ALASKA'S RIGHT TO PRIVACY TEN YEARS AFTER RAVIN V. STATE: DEVELOPING A JURISPRUDENCE OF PRIVACY

I. INTRODUCTION

The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section.

Alaska Constitution, article I, section 22.1

With these words, Alaska became one of the first states in the United States to explicitly recognize the right to privacy in its constitution.2 Previously, the existence of the right as a constitutional principle had to be inferred from the “penumbras” of the United States Constitution3 and the Alaska Constitution.4 The explicit recognition of this right in the Alaska Constitution enables the judiciary and the legislature to protect Alaskans from intrusion into their private lives. The ability of the Alaska courts and legislature to respond to threats to privacy is especially significant today because of the increased information-gathering capacity of both government and business.5

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3. The penumbra theory was first announced in Griswold v. Conn., 381 U.S. 479 (1965). Justice Douglas, writing for the Court in Griswold, held that the right to marital privacy protected married couples who use contraceptives and doctors who advise couples on their use. Id. at 485-86. The right of marital privacy was found in the "penumbras" of the first, third, fourth, fifth, and ninth amendments. Id. at 484. Justice Goldberg, in concurrence, preferred to base the right to marital privacy solely on the ninth amendment. Id. at 486 (Goldberg, J., concurring).
4. In Alaska, the right to privacy was initially implied from the term “liberty” in article I, section 1 of the Alaska Constitution, which provides a list of inherent rights enjoyed by all persons. Breese v. Smith, 501 P.2d 159, 168 (Alaska 1972). For a discussion of the Breese case, see infra text accompanying notes 48-53.
5. The term “Information Age” has been used to describe the current post-industrial era in the United States and other technologically advanced nations. McGuire, The Information Age: An Introduction to Transborder Data Flow, 20 JURIMETRICS J. 1 (1979-80) (quoting Senator George McGovern, then Chairman of the Subcomm. on International Operations of the Senate Comm. on Foreign Relations).

The increase in the information-gathering capacity of government and business is due to technological advances in the field of computers and electronics which make it easier to gather and store large amounts of information. Concern about the effect of
In the first major Alaska Supreme Court case interpreting the privacy amendment, *Ravin v. State*, the court struck down a statute that criminalized possession of marijuana in the home for personal use. The court held that, given the fundamental nature of the right to privacy in the home and the limited potential for societal harm posed by using small amounts of marijuana in the home, the state failed to demonstrate a sufficient justification for criminalizing such possession.

Several decisions interpreting the right to privacy amendment have been issued by the Alaska Supreme Court since *Ravin* was decided. These decisions represent the Alaska Supreme Court's first attempt to develop a jurisprudence of privacy. No fully independent jurisprudence of the privacy amendment has developed, however, because the courts have proceeded largely on a case-by-case basis, linking the right to privacy with other constitutional interests and borrowing standards from other constitutional guarantees. The court's failure to develop an independent analytical approach to the privacy issue has resulted in inconsistent treatment of the right in the variety of contexts in which the amendment has been invoked.

The justification for the adoption of a separate privacy amendment is undermined by the lack of an independent privacy jurisprudence. At times, the privacy amendment has been used as a justification for a broad reading of other constitutional provisions. Although those applications of the privacy amendment are correct ap-


(2) the increasing use of computers and sophisticated information technology, while essential to the efficient operations of the Government, has greatly magnified the harm to individual privacy that can occur from any collection, maintenance, use, or dissemination of personal information.

*Id.*


9. *Id.* at 511. The court held that the state must show that an actual threat to public health or welfare would exist without the challenged governmental control.
plications, they should not be the sole effect of the amendment's adoption. If the sole purpose of the privacy amendment is to justify a broad reading of other constitutional provisions, then the amendment is superfluous,\(^\text{11}\) for such broad readings could be achieved under pre-privacy-amendment precedent.\(^\text{12}\) If, on the other hand, the privacy amendment is to have an independent status, then the development of a distinct jurisprudence of privacy is necessary.

Although this process has begun, in some areas in which the court could have employed a separate privacy analysis, the court has preferred instead to use the privacy amendment to influence the conventional analysis. Foremost among these areas is search and seizure.\(^\text{13}\) This note attempts to identify the themes running through the Alaska privacy decisions and suggests that a unifying analysis employing a sliding scale test\(^\text{14}\) be adopted for use in all cases raising constitutional privacy issues.

The sliding scale test is essentially a balancing test. The test weighs the individual's interest in privacy against the state's justification for the infringement of that right. The state interest which can overcome the individual privacy interest varies with the strength of the individual interest.\(^\text{15}\) Thus, as the privacy interest grows stronger, the burden on the government to justify its intrusion on the right becomes greater.\(^\text{16}\)

The note first discusses the background of the right to privacy in both the federal and state courts. Then, specific Alaska decisions are examined in order to isolate the tests which the Alaska courts have applied in interpreting the privacy amendment and to establish the basis for a unifying test. This discussion will focus on developments in the following areas: general personal and place privacy, informational privacy, and search and seizure.\(^\text{17}\) Finally, the note compares the tests

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11. Id.
12. For a discussion of how the same results could be achieved under pre-privacy amendment precedent as under the privacy amendment, see infra note 128.
13. The need for and consequences of recognizing the independent significance of the privacy amendment in the search and seizure context are discussed infra notes 127-41 and accompanying text.
14. The sliding scale test was advocated by Justice Boochever. See Woods & Rohde, Inc. v. State Dep't. of Labor, 565 P.2d 138, 153-54 (Alaska 1977) (Boochever, J., concurring); Ravin, 537 P.2d at 515-16 (Boochever, J., concurring).
15. Ravin, 537 P.2d at 515 (Boochever, J., concurring).
16. Id.
17. The right to privacy has a potential impact on almost every area of the law, and a thorough treatment of all the implications of the privacy amendment would be well beyond the scope of this note. Accordingly, three litigated areas are examined in the note. The first category, general personal and place privacy, is meant as an all-embracing category for cases concerned with the meaning of the "fundamental right of privacy." See Ravin, 537 P.2d at 504. The principles derived from the cases in
which have been used and advocates the adoption of the sliding scale test to provide a consistent privacy analysis in all cases in which the privacy amendment is involved.

II. ORIGINS OF THE RIGHT TO PRIVACY

A. Federal Law: Inferring the Right to Privacy

Throughout most of the history of federal constitutional law, the right to privacy was not even implicitly recognized. The most famous opinion dealing with the right to privacy in the first century and a half of United States Supreme Court history was Justice Brandeis's dissent in *Olmstead v. United States* in 1928. Justice Brandeis argued that the protection provided by the fourth amendment against unreasonable searches and seizures was intended to reach not only physical tampering with property by the government, but also invasions of personal privacy, such as wiretapping, which did not involve physical penetration of protected space. Justice Brandeis described this fundamental right as "the right to be let alone." The other Justices, however, continued to support the belief that the fourth amendment protected individuals only against unreasonable searches and seizures that physically intrude into protected space.

After *Olmstead*, the right to privacy was not explicitly addressed until 1965 in *Griswold v. Connecticut*. Several decisions based on other rights, however, recognized elements of the right to privacy. These decisions included cases protecting "associational privacy," the right to privacy in one's home, and the right to decide how one's children are to be educated. The privacy interest acknowledged in these areas are intended to be applicable in other areas of the law touching upon the privacy issue.

19. *Id.* at 478. This phrase was made famous by Warren and Brandeis in an 1890 article on the right to privacy. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). In their article, the writers advocated the recognition of a common law cause of action for the invasion of privacy.
20. 277 U.S. at 465.
23. NAACP v. Alabama, 357 U.S. 449 (1958) (statute requiring a civil rights organization to provide membership lists held unconstitutional because of potential harassment and resulting chill to free speech and assembly interest).
25. Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) (statute requiring attendance at
each of these cases was not recognized as an independent interest, but was held to be necessary to the exercise of an explicit right.

The United States Supreme Court finally recognized the existence of a constitutionally protected right to privacy in *Griswold.* The "fundamental" privacy right involved in *Griswold* was the right of marital privacy. The Court did not find this right in any specific amendment, but in the "penumbras" of a number of amendments. Marital privacy is one component of the "liberty" protected from state encroachment by the fourteenth amendment.

Since *Griswold,* the Supreme Court has struggled to define the scope of this federal right to privacy. Of the many privacy decisions handed down by the Supreme Court in the last two decades, three have been of particular significance for Alaska constitutional law. These three cases have formed the basis for many of Alaska's privacy decisions.

*Katz v. United States* was the search and seizure case which introduced a privacy component into fourth amendment analysis. The case involved a challenge to the admissibility of evidence gained through a warrantless wiretapping of a public telephone booth. The majority held that, even though the government had not physically invaded the zone of privacy in the booth, the wiretap itself was unconstitutional without a warrant because of the expectation of privacy one has when the door to the telephone booth is closed. Even more significant than the majority opinion, however, was Justice Harlan's concurrence. Justice Harlan laid out a test to determine when an expectation of privacy will be protected under the fourth amendment. The Alaska Supreme Court later adopted this test as its own for cases interpreting the Alaska counterpart to the fourth amendment.

The test asks two questions. First, did the subject of the search exhibit an actual (subjective) expectation of privacy? Second, is this subjective expectation one which society is willing to recognize as reasonable? If the subjective expectation of privacy is reasonable, then a

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26. 381 U.S. at 484.
27. Id. at 486.
28. Id.; see also supra note 3.
29. 381 U.S. at 481-82.
30. Roe v. Wade, 410 U.S. 113 (1973); Stanley v. Georgia, 394 U.S. 557 (1969);
33. Id. at 358-59. In so holding, the Court overturned its decision in Olmstead v. United States. Id. at 353.
34. *Katz,* 389 U.S. at 361 (Harlan, J., concurring).
governmental encroachment upon this privacy interest without a search warrant is presumed to be unreasonable and must be justified by exigent circumstances.\(^{36}\)

The second Supreme Court case with particular significance for Alaska privacy law is *Stanley v. Georgia*.\(^ {37}\) In *Stanley*, the Supreme Court struck down an ordinance which criminalized in-home possession of pornographic materials for personal use. In reaching its decision, the Court emphasized the privacy of the home.\(^ {38}\) The decision was based on the first amendment "right to receive information and ideas,"\(^ {39}\) but the Court recognized that the privacy interest means the first amendment right "takes on an added dimension."\(^ {40}\) The acknowledgement by the *Stanley* Court of the privacy of the home provided the basis for the Alaska Supreme Court's decision in *Ravin v. State*.\(^ {41}\)

The third federal privacy case which has had significant impact on the development of Alaska law is *Roe v. Wade*,\(^ {42}\) in which the Supreme Court held that the states could not constitutionally prohibit abortions except in the third trimester of pregnancy. The decision was based on a woman's right to privacy in her decision concerning whether or not to have children.\(^ {43}\) This privacy right is related to the marital right to decide whether or not to use contraceptives which was involved in *Griswold*. Both rights emerge from the privacy interest in the family and in procreation. The Alaska Supreme Court has characterized these privacy rights as part of an even more general right of "personal autonomy in relation to choices affecting an individual's personal life."\(^ {44}\)

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36. *Katz*, 389 U.S. at 361. The United States Supreme Court has drastically cut back on previous privacy decisions in the search and seizure area. For example, the Court has approved of warrantless recording of conversations between a suspect and a consenting informant, *United States v. White*, 401 U.S. 745 (1971), and the warrantless use of an electronic tracking device placed in a car trunk, *United States v. Knotts*, 460 U.S. 276 (1983). Decisions such as these have led to an increasing willingness on the part of the state high courts to liberally interpret their own constitutions in order to compensate for the federal retreat from the protection of the privacy of individuals. See Galie, *The Other Supreme Courts: Judicial Activism among State Supreme Courts*, 33 SYRACUSE L. REV. 731 (1982); see also Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). With a separate privacy amendment in place, Alaska is particularly able to respond to the increasing need to protect individuals' privacy. See *Glass*, 583 P.2d at 875.

38. See id. at 564.
39. Id.
40. Id.
42. 410 U.S. 113 (1973).
43. Id. at 153.
44. *Ravin*, 537 P.2d at 500.
The three cases just discussed are important, not only because they have been cited as persuasive authority by the Alaska Supreme Court in defining the right to privacy, but also because they illustrate different types of privacy analysis. The Katz approach finds a right to privacy implicit in the text of a constitutional amendment and employs a test of societal reasonableness in defining the parameters of that right. Stanley also finds an implicit right to privacy but ties this right to a fundamental right and therefore allows encroachment upon these rights only upon a showing of a compelling state interest. Finally, Roe recognizes a right to privacy which is itself fundamental. Invasions of this fundamental right to privacy must be judged by the compelling state interest standard.

The diversity of approaches to privacy questions in the federal courts is mirrored in Alaska case law. Such a variety of analyses seems unnecessary in a state where an explicit textual basis for the right to privacy exists. Alaska courts continue, however, to apply at least two different analytical approaches: one for search and seizure cases and a second for other privacy cases.

B. State Law Origins: Incorporating the Federal Precedent

Prior to the adoption of the privacy amendment in 1972, Alaska courts rarely considered the right to privacy. Since so little Alaska precedent exists, it is difficult to determine the status of the right to privacy before the adoption of the amendment. The only conclusion that can safely be drawn is that the Alaska pre-amendment right to privacy was at least as broad as the federal right.

The only major pre-amendment privacy case decided by the Alaska Supreme Court is Breese v. Smith, which involved a challenge by a student to a school hair length limitation. A federal penumbral privacy argument was presented, but the court did not decide the case on those grounds. The court explained that there was disagreement over the federal issue among various state and federal courts and

45. The search and seizure cases employ the Katz societal reasonableness formula but the privacy amendment is used, as in Stanley, to justify a broader reading of the test. The effects of the test employed by the Alaska Supreme Court in the search and seizure area are discussed infra text accompanying notes 116-23.

46. The Roe type of analysis has been used in general privacy cases like Ravin. General privacy cases are discussed infra text accompanying notes 66-104.

47. This result is mandated by the supremacy clause of the federal Constitution. U.S. Const., art. VI, cl.1. Any state decision granting less protection than the federal Constitution would in effect invalidate the federal protections and thus conflict with the supremacy clause. An interesting question is whether, if a decision like Roe v. Wade, 410 U.S. at 113, were overturned, the privacy amendment would require the Alaska courts to follow the overturned precedent.

that the United States Supreme Court had refused to decide the issue.\textsuperscript{49} The Alaska court then proceeded to strike down the hair length limitation on state law grounds. The court based its decision on the right to liberty guaranteed in article I, section 1 of the Alaska Constitution and on the right to a public education guaranteed by article VII, section 1.\textsuperscript{50} The court articulated its liberty rationale in privacy terms. It stated that personal appearance was constitutionally protected as a fundamental right. This right was described as being part of a broader concept — the notion of personal immunity from governmental control or the right “to be let alone.”\textsuperscript{51} The right to be let alone is at the core of the concept of liberty.\textsuperscript{52} The court then applied a compelling state interest test to the hair length restriction. Since the court was unable to find a compelling state interest, the school regulation was struck down.\textsuperscript{53}

Two statements made by the Breese court have had significant influence on the development of the right to privacy in Alaska. First, the court noted that the state courts were not limited by federal precedent when construing similarly-worded Alaska constitutional provisions. States have a duty to “move forward” and interpret state provisions more broadly than their federal counterparts.\textsuperscript{54} Moreover, the court recognized a judicial duty to develop additional rights not recognized under the federal Constitution.\textsuperscript{55} These two statements continue to provide a significant foundation for an extension of the Alaska constitutional right to privacy beyond the limits set by federal precedent.

The 1975 decision in Ravin was the first major decision to construe the privacy amendment, which was adopted in 1972. In the decade following Ravin, developments in two specific areas of the law show that a jurisprudence of privacy is beginning to take shape in Alaska, although as yet it is without a unifying theme.

\textsuperscript{49} Id. at 167. The United States Supreme Court, however, subsequently decided the issue in favor of the validity of hair length restrictions, at least with regard to public servants. Kelley v. Johnson, 425 U.S. 238 (1976) (police officer).

\textsuperscript{50} Breese, 501 P.2d at 166-67.

\textsuperscript{51} Id. (quoting COOLEY ON TORTS, cited in Union Pac. Ry. v. Botsford, 141 U.S. 250, 251 (1891). This is the origin of the phrase used by Warren and Brandeis. See supra note 19.).

\textsuperscript{52} Breese, 501 P.2d at 168.

\textsuperscript{53} Id. at 174.

\textsuperscript{54} Id. at 167 n.30 (citing Baker v. City of Fairbanks, 471 P.2d 386, 401 (Alaska 1970)).

\textsuperscript{55} Breese, 501 P.2d at 169 n.43 (citing Baker, 471 P.2d at 402).
III. MAJOR DEVELOPMENTS IN SELECTED AREAS: 1975-1984

A. Introduction

To understand the developments in privacy jurisprudence, one must recognize the distinction between two types of privacy rights—personal privacy rights and place privacy rights. Place privacy rights protect a privacy interest in a place itself. Personal privacy rights, on the other hand, protect some inherent "personal autonomy" right or a relational interest like the marital privacy mentioned in Griswold. These rights exist regardless of where they are exercised. Future issues are more likely to arise in the personal privacy arena because the boundaries of place privacy are well defined while the boundaries of personal privacy are indefinite.

The home is the only place in which a fundamental right to pri-

56. The distinction between place and personal privacy analyses was made by Chief Justice Burger in his opinion for the Court in Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973). He contrasted the "protection afforded by Stanley v. Georgia, 394 U.S. 557 (1969), [which] is restricted to a place, the home," 413 U.S. at 66 n.13, with the "constitutionally protected privacy of family, marriage, motherhood, procreation, and child rearing, [which involve] a protected intimate relationship." Id. This distinction was utilized in a right to privacy article on Ravin. Note, Ravin v. State: A Case for Privacy and Possession of Pot, 5 U.C.L.A.-ALASKA L. REV. 178, 201-04, 218-19 (1975). For another attempt to break privacy into component parts see Comment, supra note 22.

57. This right is the primary privacy conception which has been used in search and seizure analysis. See infra note 138 and accompanying text.

58. Ravin, 537 P.2d at 500 and Breese v. Smith, 501 P.2d 159 (Alaska 1972) (right in one's own hairstyle), are examples of cases involving personal privacy rights.

59. 381 U.S. 479 (1965).

60. In both federal and state courts, place privacy has largely become synonymous with the privacy of the home. For instance, the holding in Stanley was sharply limited to the home by a series of later Supreme Court decisions. In United States v. Reidel, 402 U.S. 351 (1971), the Court upheld a federal statute prohibiting the mailing of obscene material, even when the material was mailed only to consenting adults; and in United States v. Thirty-Seven (37) Photographs, 402 U.S. 363 (1971), the Court upheld a statute criminalizing the importation of obscene material for both commercial distribution and personal use. Chief Justice Burger later characterized Stanley as "hardly more than a reaffirmation that 'a man's home is his castle.'" Paris Adult Theatre I v. Slaton, 413 U.S. at 66.

In Alaska, the protection Ravin afforded marijuana users was strictly confined to the home. See infra notes 61-63 and accompanying text; see also ALASKA STAT. §§ 11.71.060(1) & (2) (1983) (possession of one ounce of marijuana in public or any amount in a motor vehicle criminalized). The range of activity that is protected in the home is also sharply limited. Marijuana remains the only controlled substance that can legally be possessed in the home without a prescription. See State v. Erickson, 594 P.2d 1 (Alaska 1978) (possession of cocaine in the home for personal use not protected by privacy amendment). The court has also refused to extend Ravin to cover sexual conduct of children in the home. Anderson v. State, 562 P.2d 351 (Alaska 1977). The court in Anderson avoided a decision on whether the right to privacy protects certain acts between consenting adults within the privacy of the home. Id. at 358.
privacy is recognized.\textsuperscript{61} This fundamental right was the basis for the \textit{Ravin} holding.\textsuperscript{62} Thus, the protection provided by \textit{Ravin} is largely ineffectual outside the home. In \textit{Belgarde v. State}, the court refused to extend the \textit{Ravin} holding to decriminalize the possession in a public place of small amounts of marijuana intended for personal use.\textsuperscript{63}

The two areas of significant development after the right to privacy amendment was adopted are general privacy\textsuperscript{64} and privacy within the search and seizure context.\textsuperscript{65} General privacy cases involve both personal and place privacy concepts, while search and seizure cases have focused primarily on place privacy concepts. Judicial developments in each of these areas center around the refinement of basic principles unique to that particular area. As a result, a bifurcated analysis of the right to privacy is emerging, with one test for search and seizure cases and another test for general privacy cases. This bifurcation is unnecessary. A unified test that would encompass the entire spectrum of privacy cases could be employed by the Alaska courts.

B. General Right to Privacy

1. \textit{Developing the tests}. Since the adoption of the privacy amendment, the Alaska Supreme Court has used three different methods of analyzing general privacy claims. In \textit{Gray v. State},\textsuperscript{66} the court adopted the "compelling state interest" test. Under this test, any time a fundamental right is infringed by the state, the state must justify the infringement by a single standard — the infringement must be necessary to further a compelling state interest. \textit{Gray} involved a challenge to the marijuana statute which was later held unconstitutional as applied in \textit{Ravin}.\textsuperscript{67} The \textit{Gray} court held that the right to privacy encompassed the right to ingest "food, beverage, or other substances."\textsuperscript{68} The court remanded the case, however, for a determination of whether the state's

\begin{itemize}
  \item 61. \textit{Ravin}, 537 P.2d at 504.
  \item 62. \textit{Id}.
  \item 63. 543 P.2d 206 (Alaska 1975). Thus, a person can legally possess marijuana but cannot legally obtain that marijuana for personal use in the home. This situation is analogous to the result reached in \textit{Stanley} and \textit{Thirty-Seven (37) Photographs} by the United States Supreme Court in the pornography area. A person can legally possess obscene materials but cannot legally purchase them for personal use in the home. \textit{Thirty-Seven (37) Photographs}, 402 U.S. at 381 (Black, J., dissenting).
  \item 64. The right of informational privacy is a subset of general privacy. Because of the importance of the informational privacy cases, both as examples of the application of the test evolving in personal privacy cases and as examples of issues likely to confront the courts in the future, these cases are treated separately.
  \item 65. \textit{See supra} note 17.
  \item 66. 525 P.2d 524 (Alaska 1974).
  \item 67. \textit{Id}.
  \item 68. \textit{Id} at 528.
\end{itemize}
interest was compelling where marijuana is concerned. Before the Gray dispute returned to the supreme court, the court held in Ravin that the state's interest in preventing possession of marijuana in the home for personal use was not compelling.69

The method of analysis used by the Alaska Supreme Court in Ravin was the "important governmental interest" test. This test was adopted by the court as a less rigid alternative to the compelling state interest test.70 Under this test, if the government interferes with an individual's right to privacy, then the government must show that this interference furthered an important governmental interest and that the means chosen to carry out the governmental interest bore a close and substantial relationship to that interest. The court undertook an extensive review of scientific and sociological data concerning the effects of marijuana use. It concluded that the potential harm to the public from marijuana use was not great enough to present a close and substantial relationship between public welfare and control of marijuana possession and use in the home.71

In State v. Erickson,72 the Alaska Supreme Court used the "sliding scale" test to analyze the asserted privacy right to ingest cocaine in the home.73 The sliding scale test compares the infringing government conduct with the privacy interest in question. The more fundamental the privacy right, the greater the burden that is put on the state to show "the relationship of the intrusion to a legitimate governmental interest."74 In Erickson, the privacy interest was the same as in Ravin — the right to use controlled substances in the home. Nevertheless, the state intrusion in Erickson was upheld. The distinction made by the court was based on the nature of the relative effects of cocaine and marijuana on users of the drugs. Employing extensive scientific and sociological data, the court concluded that use of cocaine, even in small amounts in the home, presented a greater danger of harm to society than marijuana use.75 The court noted that a fundamental personal right "must yield when it interferes in a serious manner with the health, safety, rights and privileges of others or with the public welfare."76 Therefore, the court found that the right to ingest cocaine in

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69. 537 P.2d at 511.
70. Id. at 498.
71. Id. at 511.
73. The sliding scale test was advocated by Justice Boochever in Ravin. 537 P.2d at 515 (Boochever, J., concurring), and in Woods & Rohde, Inc. v. State Dep't. of Labor, 565 P.2d 138, 153 (Alaska 1977) (Boochever, J., concurring).
74. Ravin, 537 P.2d at 515 (Boochever, J., concurring).
75. 574 P.2d at 21-22 & n.144.
76. Id. at 21 (quoting Ravin, 537 P.2d at 504).
one's home must yield to the state interest in protecting the public welfare.\textsuperscript{77}

The Alaska Supreme Court's use of three different tests for deciding the privacy issue underscores the lack of consistency and predictability existing at present in Alaska's jurisprudence of privacy. The court does appear, however, to be moving toward acceptance of the sliding scale test used by the majority in \textit{Erickson}. This movement has occurred primarily in cases involving personal privacy concepts rather than place privacy rights,\textsuperscript{78} especially in the cases which consider the right of informational privacy.\textsuperscript{79}

\textbf{2. Informational privacy: the emerging sliding scale test.} Several types of personal privacy rights have been explored by the courts, including the right to keep personal information private.\textsuperscript{80} In analyzing informational privacy cases, the Alaska Supreme Court seems to apply

\textsuperscript{77} In his concurrence, Justice Matthews expressed concern about the majority's use of the sliding scale test. Justice Matthews believed that the sliding scale test failed to define the precise privacy right at stake, and that a definition of the specific right was necessary to give the privacy amendment "the life it deserves." \textit{Id.} at 21-22. The approach advocated by Justice Matthews emphasizes the definition of the privacy interest at stake. The \textit{Ravin} court had characterized the privacy interest as "the general proposition that the authority of the state to exert control over the individual extends only to activities of the individual which affect others or the public at large as it relates to matters of public health or safety, or to provide for the general welfare." \textit{Id.} at 21 (quoting \textit{Ravin}, 537 P.2d at 509). According to Justice Matthews, if the activity at issue falls within the sphere of the state's authority because it relates to matters of public health, safety, or the general welfare, then the activity is not protected by the right to privacy. The individual's activity in \textit{Erickson}, cocaine use, did not fall within the right to privacy because the anti-social behavior that may accompany it falls within the sphere of the state's authority. Thus, the privacy amendment offered no protection to Erickson for his cocaine use under Justice Matthews's test, even when this activity was confined to the home.

\textsuperscript{78} The distinction between personal privacy and place privacy is discussed supra notes 56-60 and accompanying text.


\textsuperscript{80} Another personal privacy area in which there has been a good deal of activity has been in the definition of children's fundamental privacy rights. Generally, less protection has been given to children's privacy rights than to those of adults because the state has a greater interest in regulating the conduct of children than of adults. \textit{Anderson v. State}, 562 P.2d 351, 358 (Alaska 1977). This is especially true with respect to the sexual conduct of children. \textit{Id.}; see also \textit{L.A.M. v. State}, 547 P.2d 827 (Alaska 1976) (The court identified distinct government interests with reference to children in upholding Alaska's Children in Need of Aid statute, \textit{ALASKA STAT. \S\ 47.10.010} (1977).). Children have also received less protection in the search and seizure area, whether place privacy or personal privacy is involved. The court has held valid against a privacy challenge a search of the person of a student where the search is conducted by a school official pursuant to properly enacted regulations within the common law privilege to discipline. \textit{D.R.C. v. State}, 646 P.2d 252 (Alaska Ct. App. 1982).
a sliding scale test, although the court often describes its approach in words that suggest the application of the compelling state interest test.

A decision which clearly illustrates the application of the sliding scale analysis is *Falcon v. Alaska Public Offices Commission.* 81 In *Falcon,* a physician member of a school board challenged a requirement under the Alaska Conflict of Interest Law 82 that he furnish a list of all patients with whom he had done more than $100 worth of business during the previous year. The court held that Falcon did not have a personal privacy interest in the disclosure, but he was allowed to assert his patients’ right to privacy, even though the doctor-patient privilege did not protect the information. 83

The court’s analysis in *Falcon* began with a determination of the nature of the privacy interest involved. 84 The privacy interest, which arose in the context of the doctor-patient relationship, was the interest in not having one’s identity revealed where such a revelation discloses personal information. Next, the court applied a level of scrutiny appropriate to that interest. To justify interference with the doctor-patient relationship, the state had to show “‘a fair and substantial relation’ between the statutory means and a legitimate governmental purpose.” 85 The court then balanced the “nature and the extent of the privacy invasion and the strength of the state interest requiring disclosure” in order to determine the validity of the state’s action. In performing the balancing, the court examined the interest of the state in promoting fair and honest government and weighed that interest against the patients’ interest in concealing their identity as patients of this doctor. 87 Because the state regulation provided a potential for revealing sensitive information without a procedure for screening out patients who would be harmed by such disclosure, the operation of the disclosure law was suspended until procedural safeguards were introduced.

An example of an informational privacy case in which the Alaska Supreme Court described its approach as an application of the compel-

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82. ALASKA STAT. §§ 39.50.010 -.200 (1983).
83. *Falcon,* 570 P.2d at 475.
84. “Under the Alaska Constitution, the required level of justification turns on the precise nature of the privacy interest involved.” *Id.* at 476
85. *Id.* (citing Isakson v. Rickey, 550 P.2d 359, 363 (Alaska 1976)).
86. *Falcon,* 570 P.2d at 476.
87. *Id.* at 480. The court noted that, in the usual case, revealing that someone had seen a doctor would not be regarded as a revelation of very sensitive material. In certain cases, however, the mere fact that the patient had been seeing a doctor or a particular doctor could amount to revelation of a sensitive matter. This would be the case where the doctor specializes in contraceptive matters or performs many abortions, or in the case where one spouse sees a doctor without the other’s knowledge. *Id.* at 479-80.
ling state interest test but which more closely resembles a sliding scale analysis is *Messerli v. State*. This case involved a challenge to a campaign disclosure law which required anyone advertising in a political campaign to file a disclosure statement with the State Election Commission. The court applied a compelling interest test but the opinion is not inconsistent with the sliding scale analysis used in *Falcon*. The state intrusion in *Messerli* infringed not only on privacy rights but also on free speech and free press rights. In combination, these rights unquestionably require a compelling state interest to justify an intrusion upon them. Nevertheless, in support of the proposition that the right to privacy is not absolute, the *Messerli* court cited the *Falcon* court's statement that the level of justification depends on the nature of the privacy interest involved. Thus, *Messerli* can be read as simply focusing on that segment of the sliding scale that requires a compelling state interest.

Another case which illustrates the Alaska Supreme Court's use of a compelling interest test which is in substance one end of the sliding scale test is *State v. Oliver*. *Oliver* was the first Alaska case raising the right to privacy as a defense for failure to file a tax return. The taxpayer argued that the right to privacy prevented the state from requiring him to submit his federal W-2 forms and other employer-generated records to the state for computation of his state income tax. The *Oliver* court rejected the privacy claim.

The court noted, and the state conceded, that the personal financial information to be disclosed was within the zone of privacy protected by the privacy amendment. Then the court applied a compelling interest test to the furnishing of information required by the tax statute. The court held that the implementation of a tax system was a compelling interest. The court noted that at best a tenuous connection existed between the information contained in W-2 forms and "a person's more intimate concerns," and that the disclosed information was to be kept confidential. Therefore, the state's

88. 626 P.2d 81 (Alaska 1980).
89. *Id.* at 86.
90. *See supra* cases cited notes 23-25.
91. 626 P.2d at 86 (citing *Falcon*, 570 P.2d at 476).
93. *Id.* at 1167. The taxpayer's self-incrimination argument was also rejected. *Id.* at 1160. Federal courts have rejected similar claims based on the federal right to privacy. *See, e.g.*, United States v. Silkman, 543 F.2d 1218, 1220 (8th Cir. 1976), *cert. denied*, 431 U.S. 919 (1977).
95. *Oliver*, 636 P.2d at 1166.
96. *Id.* at 1167.
97. *Id.;* ALASKA STAT. § 43.05.230 (1983).
interest outweighed the intrusion on the taxpayer's privacy. The court then held that self-disclosure of such information was the least intrusive means for the state to secure the information.  

Despite the court's explicit use of a compelling state interest standard in Oliver, a careful reading of the case reveals that the court actually applied a sliding scale analysis. The application of the sliding scale test is evident in several statements in the Oliver opinion. One indication that the court was applying the sliding scale analysis is the court's use of the Falcon language regarding the need for a balancing of interests. Such a balancing is inconsistent with traditional compelling state interest analysis. Traditional compelling state interest analysis is an all-or-nothing type of analysis. There is no weighing of interests. If the right is fundamental, the state must show a compelling state interest to justify infringement of that right. This is a very high standard for the government to meet. In fact, very few laws will pass such a test. If the right is not fundamental, any infringing law which has a rational basis in fact is valid. Under this standard, almost no law will fail. In practice, therefore, the determination of whether or not a right is fundamental is the end of the inquiry. In Oliver, however, the determination that a fundamental right was involved did not end the analysis. The state's interest in the implementation of an income tax was found to be compelling and then it was weighed against the privacy interest in non-disclosure. A further indication of the court's balancing approach appears in the court's expression of "grave doubts" about the permissibility of requiring production of "purely private" papers, even if necessary to the state's compelling interest in collecting revenue. Such statements represent a more precise fit

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98. Oliver, 636 P.2d at 1167.  
99. Id. at 1166.  
101. The United States Supreme Court has found a compelling interest sufficient to justify government intrusion into fundamental rights in only one case, Korematsu v. United States, 323 U.S. 214 (1944), and this result can be explained as the Court giving in to wartime pressures in upholding the Japanese internment scheme undertaken in World War II. Korematsu was the case in which the compelling interest test was first announced. Id. at 216. The Alaska Supreme Court has had only a few occasions to apply this test and has found a compelling state interest to be present in Oliver, 636 P.2d at 1167, and in Schultz v. State, 593 P.2d 640, 642 (Alaska 1979), which involved the search of a burning house by a fire inspector. See also Pharr v. Fairbanks-North Star Borough, 638 P.2d 666, 670 (Alaska 1981), which followed Oliver.  
102. Oliver, 636 P.2d at 1167.  
103. Id. These statements seem to indicate a pro-taxpayer viewpoint. In the only reported tax case citing Oliver, however, the privacy argument again lost to the revenue interests of local government. Pharr, 638 P.2d 666. Nevertheless, this case was not a cutback on the court's rationale in Oliver. It involved sales tax records already
with a sliding scale analysis than with the less flexible compelling state interest analysis.

The argument for the non-disclosure of "purely private information" is applicable to state regulations outside the tax area. The language in *Oliver* does not limit the holding to the State Department of Revenue. Given the form of the sliding scale test applied in *Oliver*, there is no reason why other governmental agencies should not have to satisfy the same compelling interest standard for gaining access to personal financial information that the Department of Revenue must satisfy.  

C. Search and Seizure: Nonrecognition of the Independence of the Privacy Amendment

Although the bulk of the case law interpreting the privacy amendment has been in the area of searches and seizures, the court has not even begun to provide an independent privacy analysis for the search and seizure cases. An examination of the case law demonstrates that the privacy amendment *can* be given independent significance in this area, as in other areas.

The preeminent Alaska privacy case in the area of search and seizure is *State v. Glass.* In *Glass*, the Alaska Supreme Court invoked the privacy amendment and suppressed evidence gained by means of warrantless monitoring of a conversation between the accused and an informant wearing a wireless transmitter. Although the United States Supreme Court found no constitutional bar to such activity and the Alaska Supreme Court indicated in a prior case that the testimony of an informant or undercover police officer actually participating in a conversation with a suspect was admissible despite the absence of a warrant, the court in *Glass* held that the right to privacy protected a suspect from warrantless recording of his conversations.

The *Glass* court reached this result by applying the two-pronged test laid out by Justice Harlan in *Katz v. United States.* No issue

in the possession of another government agency. This operated, according to the court, to lower the privacy interest because others had already seen the records.

104. There may also be a private right of action implied here in favor of individuals against credit reference organizations that make use of such personal information. This action would be in the nature of a tort action, and exploration of this possibility is beyond the scope of this note.

108. *Glass*, 583 P.2d at 880.
109. 389 U.S. at 61 (Harlan, J., concurring). The two-part Harlan test had previously been adopted by the Alaska court for use in search and seizure cases in *Smith v.*
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was raised about the treatment of the first prong of the test. The court assumed that Glass had exhibited an actual expectation that the conversation would not be recorded. The discussion in Glass focused on the "reasonableness" of such an expectation. The court first noted that the United States Supreme Court decision supporting such eavesdropping did not produce a majority opinion, and that the Alaska court was not bound by the Supreme Court's holding. The court then distinguished the situation where a "false friend" actually testifies concerning a conversation that he had with the accused from the introduction of recordings of that conversation surreptitiously made with the cooperation of the "false friend." The court noted that the expectation that one's confidential conversations would not be repeated by a friend is qualitatively different from the expectation that the same conversation would not be recorded.

Finally, the court stated that the Alaska privacy amendment "affords broader protection than the penumbral right inferred from other [federal and state] constitutional provisions. Were that not the case, there would have been no need to amend the constitution." Based on these principles, the Glass court held that the expectation that one's conversations would not be recorded is reasonable within the meaning of the Harlan test.

The search and seizure cases following Glass have primarily been concerned with the question of which expectations society is willing to recognize as reasonable. In only a few cases has the court found that the expectations of the persons involved were "reasonable" as defined

State, 510 P.2d 793, 797 (Alaska), cert. denied, 414 U.S. 1086 (1973). The two parts of the test are laid out supra text accompanying note 36.

110. White, 401 U.S. at 745.

111. Glass, 583 P.2d at 876. The court reminded those reading the opinion that it could construe the Alaska Constitution as providing rights additional to those provided by the federal constitution. Id. n.12 (citing, among others, Zehrung v. State, 569 P.2d 189 (Alaska 1977), opinion on rehearing, 573 P.2d 858 (Alaska 1978), Woods & Rohde, Inc. v. State Dep't. of Labor, 565 P.2d 138 (Alaska 1977), and Blue v. State, 558 P.2d 636 (Alaska 1977)).

112. Glass, 583 P.2d at 880. An example of such a case is Pascu v. State, 577 P.2d at 1064.

113. Glass, 583 P.2d at 876-78. The court quoted extensively from Judge Hufstedler's dissent in Holmes v. Burr, 486 F.2d 55, 72 (9th Cir.), cert. denied, 414 U.S. 1116 (1973). Judge Hufstedler stated that uninhibited discussion is an essential component of a democratic society. While the risk of one's confidential conversations being repeated can be just as inhibiting as the risk that the conversation is being recorded, the risk of recording is not one that society is willing to accept. Therefore, the expectation that confidential conversations are not being recorded is reasonable. 486 F.2d at 72.

114. Glass, 583 P.2d at 879.

115. Id. at 880.
Moreover, the court has held *Glass* inapplicable to any recordings of conversations between citizens and uniformed officers when the conversation took place in the course of the officer's duty, either before or after an arrest. The protection against unreasonable searches and seizures was interpreted by the court to cover searches by all governmental officials, including agency employees. The term "government officials," however, was held not to apply to school authorities conducting searches of students. In addition, fishermen were held not to have a reasonable expectation of privacy in catches being stored in their holds sufficient to protect them from searches by agency officials.

*Glass*, then, seems to have been the high-water mark for the privacy amendment's impact on the search and seizure area. In later cases, the holding in *Glass* was limited to undercover operations and the use of informants to record conversations. Moreover, the *Glass* decision is applicable to administrative searches, but the expectation of privacy in these administrative cases involving commercial activity is considered to be lower than that involved in criminal cases concerning one's private conversations or activities in the home.

**IV. A Unified Privacy Analysis Through The Sliding Scale Test**

The emergence of the sliding scale test in the general privacy area leaves search and seizure the only privacy area in which the Alaska Supreme Court has not begun to give the privacy amendment independent significance. By adopting the sliding scale test in the search and seizure area, the court would provide greater protection for privacy rights than is currently available under the search and seizure test. Adoption of the test also would give the privacy amendment the
independent significance which other privacy areas have given it.\textsuperscript{124} The sliding scale test also has the virtue of unifying the privacy amendment analysis found in search and seizure cases with the analysis emerging in general privacy areas. Moreover, use of the sliding scale test would allow the court to remain consistent with current precedent and the realities of law enforcement.

A. Greater Protection for Privacy Rights

In \textit{Glass}, the court used the two-pronged Harlan test to determine both the privacy and the search and seizure issues presented.\textsuperscript{125} This test does not provide lasting protection to the right to privacy from government encroachment because of its emphasis on reasonableness as determined by society. Privacy is by definition a personal right, which involves the right to \textit{exclude} an activity from society's view. Using society's expectations to define whether a given expectation of privacy is protected at all is fundamentally inconsistent with the personal nature of the right. The balance that must be struck in privacy cases is a balance between an individual's rights and society's rights. If society's expectations are used to define what the individual's rights are, the balance is bound to tilt in favor of society's interests.

Society's expectations do have a role to play in deciding to what degree a given expectation of privacy will be protected under the sliding scale test. They should not be used, however, to decide whether a privacy interest should be recognized at all. If societal expectations are used in determining which interests will be protected, privacy interests will remain in a very precarious position. Only very strong commonly held notions of privacy — like the privacy of the home or the marital bedroom — will be accorded any lasting protection under a societal reasonableness test. On the other hand, unpopular interests — like the privacy of consenting homosexual adults — will receive no protection if they are not generally recognized as "reasonable" by soci-

\textsuperscript{124} Privacy should be defined with respect to the fundamental "right to be let alone" which all citizens enjoy. How much a citizen's exercise of that right conflicts with similar rights of other citizens or the community at large should set the level of justification required to overcome that right. This is the essence of the sliding scale test. Where the interest at issue represents the core of the right to be let alone, as did the privacy of the home involved in \textit{Ravin}, the state should be required to show a compelling interest to overcome that right. On the other hand, where the right to be let alone is slight, the justification need only be a rational basis. Through the use of consistent language, courts can assure that the privacy amendment will function as an independent protection of rights for Alaskans, rather than merely an excuse for a liberal interpretation of other constitutional guarantees.

\textsuperscript{125} The Harlan test was first adopted by the Alaska Supreme Court in a case decided less than one year after the passage of the privacy amendment. \textit{Smith v. State}, 510 P.2d 793, 797 (Alaska), \textit{cert. denied}, 414 U.S. 1086 (1973).
ety. Changes in society’s ideas of reasonable expectations might even cause a protected personal right to privacy to vanish.126

It is more difficult to define privacy rights out of the privacy amendment when a sliding scale test rather than a societal expectations test is employed by the court. Under the societal expectations test the court may summarily deny any protection to a right. The court simply states that society has not accepted the given expectation of privacy as reasonable. Either a right is “reasonable” and protected against infringement absent an important governmental interest or it is “unreasonable” and totally unprotected. A sliding scale test, on the other hand, proceeds from the assumption that all privacy rights are protected to some degree. The sliding scale test avoids the either/or analysis of the societal expectations test in favor of an analysis which recognizes the existence of a middle ground between these poles of reasonableness. It does not define privacy through societal standards of reasonableness, but balances a challenged personal expectation against society’s expectations and other governmental interests. Of course, the sliding scale test itself can be manipulated to give unpopular interests minimal protection, but the sliding scale has an advantage over a reasonable expectations test in this regard. Even if judges decide to provide only minimal protection to a privacy right, the right would still be protected against arbitrary attacks. In contrast, a privacy right that the court labels as an unreasonable expectation receives no protection from the privacy amendment at all.

126. The fragility of privacy rights under a reasonable expectations test is illustrated by the case in which the Harlan test was advanced, Katz v. United States, 389 U.S. 347 (1967). Katz held that physical intrusion into protected space was not necessary in order to make out a fourth amendment violation. Id. at 352-53. In so doing, the court overruled Olmstead v. United States, 277 U.S. 438 (1928). Nevertheless, if the two cases are analyzed under the Harlan test, the results are entirely consistent. (This comparison was made in Comment, supra note 22, at 1457-61.) When Olmstead was decided in 1928, society was not yet ready to recognize an expectation of privacy in telephone use as reasonable. Very few people had telephones and societal expectations as to their use had not yet developed. By 1967, when Katz was decided, the telephone had become part of daily life in America, and definite expectations of privacy could be said to have developed. Whereas in Katz the societal expectation had developed in such a way as to provide increased protection for privacy, expectations can also change in a way that provides less protection for privacy. An example of the latter phenomenon is occurring in the area of electronic eavesdropping and information gathering. As technology develops, it will become easier and easier for the government to eavesdrop; consequently, fewer and fewer places will be characterized as places in which society would reasonably expect privacy. Other changes in society may also reduce the number of places in which one would reasonably expect privacy. An example of such a change is the replacement of the enclosed telephone booth. It is an open question whether society would decide that the expectation of privacy in an open booth, as opposed to the enclosed booth so important in Katz, is reasonable.
B. Independent Significance and Uniformity across Areas

The sliding scale test seems to be emerging as the preferred form of analysis in privacy jurisprudence.\textsuperscript{127} Search and seizure remains the main area in which the court has not adopted a separate privacy analysis. The adoption of the sliding scale test in search and seizure cases would, therefore, make search and seizure part of a uniform and independent privacy analysis. An independent privacy analysis focuses squarely on the privacy issues involved and forces recognition of the independent validity of the privacy amendment. The recognition of an independent analysis requires the recognition of a separate exclusionary rule specifically applicable to the privacy amendment.\textsuperscript{128}

A separate exclusionary rule would not only provide an independent analysis in the search and seizure area, it would provide

\textsuperscript{127} The emergence of the sliding scale test is discussed supra notes 80-104 and accompanying text.
\textsuperscript{128} Prospects for an independently significant privacy amendment depend upon convincing the supreme court to explicitly recognize an exclusionary rule based upon the privacy amendment. Although \textit{Glass} was decided based upon the right to privacy, it did not explicitly hold that article I, section 22 provides a basis for excluding evidence independent of the search and seizure provision. In fact, earlier in the same year in which \textit{Glass} was decided, the court had refused to recognize that any additional protection was provided by the privacy amendment in a search and seizure case. \textit{Weltin v. State}, 574 P.2d 816, 821 n.15 (Alaska 1978). That refusal was confined to the facts of the case. The effect of the \textit{Glass} decision on this language was not stated in \textit{Glass} itself. Subsequent to \textit{Glass}, however, at least one Alaska appeals court has held that there is no such independent exclusionary rule under the privacy amendment. \textit{Wortham v. State}, 641 P.2d 223, 224 n.2 (Alaska Ct. App. 1982), \textit{aff'd after remand}, 657 P.2d 856 (Alaska Ct. App. 1983). The supreme court affirmed the decision, but did not reach the privacy issue. \textit{Wortham v. State}, 666 P.2d 1042 (Alaska 1983).

A strong argument can be made from the language in \textit{Glass} itself that the Alaska Supreme Court in fact recognized an independent exclusionary rule based on the privacy amendment in \textit{Glass}. The court deviated from federal precedent in participant monitoring of conversation because it believed the privacy amendment provided protection in addition to that provided by the fourth amendment and its Alaska counterpart. \textit{Glass}, 583 P.2d at 879. If the privacy amendment did not provide additional protection, the court reasoned, there would have been no reason to amend the constitution. \textit{Id. See also} \textit{Palmer v. State}, 604 P.2d 1106, 1108 (Alaska 1979) (where the court said that in \textit{Glass}, “we held that the privacy amendment, Alaska Const., art. I, § 22, prohibited the electronic recording of a narcotics transaction.”).

The \textit{Glass} court, however, could have achieved the same result under pre-privacy amendment precedent. The Alaska court had previously held that state rights could provide greater protection than their federal counterparts. \textit{Zehrung v. State}, 569 P.2d 189, 199 (Alaska 1977). In fact, it is the duty of state courts to develop additional rights. \textit{Baker v. City of Fairbanks}, 471 P.2d 386, 402 (Alaska 1970). If the privacy amendment did not provide additional protection but merely served as an alternative ground for accomplishing the same result attainable without the amendment, the independent significance of the privacy amendment is lost. The only way for the privacy amendment to provide additional protection is by a separate exclusionary rule which would focus the court's attention on privacy issues.
more certain and adequate protection to privacy interests than Justice Harlan's societal expectations test. The passage of the privacy amendment meant that Alaska's courts would no longer have to rely on penumbral privacy arguments. Use of the sliding scale test in search and seizure cases, as well as in other contexts, makes the passage of the amendment meaningful and enables the courts to truly give the privacy amendment "the life it deserves." More importantly, the use of the sliding scale test will ensure that the right to privacy will have equal meaning in all contexts, including the search and seizure area.

C. Implications of the Sliding Scale Test

Once the operation of the sliding scale test is understood, one can see that the test need not be applied in an ad hoc manner. Furthermore, the test will not require abandonment of whole areas of precedent. If an aspect of the right to privacy is found to be fundamental, then an important governmental interest is necessary to overcome the right to privacy. In addition, the means of regulation or intrusion chosen by the state would have to bear a "close and substantial relationship" to the important governmental purpose. Whether or not a right to privacy is fundamental would depend upon various factors, such as the historic importance of the privacy interest, its relationship to other fundamental rights, and the impact of the exercise of the right on other people and the public at large. If the right being exercised is not fundamental, a lesser governmental justification for regulation or intrusion would be required to validate the state action, even though the same factors could be examined in balancing the interests involved.

The actual operation of the sliding scale test in the search and seizure context would require a two-tiered analysis. First, the court would apply the search and seizure test of reasonable expectations. If the search were illegal under this traditional search and seizure test,

129. See supra note 126, concerning the fragility of privacy interests under the societal expectations test.
131. See Ravin, 537 P.2d at 498.
132. For example, "associational privacy" is necessary for the exercise of first amendment rights in certain circumstances. See supra note 23.
133. The factors listed admittedly do not constitute a bright line. Nevertheless, determining whether a right is a "fundamental" or lesser protected component of the right of privacy is no more difficult than deciding whether or not a particular subjective expectation of privacy is recognized as "reasonable" by society at large.
there would be no need for a privacy inquiry. If the search passed the reasonable expectations test, a further privacy inquiry under the sliding scale test would be necessary. Should the privacy interest be a rather minor one, such as the right to use cocaine in a public place, then the burden on the government to justify its intrusion would also be minor. Thus, a legitimate interest in protecting the public by preventing crime would almost always justify a warrantless search for concealed cocaine if it were being used in a public place. Under the sliding scale test, however, as the privacy interest became stronger, the burden on the government would increase.

Applying the sliding scale test to the search and seizure area would not necessarily cause a wholesale reversal of precedent or great problems for the policeman on the street. Since public safety, officer safety, and the capture of criminals are legitimate state interests, many searches by government officials would satisfy a requirement of an increased state interest.

The privacy analysis would have the greatest potential impact where a "fundamental" right to privacy was found to be infringed. If an aspect of privacy were deemed "fundamental," then any search infringing on this right would be presumed unconstitutional, thereby requiring justification by a showing of an important governmental interest and the least intrusive means chosen to further that interest. The important governmental interest would be balanced against the fundamental privacy interests involved. The traditional exceptions to the warrant requirement would generally satisfy this test, since in these cases the governmental interest is heightened by the need to protect officers or to keep evidence from being destroyed.

If the results would be substantially the same under either the sliding scale analysis or the traditional search and seizure test, why employ a separate privacy test as a second tier of analysis at all? One reason for employing the test is that the recognition of a distinction between the aspects of privacy protected by the Harlan test and a sliding scale test suggests that the results would not be the same under both tests in all cases. The Harlan test is primarily suited for cases

135. This ignores questions concerning the scope of the search.
136. There may also be cases, however, under the intermediate standard in which the requirement that the police obtain a search warrant would impose so slight a burden that warrantless searches would be invalid. An example of such a situation would be a case involving warrantless wiretapping of a massage parlor, a place in which patrons and employees have been held to have no reasonable expectation of privacy. Hilbers v. Municipality of Anchorage, 611 P.2d 31 (Alaska 1980). In such a case, if some privacy interests were found to be infringed, a search could be invalidated if the facts showed that there would have been no burden on the police in obtaining a search warrant.
137. See supra notes 56-60 and accompanying text.
A sliding scale test, on the other hand, is used generally to provide a personal right to privacy. Such personal rights stay with an individual no matter where that person goes. Of course, personal privacy is often hard to define without reference to a place, but where a right is defined without reference to a place, as in *Glass*, the right can be protected from interference even in a place where society is not willing to recognize an expectation of privacy as "reasonable." 

V. Conclusion

It has been thirteen years since the people of Alaska adopted article 1, section 22 guaranteeing the right to privacy, and ten years since the Alaska Supreme Court's first major decision in the area. In that time, the courts have had ample opportunity to develop a unifying rationale for the explicitly recognized right. The process is under way, but it has proceeded slowly. The judicial development, relying on a case-by-case analysis, lacks consistency. As a consequence, the contours of the right, including exactly what is meant by the term "privacy," have not yet been fully defined. The courts have not used the privacy amendment to extend additional protection to individuals

138. Justice Harlan himself recognized the difference between applying his test to place privacy interests and applying it to personal privacy rights. While the majority noted that "the Fourth Amendment protects people, not places," *Katz*, 389 U.S. at 351, Harlan based his concurrence on the fact that a phone booth is a constitutionally protected area, not the fact that there was any reasonable expectation of privacy in the conversation itself. *Id.* at 360.

139. This distinction provides a basis for recharacterizing the holding in *Glass*. *Glass* was decided without reference to place, but with a recognition of the fundamental right to privacy in intimate conversations which is necessary for full and free discussion in a democratic society. This is indicated by the *Glass* court's extensive quote from Judge Hufstedler's dissent in *Holmes v. Burr*, 486 F.2d 55 (9th Cir.), *cert. denied*, 414 U.S. 1116 (1973). *Glass*, 583 P.2d at 876-78. See *supra* note 113.

140. The difficulty of defining personal privacy without reference to a place is illustrated by *Ravin*, 537 P.2d 494. The court based the holding on the place privacy of the home. The personal privacy right to ingest substances was not sufficient by itself to overcome the state's interests. *Id.* at 511.

141. A good example of the difference that recognition of fundamental privacy rights would make is *People v. Crowson*, 33 Cal. 3d 623, 660 P.2d 389, 165 Cal. Rptr. 165 (1983). In that case, two suspects were left alone in the back seat of a police car. While they were alone they talked to each other, making some incriminating statements. Their conversation was surreptitiously recorded, and the remarks introduced into evidence against them. The introduction of the remarks was upheld because there was no reasonable expectation of privacy in conversations held in a police car, even with no police officer present.

If *Glass* were recharacterized as suggested above, *supra* note 139, the fundamental right of intimate conversation would protect such conversations, even though the expectation of privacy in that place was not reasonable.

against the increasing threats to privacy posed by the demands of the Information Age in which Alaskans now live.\textsuperscript{143} What is needed is a judicial commitment to the independent significance of a separate privacy guarantee. This could be achieved by judicial inquiry into the full textual implications of the privacy amendment. Cases like \textit{Ravin v. State} and \textit{State v. Glass} indicate such a willingness on the part of the Alaska Supreme Court. Recognition of a truly independent privacy amendment, however, also requires consistent analysis in order for a comprehensive form of protection to be developed. The sliding scale test provides the vehicle for the attainment of comprehensiveness and consistency in the construction of the privacy amendment. Moreover, the test allows for flexibility in confronting any threats to privacy which may emerge in the future.

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\footnote{143. \textit{See supra} note 5.}