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"The right to privacy is, simply stated, the right to be left alone; to live one's life as one chooses, free from assault, intrusion or invasion except as they can be justified by the clear needs of community living under a government of law." (Time Inc. v. Hill 385 U.S. 374 (1967)). The protection of a person's general right to privacy is, like the protection of property and life, left largely to the law of the individual states and the exercise of state police power. The issue confronting this commission was the nature of the states' discharge of this responsibility with regard to laws concerning eavesdropping and the regulation of private sexual activities of consenting adults.

Commission II recognizes the need of federal, state, and local governments to conduct surveillance in order to safeguard the lives and property of their citizens. A function of law is to arbitrate conflicts of just claims; and often the resolution of such clashes is determined by reference to a hierarchy of individual rights, of which privacy is one, but not necessarily, the most fundamental right. Our concern is not the right of surveillance, but the regulation of that right. In Berger v. New York, a state surveillance statute was found defective because of its imprecise and discretionary provisions. However, the Supreme Court has permitted eavesdropping under "specific conditions and circumstances;" where probable cause was demonstrated; and where a warrant was obtained. The opinion of Mr. Justice Stewart in Katz v. U.S., 389 U.S. 350 (1967) at 354, is illustrative of the essential requirements for reasonable surveillance and provides the framework for the provisions of Title III of the Federal Omnibus Crime ~~and~~ Control and Safe Streets Act. In broad terms, Title III accomplishes two tasks: first, it prohibits wiretapping and electronic eavesdropping by private citizens; second, it establishes a judicially controlled procedure whereby law enforcement officials might use wiretapping or electronic eavesdropping in limited circumstances. At present, seventeen states have statutes providing judicial supervision for interception of oral and wire communications by law enforcement officers. These statutes must have provisions at least as stringent as those of Title III, which establishes minimum standards for the regulation of surveillance activity. The establishment of federal standards for the conduct of police power in the realm of surveillance recognizes the need for a degree of legal uniformity in a society where the possibility of transgression of individual rights exists on several levels. A healthy federalism depends upon the avoidance of needless conflict between the state and federal legal systems. Commission II contends that the court-order system of regulating the conduct of law enforcement surveillance, established by Title III, is the best method of regulating the state and federal structures for electronic surveillance. Although Title III has several procedural shortcomings, the basic structure of the law, accompanied by further refinement of its operative provisions, is adequate. It is the sentiment of Commission II that an incremental, procedural approach, operating within the parameters of the existing legal structures, will be more politically feasible in confronting the issues of privacy still unresolved by Title III than a structural remedy, requiring the erection of additional

federal agencies or boards.

The substance of Title III must be expanded to perform two functions: first, it must eliminate those areas that allow state electronic surveillance to be more permissive than federal standards; second, the federal standards must be revised to restrict the power of law enforcement agencies to the narrowest grounds consistent with the requirements for conducting surveillance on multiparty activities over long periods of time. Presently, certain provisions of Title III allow state procedures for electronic surveillance to be less restrictive than federal procedures. First, while the offenses for which federal officials may conduct surveillance are enumerated, the states may perform surveillance for any crime "dangerous to life, limb, or property and punishable by imprisonment for more than one year." The boundaries of the offenses so designated are almost without limit and need to be circumscribed. Second, the categories established by Title III for those empowered to authorize surveillance ("a judge of any court of general criminal jurisdiction of a state who is authorized by a statute of that state") and those allowed to conduct surveillance ("any investigative or law enforcement officer of the state or political sub-division thereof") are too broad and susceptible to abuse. Authorization should be the prerogative only of state superior court judges. All surveillance should be done by a professional group of law enforcement officers who have met additional requirements for competence in the techniques of surveillance and its ethical implications. Third, Title III leaves "consent" surveillance unregulated and thus open to state regulation. The federal government should define a uniform standard for the legal scope of such surveillance.

The present provisions of Title III need substantial revision to protect against unnecessary intrusions of privacy on both the federal and state levels. The shortcomings of Title III fall into three general areas: pre-surveillance procedures, surveillance procedures, and post-surveillance procedures. First, with reggrd to the provision for "emergency authority" to intercept communications, it must be made explicit that requests for authorization should be initiated during the time that the surveillance equipment is being set-up and not at the time that actual surveillance begins. The need for 48 hours to gain a court order should be scrutinized more closely, with the object of shortening the period during which surveillance can be conducted without authorization. Second, the interception of privileged communications, not covered in Title III, should be prohibited. Third, the present 30-day time limit for surveillance is too long. The duration of surveillance and the length of time any one intercept is allowed should be limited according to the specific purpose for which the surveillance is authorized. Finally, in the post-surveillance procedure, the area of standing needed to challenge the introduction of evidence secured by intercepted communications should be expanded to include those indirectly, as well as directly, implicated by the intercept.

The states are the main vehicles by which electronic surveillance is conducted. With the growing recognition of privacy as a fundamental, and yet, increasingly endangered right, the need to regulate wiretapping and eavesdropping and the need to establish

minimum federal standards for this purpose become imperative. Title III should remain as the principal focus of those individuals interested in reducing the scope of law enforcement conducted electronic surveillance. Having examined the protection afforded an individual's privacy by state laws regulating electronic surveillance, we will now peruse the efforts of the states to define the scope of that privacy through laws regulating the private sexual activity of consenting adults.

"The function of criminal law is to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others...Homosexual behavior between consenting adults in private should no longer be a criminal offense because of the importance which society and the law ought to give to individual freedom of choice and action in matters of private morality. Unless, a deliberate attempt is to be made by society, acting through the agency of law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is not the law's business. To say this is not to condone or encourage private immorality." This statement in the Wolfenden Report elucidates the position of Commission II on the issue of the regulation of private sexual activities between consenting adults. Criminal law must distinguish public and private morality and refrain from legislating in the private sphere. (Private morality is defined as that behavior which does not affect the person or welfare of others, either physically or psychologically, in that it occurs in such a manner or place that by reasonable construction would lead actors to believe themselves beyond the ken of the public eye or ear). The questions that must be asked before turning popular morality into criminal law are: first, whether a practice which offends moral feeling is harmful independent of its repercussions on the general moral code; and second, whether the failure to translate an item of general morality into criminal law will jeopardize the whole fabric of society and morality. There must be maximum respect for individual liberty consistent with the integrity of society. For an act to be criminal it is not sufficient that it be generally intolerable or abominated; it must be damaging to the fabric of society. People will not abandon morality because some private sexual practice which they disdain is not punished by the law. The position that homosexuality is an abominable vice not to be tolerated by society may itself lack the stance of a moral conviction. The position may be a compound of prejudice (the contention that homosexuals are morally inferior because they are effeminate), rationalization (adhering to the unsupported fact that homosexuals are unable to perform jobs as competently as heterosexuals), and personal aversion (representing no conviction, but merely hate rising from unacknowledged self-suspicion). The enforcement of a consensus condemning homosexuality is without the principles of our democracy, for the belief that prejudices, rationalizations, and personal aversions do not justify restricting another's freedom, itself occupies a prominent place in our public morality.

It is the opinion of Commission II that the homosexual is immoral only from the perspective of Christian religious doctrine which is anti-sexual as it is anti-homosexual. If it is true that

homosexuality changes the social environment, we maintain that change in social constructions is not the sort of harm that society is entitled to protect itself against. The homosexual is an intelligent, capable, sensitive human being whose sexual orientation does not impair his performance of social roles. Homosexual activities are conducted in private. Solicitation by homosexuals is executed through coded gestures and phrases, generally imposing no undesired inconvenience upon the public. It is essential to note that homosexual actions offensive to the public sensibility can be prosecuted under other laws regulating public activity, e.g. lewdness, assault, rape, indecent exposure, and loitering. The only components of the homosexual act not encompassed by other public offense laws are those private in nature and these acts should not be subject to criminal law.

A legislator must not merely accept the existence of a moral consensus, but must test the credentials of that consensus. He must act on his understanding of what our shared morality requires. No legislator can ignore the public's outrage. This will set the boundaries of what is politically feasible. But feasibilty must not be confused with justice, nor facts of political life with principles of political morality. It is in this spirit that Commission II has examined the state laws regulating private sexual activity of consenting adults and found them deficient.

The homosexual varies in no meaningful way from the heterosexual. Being homosexual is tantamount to being left-handed. The incapacitating insecurities suffered by the homosexual are traceable to a threatening social environment. Whereas the justification for sodomy laws is that the homosexual corrupts and injures society, the sociological and psychological evidence affirms the opposite - society is the culprit and the homosexual the victim. First, sodomy statutes are very difficult to enforce. For every 20 convictions in court, 60 million homosexual acts occur. The enforcement of the laws is thus arbitrary and inefficient. The nature of the behavior regulated is of such a private nature that enforcement will undoubtedly reflect a hit or miss posture. Criminal law is inefficient as applied to adult consensual homosexuality. Second, homosexual behavior is only a nuisance, not a menace to society. Still, in many states' laws sodomy is included on the same level with a host of offenses blatantly dangerous to life, liberty or property such as murder, arson, kidnapping, rape and robbery. Third, sodomy laws violate the Due Process Clause of the Fourteenth Amendment in two respects: first, clearness of intent; second, reasonableness of relation to the ends which such regulation seeks to achieve. Terminology such as "infamous crime against nature" is vague, emotional, and liable to subjective interpretation. Such terminology has no place in legal provisions. The philosophical evidence adduced above demonstrates that the promulgated end of homosexual regulation, which is the protection of public morality, is not a sufficiently compelling interest to render the state sodomy laws a reasonable means toward that end. In order to overcome these deficiencies, Commission II recommends the following changes in state laws:

-first, all sodomy statutes regulating the private, consensual behavior of persons sixteen years or older shall be repealed.

-second, any person, 21 or older, who engages in private consensual sodomy with a youth of 15 years or younger shall be treated by the law as an offender of public morality, despite the private nature of the act.

-third, all sexual acts of a coercive nature, limiting the free exercise of the victim's life, liberty, or property, shall come under the purview of the criminal law and be resolved by the appropriate sections of that law.

-fourth, consensual sodomy performed in a nature directly offensive to the eyes or ears of the public, shall constitute public lewdness and be justifiable cause for public action against the offender.

-fifth, no law shall attempt to regulate homosexual solicitation, unless such behavior comes to the attention of the law through issuance of a public complaint against breach of peace or invasion of individual life, liberty, or property. Solicitation laws shall be repealed and public peace and order statutes made to assume whatever burden such repeal may impose.

-sixth, no person shall be discriminated against in matters of employment on the basis of sexual orientation.

"The object of this essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion. That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can rightfully be exercised over any member of a civilized community, against his will, is to prevent harm to others." (On Liberty, J.S. Mill) The object of the work of this commission was to examine the right of privacy in relation to the states' concern with the surveillance of individual activities and with guarding the public morality. Mill's principle has been the guiding light to our conclusion that in so far as individual behavior does not encroach upon the public interest or safety, it is recognized as private and protected by the state. It is the function of law to define the realm of autonomous jurisdiction of every individual. This task is a difficult one in the face of changing technology and changing social values. But in all times and in all circumstances, the right to privacy is to be affirmed.