest in their personal financial records.<sup>88</sup> Applying the balancing test set forth in *Breese*, Justice Rabinowitz concluded that the state's compelling interest in obtaining information essential for computing taxes justified requiring individuals to produce financial records.<sup>89</sup> However, the state must proceed using the least intrusive method for obtaining the necessary information.<sup>90</sup> The court held that the state may compel production of papers that are not "purely private" such as W-2 forms, checking account records, and other documents not generated in the privacy of the home, but the government may not compel production of purely private papers unless it shows in the particular case that it cannot determine tax liability without this additional invasion of the individual's privacy.<sup>91</sup>

Justice Rabinowitz mandated the "least intrusive method" approach in a different context in *In re Mendel*.<sup>92</sup> Mendel was an attorney who represented a fugitive parent in a hotly contested custody case and related civil tort suit.<sup>93</sup> The client's friends established a legal defense fund and sold T-shirts to help defray legal costs.<sup>94</sup> Mendel was asked to disclose the names of those who contributed to the fund. She resisted disclosure, contending that individuals who contribute to a legal defense fund have a protected privacy interest in their freedom of association, and that this privacy may be invaded only following a showing of genuine need for the information and only after taking steps to minimize infringement of the individuals' First Amendment rights.<sup>95</sup> The trial court held Mendel in contempt for refusing to supply the requested information.<sup>96</sup> Writing for a unanimous court, Justice Rabinowitz reversed, accepting Mendel's arguments that the courts must take steps to protect individuals' associational privacy.<sup>97</sup>

Justice Rabinowitz expressed independent views in a few of

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86. 636 P.2d 1156 (Alaska 1981).

87. *See id.* at 1157-58.

88. *See id.* at 1166.

89. *See id.* at 1166-67.

90. *See id.*

91. *See id.* at 1166-68.

92. 897 P.2d 68 (Alaska 1995).

93. *See id.* at 70-71.

94. *See id.* at 76.

95. *See id.*

96. *See id.* at 70.

97. *See id.* at 76-77.

the free expression and privacy cases decided during his tenure on the court. For example, in *Vogler v. Miller I*,<sup>98</sup> he joined the majority in analyzing a small political party's right to be listed on an election ballot as a quintessential free expression issue, because voting is one of the most important ways citizens can express themselves. The court invalidated a statute requiring a candidate to obtain petitions containing signatures equal in number to 3% of the votes cast in the preceding general election in order to be listed on the gubernatorial ballot.<sup>99</sup> In a follow-up opinion, the court also invalidated as too restrictive a statute requiring a new party to obtain 10% of the vote in one gubernatorial election in order to have a candidate listed on the primary ballot for the next election.<sup>100</sup> The majority opinion noted that a requirement to obtain 5% of the vote passed constitutional muster in other states, intimating that it might be constitutional in Alaska also.<sup>101</sup> Justice Rabinowitz issued a separate concurrence to express a view that was even more protective of small parties' rights.<sup>102</sup> He emphasized the need to apply the compelling interest standard rigorously in instances where a statute restricts access to the ballot, and, focusing on the uniqueness of Alaska, he stressed that a legal standard appropriate in other states might not be constitutional in Alaska:

I do not join in the court's intimation that the state could meet its burden of justifying a lower percentage definition of political party merely by citing the existence of arithmetically similar statutes in the other jurisdictions. Other states are different geographically from Alaska, have different voter populations, are governed by their own unique constitutional guarantees and have statutory patterns of election laws that may vary substantially from that in Alaska. Unexplained numbers cannot be used to inform this court of its constitutional responsibilities.<sup>103</sup>

Justice Rabinowitz also wrote a special concurrence in *Allred v. State*.<sup>104</sup> *Allred* was a murder case tried before the adoption of the Alaska Rules of Evidence. Shortly after his arrest, the defendant asked to speak with either a psychiatrist or with a counselor from a drug program, with whom he had an established counseling relationship. When the counselor came to the police station and spoke with the defendant, the defendant confessed to shooting the

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98. 651 P.2d 1 (Alaska 1982).

99. *See id.* at 4-6.

100. *See* *Vogler v. Miller II*, 660 P.2d 1192, 1195-96 (Alaska 1983); *see also infra* note 79.

101. *See id.* at 1195 & n.5.

102. *See id.* at 1196 (Rabinowitz, J., concurring).

103. *Id.* (Rabinowitz, J., concurring).

104. 554 P.2d 411 (Alaska 1976).

victim.<sup>105</sup> The defendant later moved to preclude the counselor from testifying at trial about the statement.<sup>106</sup> A majority of the Alaska Supreme Court accepted Allred's arguments that the court should recognize a psychotherapist-patient privilege; the majority opinion drew heavily on the need to protect the individual's expectation of privacy in such conversations.<sup>107</sup> The author of the court's opinion and one other justice believed that the evidentiary privilege should extend only to communications with a licensed psychiatrist or psychologist, not to a counselor such as the one who spoke with Allred.<sup>108</sup> Justice Rabinowitz drafted a special concurrence, stating his belief that the privilege also should apply to non-licensed mental health counselors because patients have the same expectation of privacy in such conversations.<sup>109</sup> Two other justices reached the same result.<sup>110</sup>

Justice Rabinowitz's practical approach, emphasizing reasonable laypersons' expectations rather than the importance of a specialized degree, had the effect of providing the same protection to poorer people, who would be more likely to rely on a paraprofessional counselor, as to wealthier individuals, who could afford a psychiatrist's services. This same solicitude for the rights of the poor is reflected in some of Justice Rabinowitz's search and seizure cases.<sup>111</sup>

Justice Rabinowitz dissented from the majority view in one free expression case, *Friedman v. District Court*.<sup>112</sup> Friedman was an attorney who practiced in Homer. He was told by two judges that he was required to wear an appropriate coat and tie when he appeared in court, then was fined small amounts by both judges when he refused to comply with the court's unwritten dress code for attorneys.<sup>113</sup> He appealed the penalties, contending that the courts have no power to direct an attorney's attire so long as it is

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105. *See id.* at 413.

106. *See id.*

107. *See id.* at 417, 421.

108. *See id.* at 418-21.

109. *See id.* at 425 (Rabinowitz, J., concurring).

110. *See id.* at 422. Justice Dimond joined Justice Rabinowitz's concurring opinion. Chief Justice Boochever wrote a separate concurrence.

111. *See, e.g.,* *Smith v. State*, 510 P.2d 793, 799 (Alaska 1973) (Rabinowitz, C.J., dissenting) (discussed *infra* at Part VII); *see also* *State v. Albert*, 899 P.2d 103, 120-32 (Alaska 1995) (Rabinowitz, J., dissenting) (Justice Rabinowitz joined one other justice in dissenting from approval of a court rule that requires indigent criminal defendants to pay part of the costs of appointed counsel, regardless of their ability to pay).

112. 611 P.2d 77 (Alaska 1980).

113. *See id.* at 77.

not disruptive of judicial proceedings.<sup>114</sup> The majority of the Alaska Supreme Court upheld the power of the court to establish a dress code and to sanction lawyers who did not abide by it, although the court reversed Friedman's penalties on procedural grounds.<sup>115</sup> Justice Rabinowitz dissented. In his view, the case was controlled by *Breese*:

Given the personal liberty interest involved, I am of the view that no attorney should be subject to contempt proceedings so long as her or his attire does not interfere with the judicial proceedings or manifest disrespect for the court. Distracting or bizarre attire should not be permitted to infringe upon the dignity of the judiciary and its proceedings. But where these interests are not implicated, it is my view that judicial infringement upon the personal liberty of counsel to choose their mode of attire is antithetical to Alaska's constitution.<sup>116</sup>

Justice Rabinowitz recently dissented in another free expression case, *Thoma v. Hickel*,<sup>117</sup> where, atypically, his dissent placed him in the position of being arguably less protective than his colleagues of the right of uninhibited speech.<sup>118</sup> Thoma was an environmental activist who filed an ethics complaint against then-Governor Hickel.<sup>119</sup> Thoma alleged that Hickel retaliated against him by improperly accessing public safety records and publicizing disparaging remarks about him, including his criminal record. Thoma sued Hickel on a variety of legal theories, including 42 U.S.C. § 1983, for an alleged violation of his constitutional rights. Thoma contended that the governor's action was intended to retaliate and thus to squelch the exercise of free speech.<sup>120</sup> The majority of the Alaska Supreme Court rejected Thoma's § 1983 claim, holding that imposing liability on a public official who "responds in kind" to protected speech critical of the official would not be consistent with the First Amendment.<sup>121</sup> Justice Rabinowitz and his dissenting colleague believed that to allow liability would not threaten First Amendment values, since, in their view, what was at issue was conduct and not speech.<sup>122</sup>

This survey of cases shows the wide variety of settings in

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114. *See id.* at 78.

115. *See id.* at 79. The majority considered that practicing law is a privilege that may be subject to reasonable conditions, including reasonable rules of courtroom decorum. *See id.* at 78.

116. *Id.* at 80 (Rabinowitz, C.J., dissenting).

117. 947 P.2d 816 (Alaska 1997).

118. *See id.* at 825 (Carpeneti, J., and Rabinowitz, J., dissenting).

119. *See id.* at 818.

120. *See id.*

121. *Id.* at 821.

122. *See id.* at 826 (Carpeneti, J., and Rabinowitz, J., dissenting).

which the Alaska Supreme Court has recognized limitations on government action in order to protect individual rights of privacy and free expression. While far from radical or libertarian, the court's cases reflect a thoughtful balancing of government and personal interests. Justice Rabinowitz contributed significantly to the court's case law; most of the cases build on the analyses he articulated in *Breese* and *Ravin*. When Justice Rabinowitz disagreed with his colleagues, his own views generally placed him arguing for even greater protection of individual rights. This same pattern is seen in other areas of the supreme court's cases, such as family law, discussed below, where again Justice Rabinowitz led the court toward greater protection of individual freedoms and the right to be different.

#### VI. FAMILY LAW CASES

Justice Rabinowitz's belief that society must tolerate individual differences and not penalize those who do not adhere to the cultural norm had a strong influence on his opinions concerning child custody and other aspects of family law. Several of his opinions played an important part in shaping the jurisprudence of the Alaska Supreme Court in this area.

One important early decision was *Carle v. Carle*.<sup>123</sup> In *Carle*, Justice Rabinowitz addressed issues arising in a custody case in which one parent lived a traditional Native life in a small village while the other parent lived a more westernized, urban lifestyle.<sup>124</sup> In the lower court proceedings, the judge concluded that the best interest of the child justified awarding custody to the mother, the more urbanized parent, in part because the judge believed that the Native culture is "inevitably succumbing" to the predominant caucasian, urban culture.<sup>125</sup> The judge concluded that the child would be better served if allowed to make the transition to the urban culture while still young.<sup>126</sup> The father appealed from this determination, and the Alaska Supreme Court reversed the custody award, remanding for reconsideration without improper denigration of the Native lifestyle.<sup>127</sup>

Writing for the full court, Justice Rabinowitz found it "impermissible" for a court to decide a custody question "on the hypothesis that it is necessary to facilitate the child's adjustment to what is believed to be the dominant culture."<sup>128</sup> Justice Rabinowitz

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123. 503 P.2d 1050 (Alaska 1972).

124. *See id.* at 1052-55.

125. *Id.* at 1055.

126. *See id.* at 1054.

127. *See id.* at 1053-54.

128. *Id.* at 1055.

declared that the only proper focus for the custody decision is on the fitness of the parent and the parent's ability to accord the child a meaningful parent-child relationship. "It is not the function of our courts to homogenize Alaskan society."<sup>129</sup> Making clear that tolerance for diversity is not limited to free speech and expression cases, Justice Rabinowitz repeated philosophy he had first expressed in *Breese*: "The United States of America, and Alaska in particular, reflect a pluralistic society, grounded upon such basic values as the preservation of maximum individual choice, protection of minority sentiments, and appreciation for divergent lifestyles."<sup>130</sup>

Justice Rabinowitz applied the same principle of tolerance in *Horutz v. Horutz*,<sup>131</sup> a case raising questions about the extent to which courts may consider a parent's individual choices in a moral light when making custody determinations. Writing again for the full court, Justice Rabinowitz reversed a trial court's custody award to a father and remanded for further proceedings where the trial judge based the award largely on the mother's character and lifestyle, rather than on evidence of how the mother's actions had affected the child.<sup>132</sup> In particular, Justice Rabinowitz stated that it appeared that "the trial court might possibly have assigned too great a weight to the respective sexual conduct of the parties without determining what impact such conduct had on the parties['] parental relationship to [their son]."<sup>133</sup> As in *Carle*, the supreme court remanded the case with directions to focus on only the legally relevant criteria.<sup>134</sup>

Justice Rabinowitz's opinions in *Carle* and *Horutz* have been relied upon in many decisions over the years, as the Alaska Supreme Court has repeatedly reiterated that the only proper focus of child custody decisions is the welfare of the child; thus, concerns for parents' lifestyles may not affect the custody decision except to the extent the lifestyle affects the parent's relationship with the child.<sup>135</sup>

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129. *Id.*

130. *Id.* (quoting *Breese v. Smith*, 501 P.2d 159, 169 (Alaska 1972)).

131. 560 P.2d 397 (Alaska 1977).

132. *See id.* at 400-01.

133. *Id.* at 401.

134. *See id.* at 402.

135. *See, e.g., S.N.E. v. R.L.B.*, 699 P.2d 875 (Alaska 1985) (finding that the trial court erred in awarding custody to the father where the ruling was premised in large part on the fact that the mother was a lesbian); *Craig v. McBride*, 639 P.2d 303 (Alaska 1982) (holding that the trial court erred in basing award of custody to the father in part on the fact that the mother had borne children out of wedlock, but holding that continuity of parental residence location was a factor properly considered); *Bonjour v. Bonjour*, 592 P.2d 1233 (Alaska 1979) (stating

Justice Rabinowitz joined the majority in each of the above cases in which he participated. He wrote a special concurrence in *Craig v. McBride*,<sup>136</sup> expressing his view that even the majority's position of apparent tolerance for divergent lifestyles reflected stereotypical assumptions that he believed should not be the basis for a custody decision. He wrote, "I cannot emphasize too strongly that trial judges must guard against injecting socialized, stereotyped assumptions and misconceptions into custody decisions."<sup>137</sup> The majority, while criticizing the trial court for placing too much emphasis on the mother's frequent moves, opined that the ability to provide a stable home in one community was "undeniably relevant" to the determination of which parent could better provide for the child.<sup>138</sup> According to Justice Rabinowitz, this assumption denigrated the parent's chosen lifestyle and represented a lifestyle conflict between the judges and the parent.<sup>139</sup> He noted that the idea that a stable life in one community is preferable to frequently moving a child from city to city is "an assumption with which many persons would not agree."<sup>140</sup> Alaska has a large number of military families, and Justice Rabinowitz used them to illustrate his point:

[T]he fact that the physical location of a child's home changes may have little or no bearing on the stability of the home. Stability is often a function of parental attitude and not of geography. To use a familiar example, I am certain that many of the servicemen and women in this state would be surprised to learn that they are not providing stable homes for their children because their careers may require frequent moves.<sup>141</sup>

Justice Rabinowitz believed that a parent's "nomadic life" should not be considered relevant in a custody dispute absent evidence that this way of life has a demonstrable impact on the child.<sup>142</sup>

The themes expressed in Justice Rabinowitz's early child custody cases recur throughout his family law opinions. One recent

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that the trial court erred in giving weight to the fact that one parent and not the other would raise the child as a member of an organized religion); *Britt v. Britt*, 567 P.2d 308 (Alaska 1977) (ruling that the trial court erred in emphasizing the parent's habits and character, without considering how the parent's actions affected her relationship with her child); *Johnson v. Johnson*, 564 P.2d 71 (Alaska 1977) (holding that the trial court did not err in awarding custody to the mother, a strict Jehovah's Witness; supreme court also rejected "tender years" doctrine, saying that henceforth there would be no stereotypical presumption in favor of the mother, even for custody of very young children).

136. 639 P.2d 303 (Alaska 1982).

137. *Id.* at 307 (Rabinowitz, C.J., concurring).

138. *Id.* at 305 ("Clearly stability is a proper consideration.").

139. *See id.* at 307-08 (Rabinowitz, C.J., concurring).

140. *Id.* at 308 (Rabinowitz, C.J., concurring).

141. *Id.* (Rabinowitz, C.J., concurring).

142. *Id.* (Rabinowitz, C.J., concurring).

example is *Mariscal v. Watkins*.<sup>143</sup> Writing for the majority, Justice Rabinowitz held that the superior court erred in placing on a parent conditions that seemed to reflect moral judgments and a desire to impose the judge's notions of proper behavior.<sup>144</sup> These conditions directed that the parent not use alcohol in the child's presence, not drive the child anywhere within twelve hours of having had even a single alcoholic drink, and not expose the child to "inappropriate sexual behavior."<sup>145</sup> Since there was no evidence that the parent had a drinking problem or that her past sexual conduct had affected the child, the supreme court found these conditions to be an abuse of the trial court's discretion.<sup>146</sup> Justice Rabinowitz repeated a caution expressed by the supreme court in *Craig*, and reminded trial judges "[t]o avoid even the suggestion that a custody award stems from a lifestyle conflict between a trial judge and a parent."<sup>147</sup> As Justice Rabinowitz explained, "[t]his caution reflects not only a concern that the superior court consider proper factors in making a custody decision, but also that the superior court not unnecessarily impose its moral values upon a litigant."<sup>148</sup>

One recent decision by the supreme court, in which Justice Rabinowitz did not participate, proves that his efforts to enforce tolerance and respect in the family law area will have a lasting impact. In *Jones v. Jones*,<sup>149</sup> the court addressed questions arising from the division of property in a divorce case.<sup>150</sup> It criticized the lower court for penalizing the husband for contributing to the failure of the marriage by his illegal gambling.<sup>151</sup> The court wrote,

We generally share the concern reflected in [the husband's] argument that value judgments concerning the nature of discretionary spending during a marriage should be avoided. What seems wasteful to one party may be a treasured source of solace to another, and it should generally not be for the judge to say which is which.<sup>152</sup>

One other family law opinion authored by Justice Rabinowitz deserves special mention in this survey of how his influence shaped Alaska's case law to respect the pluralism in this state. In *Calista*

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143. 914 P.2d 219 (Alaska 1996).

144. *See id.* at 221-22.

145. *Id.* at 222.

146. *See id.*

147. *Id.* (quoting *Craig*, 639 P.2d at 306).

148. *Id.*

149. 942 P.2d 1133 (Alaska 1997).

150. *See id.* at 1135.

151. *See id.* at 1139-41.

152. *Id.* at 1139.

*Corp. v. Mann*,<sup>153</sup> with Justice Rabinowitz writing for four of the justices,<sup>154</sup> the Alaska Supreme Court recognized the principle of equitable adoption in probate cases involving intestate succession.<sup>155</sup> This doctrine allows a court to award the property of a deceased adult to a foster child who was “adopted” and treated as a member of the family within Indian or Eskimo village culture, but who was never formally adopted under the laws of the state.<sup>156</sup> Justice Rabinowitz regarded it as necessary to recognize traditional Native “adoptions” in order to avoid hardship “created in part by the diversity of cultures found within this jurisdiction.”<sup>157</sup> He quoted *Breese* on the importance of preserving a pluralistic society,<sup>158</sup> then expanded on this theme with specific reference to the Native values and customs:

One factor which makes Alaska particularly unique . . . is the existence of various Native cultures which remain today much as they were prior to the infusion of Anglo-American culture.

While from a sociological standpoint the diversity of lifestyles has added strength to the cultural mosaic which comprises the Alaska community, it has created problems in administering a unified justice system sensitive to the needs of the various cultures.<sup>159</sup>

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153. 564 P.2d 53 (Alaska 1977).

154. The fifth justice concurred separately in the result. *See id.* at 62 (Boochever, C.J., concurring).

155. *See id.* at 61.

156. *See id.* at 58-62.

157. *Id.* at 62.

158. *See id.* at 61 (quoting *Breese v. Smith*, 501 P.2d 159, 169 (Alaska 1972)) (“The United States of America, and Alaska in particular, reflect a pluralistic society, grounded upon such basic values as the preservation of maximum individual choice, protection of minority sentiments, and appreciation for divergent lifestyles.”).

159. *Id.* The idea that the state judiciary must adapt in order to be fair to people of diverse cultures, especially the indigenous Native cultures, is a recurrent theme in cases decided during Justice Rabinowitz’s tenure on the court. The *Calista Corp.* opinion, for example, relies in part on a criminal case:

“The Anglo-American system of justice differs substantially from the traditional Indian, Eskimo and Aleut systems, which predated Western cultures by hundreds of years. The cultural difficulties experienced by many of the Alaska Natives as the contemporary Anglo-American institutions reach out to the bush communities require that the [s]tate legal system use extreme care in cases of this nature.”

*Id.* (quoting *Gregory v. State*, 550 P.2d 374, 379 n.5 (Alaska 1976)); *see* *Aguchak v. Montgomery Ward Co., Inc.*, 520 P.2d 1352, 1356, 1358 n.34 (Alaska 1974) (setting aside a default judgment entered in a small claims case brought by a department store against a consumer who resided in a remote village and establishing a new requirement that plaintiffs in small claims cases give rural defendants notice of their right to request that the case be moved to a more convenient loca-

## VII. CRIMINAL CASES

Respect for individual privacy and divergent lifestyle choices is also seen in Justice Rabinowitz's criminal law decisions. There are numerous criminal cases in which Justice Rabinowitz and members of the appellate courts applied the concepts articulated in *Breese* and *Ravin*.<sup>160</sup> This part of the Article first examines a series of search and seizure opinions written by Justice Rabinowitz, because these cases, defining the limits on warrantless searches and seizures, are closely tied to attitudes on personal privacy and respect for the individual, even the individual accused of a crime. This part then briefly explores other areas in criminal law where the Alaska Supreme Court has relied on the same values expressed in *Breese* and *Ravin* to expand individual rights beyond those provided by the U.S. Constitution. Many of these decisions, both those written by Justice Rabinowitz and those written by other justices, are more protective of individual privacy and the rights of those who live outside the mainstream culture than are cases by the federal judiciary and courts of other states construing compa-

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tion); *Alvarado v. State*, 486 P.2d 891 (Alaska 1971) (requiring jury panels in criminal cases to be selected in ways that will increase the diversity of the venire when the crime occurred in a remote area, so that the likelihood that the jury will include others familiar with the defendant's lifestyle will be greater).

160. See, e.g., *Mossberg v. State*, 624 P.2d 796, 799 & n.8 (Alaska 1981) (finding police justified in assuming that warrant requirement to monitor defendant's conversations did not apply to conversations outside the home); *Anderson v. State*, 562 P.2d 351, 358 (Alaska 1977) (refusing to decide whether the right to privacy articulated by the court in *Ravin* protects certain private sexual practices committed by consensual adults in their homes); *Anderson v. State*, 555 P.2d 251, 261 & n.44 (Alaska 1976) ("While the warrant permitted an intrusion of substantial magnitude, . . . it did not provide authorization for the 'general' search which is constitutionally abhorred."); *Gibson v. State*, 930 P.2d 1300, 1302 (Alaska Ct. App. 1997) (recognizing *Ravin's* protection of an individual's privacy at home, but emphasizing that even privacy may be infringed upon at times); *Earley v. State*, 789 P.2d 374, 376 & n.2 (Alaska Ct. App. 1990) (finding the *Ravin* right to privacy in one's house does not equal permission to argue loudly enough to disturb sleeping neighbors); *Punguk v. State*, 784 P.2d 246, 247 & n.1 (Alaska Ct. App. 1989) (holding that *Ravin* protection did not require a searching officer to adopt the "least intrusive means" of protecting against destruction of evidence); *Cleland v. State*, 759 P.2d 553, 556 (Alaska Ct. App. 1988) (upholding the constitutionality of a prison contraband statute that made it illegal for inmates to possess marijuana, even though under *Ravin* they could possess small quantities of marijuana in their homes upon release); *State v. Weaver*, 736 P.2d 781, 783 (Alaska Ct. App. 1987) ("No one has an absolute right to do things in the privacy of his own home which will affect himself or others adversely." (quoting *Ravin v. State*, 537 P.2d 494, 504 (Alaska 1975))); *McKenzie v. Municipality of Anchorage*, 631 P.2d 514, 518 (Alaska Ct. App. 1981) (finding no reasonable expectation of privacy in conducting a gambling operation in a public bar).

rable constitutional provisions.

Two of Justice Rabinowitz's early opinions on privacy and search and seizure issues are dissents. In *McCoy v. State*,<sup>161</sup> the majority of the court upheld the search of an arrestee at the police station, and affirmed the right of the police to open, without a warrant, a wrapped packet removed from the arrestee's pocket.<sup>162</sup> Suspecting that the packet contained drugs, the police searched it even though it was in police control and there was no longer any risk that it would be destroyed before they could obtain a warrant.<sup>163</sup> Justice Rabinowitz dissented from the portion of the opinion that stated no warrant was required to open the packet.<sup>164</sup> He began his analysis by quoting Justice Frankfurter, who wrote that

"[i]t is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people. And so, while we are concerned here with a shabby defrauder, we must deal with his case in the context of what are really the great themes expressed by the Fourth Amendment."<sup>165</sup>

The defendant in *McCoy* was charged with possession of cocaine.<sup>166</sup> Despite the "opprobrium" attached to the offense, Justice Rabinowitz believed it was essential to protect the right of all citizens, including drug users, against unreasonable searches and seizures.<sup>167</sup> In his view, once the packet was in police control, the exigency that justified the warrantless seizure disappeared, and, accordingly, any further invasion of the individual's privacy should be based on a search warrant.<sup>168</sup> This preference for a warrant, as a shield that protects the individual against unreasonable governmental intrusions, recurs throughout Justice Rabinowitz's criminal opinions.

Justice Rabinowitz's second significant dissent came in *Smith v. State*.<sup>169</sup> There, the majority of the court held that an individual has no protected privacy interest in materials that had been placed in an apartment building dumpster.<sup>170</sup> The majority determined that, once materials are deposited in the dumpster, the individual has indicated an intent to abandon the property and therefore can

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161. 491 P.2d 127 (Alaska 1971).

162. *See id.* at 131.

163. *See id.* at 131-39.

164. *See id.* at 139-43 (Rabinowitz, J., dissenting).

165. *Id.* at 139 (Rabinowitz, J., dissenting) (quoting *United States v. Rabinowitz*, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting)).

166. *See id.* at 128.

167. *See id.* at 140 (Rabinowitz, J., dissenting).

168. *See id.* at 140-41 (Rabinowitz, J., dissenting).

169. 510 P.2d 793 (Alaska 1973).

170. *See id.* at 796-99.

have no subjective expectation of privacy.<sup>171</sup> The majority also concluded that any expectation of privacy would not be one that society would recognize as reasonable.<sup>172</sup>

Justice Rabinowitz disagreed with his colleagues.<sup>173</sup> He argued that individuals who place bags in a dumpster have a reasonable expectation of privacy from governmental intrusion into the materials in the dumpster, and that therefore the police should not be permitted to search the dumpster without a warrant.<sup>174</sup> In a sentiment he would echo in his later cases, Justice Rabinowitz wrote, "I think it is essential to recognize that a free and open society cannot exist without the right of the people to be immune from unreasonable interference by representatives of their government."<sup>175</sup> In addition, Justice Rabinowitz commented on several aspects of the majority decision that in practice would extend greater privacy rights to wealthier citizens. For example, the majority suggested that an individual who disposes of materials in a garbage can close to his own single family home might have a greater expectation of privacy than a person who disposes of materials in a dumpster shared by other apartment dwellers.<sup>176</sup> Justice Rabinowitz emphatically disapproved of this result:

I disagree with the majority's holding insofar as it discriminates between the right to privacy of citizens occupying a single family dwelling, and those living in multiple unit dwelling places. . . . Nowhere in the text of the [F]ourth [A]mendment, article I, section 14 or article I, section 22 is the proviso, "for property owners only." Many, if not most, of our citizens cannot afford to own their own homes and live in single family dwellings. Further, some persons may prefer to live in apartments or condominiums. Moreover, many urban dwellers are obliged to reside in high rise apartment buildings, due to the crowded spatial conditions of our cities. To make the protection of the [F]ourth [A]mendment, article I, section 14 or article I, section 22 depend upon the economic status of an individual, life-style preferences and urban spatial conditions is, in my opinion, unacceptable. . . . In other words, I am convinced that a resident's expectation that the police will not be scavenging through his or her garbage when such refuse is deposited in the only available waste recep-

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171. *See id.* at 796-98.

172. *See id.* at 798-99 ("[A]ny tenant in the [defendant's apartments] could be sure that periodically a group of third persons would look into the dumpster and possibly scavenge items therefrom.").

173. *See id.* at 799-805 (Rabinowitz, C.J., dissenting).

174. *See id.* at 799 (Rabinowitz, C.J., dissenting).

175. *Id.* (Rabinowitz, C.J., dissenting).

176. *See id.* at 797-98 ("We observe, without so deciding, that [trash located close to a single family dwelling] would be a strong case for holding the expectation of privacy to be reasonable.").

tacle for the living unit remains the same, whether the dweller resides in a split-level ranch home in the suburbs or in a crowded tenement in the inner city.<sup>177</sup>

Approximately four years later, in *Woods & Rohde, Inc. v. State*,<sup>178</sup> Justice Rabinowitz wrote one of the court's first majority criminal law opinions decided squarely on the basis of the Alaska Constitution. Expanding on what he had written in *Smith*, Justice Rabinowitz treated the adoption of article I, section 22 as underscoring the importance of the right of privacy in Alaska and supporting adoption of stricter controls on warrantless government action than is required under the federal Constitution.<sup>179</sup> Finding the federal precedent ambiguous, the court held that the state constitution prohibits warrantless administrative inspections of business premises.<sup>180</sup>

Continuing to emphasize both the importance of a warrant and that Alaska's constitutional privacy protections are broader than those provided by the federal Constitution, Justice Rabinowitz authored two more majority opinions in the next few years that expanded defendants' privacy rights. In *State v. Daniel*,<sup>181</sup> the court held unconstitutional a warrantless search of a briefcase that troopers took out of a vehicle they had impounded following the driver's arrest for driving while intoxicated.<sup>182</sup> The majority opinion follows the logic of Justice Rabinowitz's dissent in *McCoy*, finding that a warrant was required to open the briefcase after it was lawfully seized, since there was no exigency to justify a warrantless search once the briefcase was in police control.<sup>183</sup> The court rejected the state's argument that routine inventory searches are rebuttably presumed to be reasonable and that they consequently should be considered an exception to the warrant requirement.<sup>184</sup> The court concluded that "protection of the interiors of closed luggage, briefcases, containers and packages transported in a vehicle reflects fundamental expectations of privacy which Alaska society would recognize as reasonable."<sup>185</sup> In comments reminiscent of his dissent in *Smith*, Justice Rabinowitz also re-

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177. *Id.* at 805 (Rabinowitz, C.J., dissenting). This eloquent opinion reflects Justice Rabinowitz's New York City roots. There were no crowded inner city tenements in Alaska in 1973.

178. 565 P.2d 138 (Alaska 1977).

179. *See id.* at 148-49.

180. *See id.* at 152.

181. 589 P.2d 408 (Alaska 1979).

182. *See id.* at 417-18.

183. *See id.* at 411-17; *see also McCoy v. State*, 419 P.2d 127, 140-41 (Alaska 1971).

184. *See Daniel*, 589 P.2d at 411.

185. *Id.* at 416.

jected the state's attempt to distinguish between locked and unlocked containers. He wrote that this attempted distinction "ignores the common reality that some persons may not own luggage with locks and that others expect that closed containers will adequately conceal what they regard as private."<sup>186</sup>

In *Reeves v. State*,<sup>187</sup> writing for the majority, Justice Rabinowitz held unconstitutional a warrantless search of a package (actually a rolled-up balloon) after it was removed from a prison inmate during a pre-incarceration inventory of his property.<sup>188</sup> The case is analogous to *Daniel* in many ways; again, the initial seizure of the object was legitimate but the court concluded that, because no exigency justified a warrantless search, a warrant was required before police could search inside the package. Stressing the importance of a warrant, the Alaska Supreme Court held that, although correctional officers routinely may conduct a warrantless search of a new inmate in order to prevent the introduction of contraband into the institution, they may not then search inside containers removed from the inmate in the absence of a warrant.<sup>189</sup> The holding in *Reeves* rests solely on the Alaska Constitution, with the court acknowledging that the U.S. Supreme Court had held that a lawfully arrested individual retains no significant Fourth Amendment interest in the privacy of his person.<sup>190</sup>

In a concurring opinion issued just a month after *Reeves*, Justice Rabinowitz reiterated yet again the high importance he placed on a warrant or on a clearly defined exception to the warrant requirement as the only ways to assure that individual privacy interests are properly protected against government intrusion.<sup>191</sup> The majority of the court in *State v. Myers* approved a late-night warrantless entry by police into the open back door of a theater, which the officers had described as a "security check."<sup>192</sup> The majority found the police conduct "reasonable," even though it did not fit within any of the previously recognized exceptions to the warrant requirement.<sup>193</sup> Justice Rabinowitz was evidently uncomfortable with the analysis based simply on "reasonableness." He concurred in the result, but on the basis that the search in question fit within the established "emergency aid" exception to the warrant re-

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186. *Id.* at 417.

187. 599 P.2d 727 (Alaska 1979).

188. *See id.* at 736-38.

189. *See id.*

190. *See id.* at 734 (citing *United States v. Robinson*, 414 U.S. 218 (1973)).

191. *See State v. Myers*, 601 P.2d 239, 245 (Alaska 1979) (Rabinowitz, J., concurring).

192. *Id.* at 241-45.

193. *See id.* at 244-45.

quirement.<sup>194</sup>

The same themes about respecting privacy in the absence of a warrant or a well-established warrant exception reappear in Justice Rabinowitz's dissent in *Hinkel v. Anchorage*.<sup>195</sup> The majority approved the warrantless search of a woman's purse, which the police found on the seat of her car after she was removed from the car and arrested for reckless driving. The majority treated the search as a search incident to an arrest, which, in order to locate any weapon that might threaten officer safety, allows police to search the personal property found on an arrestee, as well as the area immediately around the person.<sup>196</sup> The majority concluded that there was no reason to distinguish a legitimate search of an arrestee's clothing pockets and a search of a purse or pocketbook that was not literally on the person but that would be used for generally the same function as clothing pockets.<sup>197</sup> Justice Rabinowitz found the majority's analysis unpersuasive.<sup>198</sup> Once Hinkel was removed from the car and away from her purse, Justice Rabinowitz saw absolutely no basis for permitting a warrantless search of her purse.<sup>199</sup>

After 1980, with the creation of the Alaska Court of Appeals, the Alaska Supreme Court heard relatively few criminal cases. Justice Rabinowitz dissented in one of the only cases the supreme court did hear that raised search and seizure issues involving the privacy of the person and the home. In *Guidry v. State*,<sup>200</sup> two plainclothes officers investigating an illegal moose kill drove onto the suspect's property. They spoke with the owner and implied through their comments that they were interested in purchasing his property. Because the owner-suspect could not answer all the officers' questions, he invited the officers into his house to see if his wife could provide additional information. While inside the house, the officers observed items that they believed were evidence of illegal moose hunting, and they used those observations to obtain a search warrant.<sup>201</sup> The majority approved the warrantless entry by the fish and game investigators into the suspect's home on the basis that the entry was consensual, even though consent was obtained through a ruse.<sup>202</sup> The majority also rejected claims that the

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194. See *id.* at 245 (Rabinowitz, J., concurring).

195. 618 P.2d 1069 (Alaska 1980).

196. See *id.* at 1071.

197. See *id.*

198. See *id.* at 1073 (Rabinowitz, C.J., dissenting).

199. See *id.* at 1074-75 (Rabinowitz, C.J., dissenting).

200. 671 P.2d 1277 (Alaska 1983).

201. See *id.* at 1279-80.

202. See *id.* at 1282.

entry violated the suspect's right of privacy.<sup>203</sup>

Justice Rabinowitz believed that the officers' misrepresentation of who they were precluded a finding that the suspect had voluntarily consented to their entry into his home. Since consent was the only exception to the warrant requirement argued by the state, in Justice Rabinowitz's opinion, the entry was unconstitutional and the evidence gained from the entry could not be relied on in issuing the warrant.<sup>204</sup> In light of this conclusion, Justice Rabinowitz found it unnecessary to discuss the defendant's privacy claim in detail, but he commented that he concluded that the defendant's privacy rights under the Alaska Constitution also were violated by the officers' entry into the home without valid consent.<sup>205</sup>

In 1986, in *State v. Malkin*,<sup>206</sup> Justice Rabinowitz wrote the majority opinion providing that, when a criminal defendant challenges a warrant as being based on false statements by the police to the issuing magistrate, the government bears the burden of showing that the false statements were not made recklessly or intentionally.<sup>207</sup> This position is more protective than the federal rule, which places the burden of proof on the defendant.<sup>208</sup> The court believed that "[p]lacing such a burden on defendant would render the test practically meaningless so as to have little deterrent effect."<sup>209</sup> In his opinion, Justice Rabinowitz characterized the decision the court made as one based on a balance of individual privacy rights against the societal interest in using reliable evidence of criminal activity.<sup>210</sup>

In addition to the decisions Justice Rabinowitz himself wrote, many decisions authored by his colleagues on the court drew heavily on the principles expressed in *Breese* and *Ravin* to expand criminal defendants' privacy rights. Brief mention should be made

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203. *See id.* at 1282-83.

204. *See id.* at 1284 (Rabinowitz, J., dissenting).

205. *See id.* at 1284-85 (Rabinowitz, J., dissenting).

206. 722 P.2d 943 (Alaska 1986).

207. *See id.* at 946.

208. *See Franks v. Delaware*, 438 U.S. 154 (1978).

209. *Malkin*, 722 P.2d at 948.

210. *See id.* The Alaska Supreme Court's decision is less protective of criminal defendants' rights than the opinion by the Alaska Court of Appeals, which held that even negligent misstatements should not be considered in determining whether a warrant should be upheld. *See State v. Malkin*, 678 P.2d 1356, 1362 (Alaska Ct. App. 1984). One of the five justices of the supreme court voted to uphold the court of appeals's approach. *See Malkin*, 722 P.2d at 948-49 (Compton, J., dissenting). While this article focuses on Justice Rabinowitz's contributions to protecting individual freedoms, it is important to recall that he was not invariably the most liberal justice on the court, even on issues relating to privacy.

of a few noteworthy cases, where the concerns for free speech and privacy converged, and the Alaska Supreme Court reacted by providing protections to criminal defendants beyond those recognized by the federal courts.

In *State v. Glass*,<sup>211</sup> the supreme court adopted a rule prohibiting warrantless tape recording by police undercover agents. The court believed such a rule was necessary to preserve the freedom of Alaskans to speak without fear that their words would be broadcast to unintended listeners or preserved for posterity on tape. Justice Rabinowitz joined the majority in the original decision. In the opinion on rehearing, when the majority opted to apply its decision prospectively only, Justice Rabinowitz dissented, believing that the rights recognized in *Glass* should be applied in all cases pending on direct review at the time of the original decision.<sup>212</sup>

In *Bargas v. State*,<sup>213</sup> the court adopted a rule precluding admission of evidence that an individual refused to consent to a search. The court reasoned that refusal to agree to a search is a legitimate exercise of one's right to privacy and freedom from warrantless searches, and individuals should not be penalized for exercising their rights.<sup>214</sup>

In *Scott v. State*,<sup>215</sup> the court adopted a rule limiting pretrial discovery from the defense, thereby protecting the privacy of a defendant's efforts to prepare a defense. The court held that to require the defendant to disclose his potential witnesses violates his right not to be compelled to provide self-incriminating evidence.<sup>216</sup>

In *State v. Gonzalez*,<sup>217</sup> the supreme court adopted a rule requiring the government to provide transactional immunity, not just use and derivative use immunity, when individuals are compelled to give testimony that is self-incriminating. The supreme court opinion does not specifically cite *Breese* and *Ravin*, but the opinion

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211. 583 P.2d 872 (Alaska 1978), *opin. on reh.*, 596 P.2d 10 (Alaska 1979).

212. *See Glass*, 596 P.2d at 15-16 (Rabinowitz, J., dissenting).

213. 489 P.2d 130 (Alaska 1971).

214. *See id.* at 132; *see also* *Elson v. State*, 659 P.2d 1195, 1197 (Alaska 1983) (Rabinowitz, J.) (extending *Bargas* to exclude evidence of defendant's refusal to agree to a search that would have been lawful even without defendant's consent, but not extending it to evidence of physical resistance to the search); *Doisher v. State*, 658 P.2d 119 (Alaska 1983) (Rabinowitz, J.) (holding that defendant's silence was not admissible as an adoptive admission).

215. 519 P.2d 774, 785 (Alaska 1974).

216. In 1996, the Alaska legislature enacted a statute requiring more pretrial discovery from defendants. Relying on *Scott*, the Alaska Court of Appeals invalidated the statute. *See State v. Summerville*, 926 P.2d 465 (Alaska Ct. App. 1996), *aff'd*, 948 P.2d 469 (Alaska 1997).

217. 853 P.2d 526 (Alaska 1993).

by the court of appeals, which the supreme court affirmed, does. The court of appeals specifically linked the immunity question to the constitutional rights of privacy and free expression.<sup>218</sup>

In several important areas of criminal law, the Alaska Supreme Court has taken stances more protective of citizens' privacy than have courts of other jurisdictions. Justice Rabinowitz wrote many of the important decisions defining the limitations on warrantless searches. Over the past three decades, the opinions he authored contributed to the systematic development of an independent theory of constitutional rights of criminal defendants.<sup>219</sup>

### VIII. CONCLUSION

The Alaska Supreme Court is accurately perceived nationwide as an independent court protective of individual rights. In many areas of law, where the interests of government and the individual diverge, the court has developed a jurisprudence requiring a thoughtful balancing of competing interests. In his years on the court, Justice Rabinowitz played a central role in the development of this case law. When he wrote about hair length and marijuana use in the early 1970s, he probably did not envision that these opinions would prove so influential to the development of case law on elections, child custody, adoptions, search and seizure, and immunity. It was one of Justice Rabinowitz's talents to draw on principles expounded in one context when defining rights in a very different setting. Based in no small part on Justice Rabinowitz's contributions, the Alaska Supreme Court has avoided the development of rigid legal categories with unrelated modes of analysis and moved instead toward similar balancing analyses in a wide variety of constitutional law questions, in both civil and criminal cases. Decisions from the Alaska Supreme Court in the months since Justice Rabinowitz's retirement suggest that his influence will continue to be felt for years to come.

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218. See *State v. Gonzalez*, 825 P.2d 920, 933 (Alaska Ct. App. 1992) ("The Alaska [c]onstitution's unique concern with the rights to liberty and privacy, and the Alaska Supreme Court's vigilant enforcement of these rights, have a strong bearing on the manner in which interpretation of Alaska's privilege against self-incrimination should be approached.").

219. Justice Rabinowitz also authored the supreme court's decision in *State v. Chaney*, which established the court's framework for review of criminal sentences. See 477 P.2d 441 (Alaska 1970). *Chaney* is significant in that it marks the beginning of a theory of penal administration based entirely on the state constitution. The philosophy and analytical approach on which the *Chaney* decision is based ultimately was incorporated into statute by the Alaska legislature in 1978. See ALASKA STAT. § 12.55.005 (Michie 1996).