The CABIRION and GAY BOOKS BULLETIN
Nº 10 Winter/Spring 1984

# REPORT OF THE COMMISSION ON PERSONAL PRIVACY

## STATE OF CALIFORNIA

**Thomas F. Coleman, Esq., and others**
December 1982, 489 pp.

## Two Views

I

The *Report of the Commission on Personal Privacy* (hereinafter, the *Report*) is the product of a Commission appointed by former Governor Edmund Brown, Jr., intended to create a synoptic view of developments in privacy law pertinent to California and making various recommendations for the progressive evolution of legal guarantees of privacy values in California in the future. As such, it is a work admirably done and well executed, which may provide a clarifying picture for privacy activists in other states of the nature and pace of progressive legal change in California.

The *Report* divides privacy law into three parts: decisional or associational privacy, territorial privacy, and informational privacy, discussing associated legal rights and remedies in terms of the elaboration of such rights and remedies under tort law and under constitutional law. The great bulk of the *Report* is absorbed in a discussion of the efflorescence of California law in the areas of territorial and informational privacy, especially the latter, spurred by the privacy amendment to the California Constitution of 1972, by the California judiciary's liberal elaboration of privacy rights of these kinds under state constitutional, statutory, and common law, and by former Governor Brown's active support of privacy activism exemplified, *inter alia*, by the appointment of the Commission which authored the *Report*. The *Report* notes with care the implications of these privacy rights for the claims of territorial and informational privacy of sexual minorities, but there is a dearth of discussion of the grounds for extending decisional or associational privacy to consensual adult homosexual relations, for example. The *Report*, rather, assumes the propriety of the 1976 California legislative decriminalization of consensual homosexuality, and focuses its concerns on the analysis of privacy claims on the frontiers of feasible legal change. As such, the *Report* is studded with recommendations for the fuller and fairer elaboration of privacy values in California law, which undoubtedly will shape future California law in progressively more just directions.

The explicit concern of the *Report* for the rights of sexual minorities appears only in its last 100 pages in which, consistent with its mandate, the *Report* undertakes a discussion of discrimination on grounds of sexual orientation which is, in style and depth of analysis, in striking contrast to the earlier 300 pages of the *Report* which focus on privacy law, strictly understood. These earlier pages are generally in the style of a law reporter or a student note in a law review, essentially recording the complex changes in California privacy law in the last ten years. It is a remarkable record of just social change through law, but it is only that, a record. There is almost no concern with principled argument, with history, with democratic political theory and liberalism, etc. It is doggedly and rigorously atheoretical. As such, its broader interest to humane learning is minimal. It should strike us that this style of analysis by governmental commissions is not inevitable: consider, for example, the kind of analysis mustered in the *Wolfenden Report*[1] in the United Kingdom and the more recent *Report on the Committee on Obscenity and Film Censorship,*[2] or, in the United States, *The Report of the Commission on Obscenity and Pornography.*[3] All these pathbreaking reports of blue ribbon governmental commissions are remarkable precisely for what is absent in the *Report* or, at least, its first 300 pages, namely, an interdisciplinary elaboration of good legal argument with good argument from pertinent social sciences, from philosophy, political theory, history, etc. As such, these reports advance humane thought and practice as one, and are all the more powerful and profound and transforming of our culture. In contrast, the *Report* does not conceive the bulk of its work in this way, and thus misses a certain kind of historic opportunity for a larger contribution to our collective life as a self-conscious political community.

Even its purely legal analysis suffers from the atheoretical orientation of these sections of the *Report*, for a good legal analysis will explore hard cases and the tensions among relevant principles they reflect in a much more probing way than the discussions of privacy in the *Report* accomplish. For example, the claim that privacy claims involving the tort of public disclosure of private facts are treated, for first amendment purposes, on a par with libel cases (p. 58) reflects a case involving the tort of false light, which has been discredited by later case law which has effectively changed the concept of what counts as a public figure for first amendment purposes. In fact, the status of the tort of public disclosure, vis-a-vis conflicting first amendment considerations, is quite open, and the failure of the *Report* to delve into the complex conflicting principles of American law means it will often not reflect the deeper dynamics and tensions in the case law.

In the discussion of discrimination on grounds of sexual orientation, the *Report* mercifully abandons the rather sterile legalism of its previous discussions for a more engaging discussion, focusing on a number of "myths" about homosexuality whose rebuttal is necessary to the fair-minded consideration of the discrimination issue. Here, the *Report* is concerned to introduce into California political dialogue important factual, historical, and philosophical considerations about sexual preference which, when taken seriously and responsibly, should enable public consciousness to understand the kind of deep injustice that discrimination on grounds of sexual preference clearly involves. This task of public education about homosexuality is probably the most important achievement of the *Report*, and the findings of legislative and/or constitutional fact, introduced into the discussion of the discrimination issue by the *Report*, can be used fruitfully in later political dialogue about these and related issues in California and throughout the nation.

It is in the context of its rather deeper examination of the discrimination issue, than in its longer earlier discussion of privacy questions, that the most interesting question raised by the *Report* occurs, the one that clearly requires more extgended thought from all of us—namely: what, if any, is the connection between privacy arguments as justifications for legal protections of sexual minorities, and arguments for protections against discrimination? Surely, it is possible consistently both to believe in privacy protections for sexual minorities (of all the three kinds discussed in the *Report*—decisional or associational, territorial, informational) and not to believe in anti-discrimination protections. Indeed, that may be precisely the state of the current conventional wisdom in the United States today—homosexuals, for example, should be left free of any criminal penalty if their sexual life is private, secretive, or discreet, but social and political tolerance will not extend to access to jobs, housing, state benefits, etc. if the homosexuality is public and political. Indeed, there may, on this view, be an internal tension between the privacy arguments featured in the bulk of the *Report* and the anti-discrimination arguments which grace its concluding discussions: the former assume a privacy which the latter arguments appear to deny.

It is at this point that we must, as the *Report* itself suggests, reconsider exactly what the ground for decisional or associational privacy is or should be. Perhaps it was always a mistake, an accident connected to the enunciation of a right to constitutional privacy in the context of the criminalization of use of contraceptives by married couples in the privacy of the home (with the prospect of egregious police surveillance techniques, including the odious bugging of the bedroom), that decisional or associational privacy has been thought of as a right to privacy at all. After all, the core of associational liberty under classic American constitutional principles has always been the liberty to form religious or political groups and to advocate positions associated with the integrity of those groups. The underlying moral right here is not a right to privacy, although some aspects of the right may be protected by privacy values, but a basic right of determination of one's personality on terms fair to all in a community of equals, which may involve, as an inalienable right of the person, both rights of privacy and rights of publicity on terms of mutual respect. If this view is plausible, then discrimination on grounds of sexual preference may violate this underlying moral right as much as the unjust criminalization of consensual adult homosexual relations. For, on examination, public acknowledgement and legitimation of one's sexuality, a perception of its irrelevance to any legitimate purpose of differential treatment, may be as much one's right as one's right to privacy, properly so called.

This argument, properly pursued, would carry us into areas not explored by the *Report*: the exclusion of homosexual couples from institutions of marriage and the corollary benefits associated with those institutions, the question of child custody and child rearing on the part of homosexual persons, the issue of homosexual teachers, and the like. It is perhaps enough to ask of the *Report* that it enables us to carry its dialogue further: it is a document of great intelligence, moral good will, and much political wisdom. We have much to learn from the *Report* about the great advances made by these bravely activist Californians, the ways in which a political coalition has been formed around the issues in the *Report*, the benefits gained by their strategy by having the *Report* made part of the political culture of California law and politics, the possible costs in omitting or deemphasizing other issues (abortion, for example, is much deemphasized in the *Report*, including the costs of omitting the kind of depth which might have made this document a more profoundly

transforming instrument. Activism or different styles of activism have different benefits and costs, and we should think deeply about what is gained and lost by the kind of style the *Report* reflects. Its style is that of consensus coalition building, which appears to have worked in California. We need to inquire whether its style would work elsewhere, or whether activism must adjust its claims and strategies to the special circumstances of different states or regions, depending on ethnicity, religious composition, etc.

But, let us not fail to say what is true: the *Report* is a brave and sound achievement of the aspiration for justice through law. It is an exemplary model of what can be accomplished when people of good will unite together on issues of principle and carry out their task with intelligence, political wisdom, strategic good sense, and a sense of justice. □

***David A. J. Richards***

## II

Although reports of some government commissions are held to have great influence on future political and legal decisions, they are seldom read by either scholars or the general public. The California Commission on Personal Privacy certainly seems to be in the mainstream in several ways. Its long and complex *Report* is almost intentionally boring; its recommendations are so comprehensive and forward looking that the label "radical" or perhaps "utopian" seems appropriate.

Despite its title, the major focus of the commission seems to be as much the legal protection of homosexually oriented persons as it is the broad range of legal concerns which fall under the heading of personal privacy. At times, these two relatively diverse concerns make the report seem a bit schizophrenic. This reviewer constantly had the feeling that the privacy matters which had focuses other than homosexual behavior were being used as a "cover" to balance the sections which concerned homosexuality, a method of legitimizing homosexuality by listing it as merely one of a series of related topics which might concern the average citizen. Generally those fighting for homosexual rights have tried to locate the rubric for their protection under civil rights (non-discrimination) laws by analogies to other oppressed groups. There is some highy sophisticated legal writing which locates the protections for homosexual behavior clearly under the equal protection clause of the 14th Amendment to the Federal Constitution.

The approach of this *Report* is relatively new. Although there have been public calls to switch the fight for gay rights to "privacy," to my knowledge this is the first organized presentation of that idea. In many places I find the arguments intellectually hard to sustain, and I will attempt to point out some specific examples further on, but it may well be an extremely clever political strategy.

Before attempting to evaluate some specific sections in the *Report*, it is necessary to give some overall perspective of its organization. There is a short opening section providing some background of the commission and its goals. This is followed by another brief part which discusses some philosophical background of privacy rights as well as its specific legal roots in tort and constitutional law. The great majority of the pages are devoted to descriptions of present privacy rights as protected by federal or California law in a series of areas including such diverse topics as prisoners' rights, arrest, employers' rights in the public and private sectors to obtain information about employees, rights of prospective renters and purchasers of housing, the right to check into consumers' finances before giving credit, various rights in interfamily relationships, the rights of mental patients, and the rights of those wishing to immigrate to the U.S. In all of these diverse areas there is a discussion of the present law and then there are suggestions for correction of difficulties or insufficiencies. The way in which these very diverse aspects of the law are joined is often difficult to discern which seems to be one of the weaknesses of the study.

The *Report* includes 79 specific recommended changes in the law or public policy relating to privacy, most of which have a concern for those engaged in homosexual behavior. While some of these recommendations are relatively simple, others would involve major changes in the law. Taken as a package, they are so extensive as to merit the description "utopian." There is no possible way in a short review to discuss even a small percentage of them. Furthermore, they encompass such diverse areas that I could find no adequate way to attempt to summarize them by categories. All the situations protected by the most extensive non-discrimination laws would be covered in these recommendations. These would range from not questioning a person about sexual orientation when he/she is applying for a job, to protecting against dismissal if sexual orientation becomes known. Yet the *Report* goes far beyond these kinds of proposals.

There are several recommendations for reeducation about homosexuality which would extinguish what are labeled myths about the subject. There are also sections about redefining the word "family" in the mental health law to allow mental patients to choose anyone they want as a conservator, and to allow visitation rights for patients for all lawful purposes. In case the reader is in doubt, it is reasonably clear that those lawful purposes would include same-sex relationships in some private setting. I think this last recommendation gives some hint of the breadth of the committee's ideas of the potential protections to be found in the concept of privacy.

It is quite clear that the world would be a far nicer place for those with a homosexual orientation if these recommendations were implemented. In reality, I would doubt that even a few will be adopted by the California legislature within the foreseeable future. One must regard the *Report* more as a series of goals than a practical manual. Therefore, I believe it is appropriate to consider whether or not the goals are well stated and whether the rationale for them is convincingly argued. Viewed in this way, the *Report* raises some serious doubts.

Some of the possible objections are that privacy, whether territorial, decisional or informational, must be balanced by the needs of the general polity. Many times the *Report* has dismissed any counterbalancing public needs and weighted the equations purely toward the individual. As a committed civil libertarian, my own tendency is to agree with most of the resulting recommendations, but I feel that failing to give more serious attention to the obvious needs of the polity as against the individual weaken the study.

The opening phlosophical sections are short, an indication of the weak philosophical backing for many of the ideas in this study. Privacy is not a word one finds any place in the Constitution; even its usage in tort law is of relatively recent vintage, less than a century old. The constitutional protections which are drawn from a modern mix of the first, fourth and fifth Amendments are hardly clear and precise and the ambiguities are hardly revealed in this study. Cases which support privacy are picked at random, but others which would present an opposing view are omitted. Tort law is often treated as if it were on an equal place as constitutional protection which simply is not the case. Furthermore, there needs to be a greater distinction about restraints on privacy which are

placed on government entities and those which are placed on private citizens and businesses. All of these are mixed together in a manner that is hazy from a legal perspective.

Finally, I am troubled by the shift between recommendations that seem to be mainly about homosexuality to those that seem to have nothing at all to do with it. For a single example there is a recommendation dealing with tenant "rating companies," companies which rate tenants on ability to pay,which could be based on a landlord's filing of an "unlawful detainer petition." The petition might be an inaccurate representation of the tenant's ability to pay rent because it can be filed without the tenant losing the case, or because it can be used against someone else who paid the rent for a tenant who was later evicted. The recommendation proposes some wise safeguards for this situation. One can see that it does not concern homosexual behavior. It is an example of that unsettling ambivalence of the Report, the question of whether the central focus is homosexuality or privacy. If privacy is really the central concern, then there is far too great an emphasis placed on the specific issues involving privacy for homosexual acts and associations. However, one can see from those involved in compiling the Report, as well as those who gave the testimony on which it is based, that homosexuality was clearly a central concern. It is possible that the Report would have been more valuable if it had been more honest about its central concern.

Given these intellectual objections, it remains to be said that the Report is an amazing work to have the imprimatur of an official government entity in the United States. It will probably be decades before any other state issues any document so forward looking about the rights of lesbians and gay men. It makes other published government reports look absolutely timid by comparison. As a statement of goals it is a valuable document; as a work of philosophical reasoning or legal prescience it leaves much to be desired. □

***Jim Levin***

**Notes**

[1]See *The Wolfenden Report* (Stein & Day: New York, 1963).

[2]See *Obscenity and Film Censorship: An Abridgement of the Williams Report*, edited by Bernard Williams (Cambridge University Press: Cambridge, 1979).

[3]See *The Report of the Commission on Obscenity and Pornography (U.S. Government Printing Office: Washington, D.C., September, 1970).*

---

David A.J. Richards is a professor at New York University School of Law. Jim Levin is a practicing attorney in New York and a member of the Gay Academic Union.