

7-2007

Keynote Address: The Right to Privacy

James C. Nelson

Keynote Speaker; Justice, Montana Supreme Court

Follow this and additional works at: <https://scholarworks.umt.edu/mlr>



Part of the [Constitutional Law Commons](#)

Let us know how access to this document benefits you.

Recommended Citation

James C. Nelson, *Keynote Address: The Right to Privacy*, 68 Mont. L. Rev. 257 (2007).

Available at: <https://scholarworks.umt.edu/mlr/vol68/iss2/2>

This Article is brought to you for free and open access by ScholarWorks at University of Montana. It has been accepted for inclusion in Montana Law Review by an authorized editor of ScholarWorks at University of Montana. For more information, please contact scholarworks@mso.umt.edu.

SYMPOSIUM ARTICLES

KEYNOTE ADDRESS: THE RIGHT TO PRIVACY*

James C. Nelson**

I can think of few things that are of more concern to me than the right of individual privacy guaranteed by the Montana Constitution, and I am just so pleased that the staff of the *Montana Law Review* chose to present this topic and to bring in these world-class speakers.

A colleague of mine gave me this coffee mug as a gift. By all accounts, it looks like an ordinary white coffee mug with a black handle, but if you look at this coffee mug closely, you will notice that inscribed on its surface in small letters is the Bill of Rights of the U.S. Constitution. Nothing too unusual about that. Perhaps second only to T-shirts, coffee mugs serve as the ordinary citizen's billboard for conventional wisdom, political statements, emotional outpouring, and tongue-in-cheek sedition.

This mug has the Bill of Rights written on it: the first ten amendments to the federal Constitution. The fundamental guarantees that are so interwoven into the fabric of our culture and our national psyche that hardly any American can be found who does not know that she has the right to remain silent if arrested,¹

* Editors' Note: This Article is an edited, annotated transcript of the Keynote Address to the *Montana Law Review's* Honorable James R. Browning Symposium, *The Right to Privacy*, held at The University of Montana School of Law on October 11–13, 2006. This Article draws on themes raised in the author's concurring opinion in *State v. A Blue in Color, 1993 Chevrolet Pickup*, 116 P.3d 800 (Mont. 2005).

** Justice, Montana Supreme Court.

1. U.S. Const. amend. V; see also *Miranda v. Ariz.*, 384 U.S. 436, 444 (1966).

that he has the right to bear arms,² and that the government cannot take your private property without paying for it.³

This mug, however, goes a bit further than simply displaying the Bill of Rights. This coffee mug has a unique feature that quite accurately and, I think, quite frighteningly, caricatures the times in which we live. If you take this mug and pour hot coffee or tea into it, the Bill of Rights simply fades off the surface. When subjected to a hot liquid, the hallowed words chosen by the authors of the Constitution disappear. It is just as if those rights never existed in the first place. No more freedom of speech.⁴ No more freedom of religion.⁵ No more right to peaceably assemble.⁶ No more protection against unreasonable searches and seizures.⁷ No more guarantee that you will not be deprived of your life, your liberty, or your property without due process of law.⁸ No more right to a speedy trial in public by a jury.⁹

The Bill of Rights is just not strong enough to withstand being placed in hot water. Indeed, I suggest to you that the phenomenon played out on the surface of my coffee mug has been reenacted time and time again in our country over the last few decades, and one of the primary victims of this tragedy is the right of individual privacy. That is why this symposium is devoted to the right of privacy. That right—the right to be let alone, the right to keep one’s private information and conversations private, the right to make autonomous decisions about one’s healthcare, body and moral and religious values, the right to engage in personal and intimate relationships with people—that right is not found in these Bill of Rights. It is found in a penumbra of other federal constitutional guarantees, but it is not textually protected in the federal Constitution.¹⁰

This right of individual privacy, however, is a key fundamental right textually guaranteed in the Declaration of Rights in Montana’s Constitution, Article II, section 10, and it is vigorously—vigorously—defended by the courts of this State. It says, “The right of individual privacy is essential to the well-being of a free

2. U.S. Const. amend. II.

3. *Id.* at amend. V.

4. *Id.* at amend. I.

5. *Id.*

6. *Id.*

7. *Id.* at amend. IV.

8. U.S. Const. amend. V.

9. *Id.* at amend. VI.

10. *Griswold v. Conn.*, 381 U.S. 479, 484–86 (1965).

society and shall not be infringed without the showing of a compelling state interest.”¹¹ This right in Montana guarantees far greater protection from unreasonable searches and seizures than does the Fourth Amendment to the federal Constitution.¹² This Montana right of individual privacy guarantees the right of consenting adults to have private sexual relations without fear of government interference.¹³ This right of individual privacy guarantees that all Montanans have the right to choose a licensed health-care provider to perform a lawful medical procedure or service.¹⁴ This right protects a woman’s choice whether to conceive or to bear a child.¹⁵ This right guarantees the sanctity of personal and private information.¹⁶

In proposing Article II, section 10, of the Montana Constitution, Delegate Bob Campbell—who is with us here tonight—spoke for the Bill of Rights Committee in recognizing the need for more powerful and explicit protections of individual privacy.¹⁷ His words are in the convention transcripts, and they reflect needs grounded in an increasingly complex society and needs grounded in the recognition of increasing government involvement and interference in each citizen’s life.¹⁸ These needs were grounded in the abilities of new technologies to snoop, discover, and record. Also, these needs, I believe, were grounded in the declining commitment of the federal courts to vigorously defend the right of privacy, and, sadly, in the willingness of politicians to strip persons of their individual privacy rights for any number of politically popular and socially expedient reasons—reasons which, I believe, are largely dependent upon which way the political winds are blowing at any given time and what sort of partisan or religious rhetoric is fanning those winds.

Indeed, we have much to fear. The concerns that drove the Constitutional Convention delegates to recommend a new constitution to the people of Montana and drove Montanans to adopt it have not simply faded away in a new age of good will, understanding, and knowledge. The bogeymen of individual privacy are alive

11. Mont. Const. art. II, § 10.

12. See e.g. *State v. Siegal*, 934 P.2d 176, 183 (Mont. 1997).

13. *Gryczan v. State*, 942 P.2d 112, 122 (Mont. 1997).

14. *Armstrong v. State*, 989 P.2d 364, 376 (Mont. 1999).

15. *Id.*

16. *State v. Nelson*, 941 P.2d 441, 448 (Mont. 1997).

17. *Montana Constitutional Convention* vol. 5, 1680–88 (Margaret S. Warden et al. eds., Mont. Legis. 1981).

18. *Id.*

and well among us. The right of individual privacy of every person in this room, of every person in this state, of every person in this country, is at risk. Some of these risks are very subtle and some not so.

One of the main current justifications for invading personal privacy is war. Indeed, I fear that eventually we are all going to become collateral damage in the war on drugs, or the war on terrorism, or the war for patriotism, or the war for sectarianism, or whatever war is in vogue at the moment. I retain a real and abiding concern that our Declaration of Rights will be killed by friendly fire, and I am convinced that in this day and age, the courts are the last, if not the only, bulwark to prevent that from happening. As it is in most wars, the sister rights of human dignity—which is also textually protected in Montana’s Constitution¹⁹—and individual privacy are among the first casualties.

We are at war with terrorism, and that war—we now find out—justifies warrantless and secret monitoring of the electronic communications of millions of people.²⁰ It justifies warrantless secret snooping into personal and financial information of millions of people.²¹ This war justifies thumbing our national nose at international conventions designed to protect human dignity and privacy.²² This war is epitomized by my coffee mug: Pour in the hot water of 9/11, and the Bill of Rights just fades from view.

The late Justice William J. Brennan, Jr.²³ offered this prescient observation:

[W]hen I think of the progress we have made over the last 30 years, I look upon our system of civil liberties with some satisfaction, and a certain pride. There is considerably less to be proud about, and a good deal to be embarrassed about, when one reflects on the shabby treatment civil liberties have received in the United States during times of war and perceived threats to its national security.

For as adamant as my country has been about civil liberties during peacetime, it has a long history of failing to preserve civil liberties when it perceived its national security threatened. This series of failures is particularly frustrating in that it appears to result not from informed and rational decisions that protecting civil

19. Mont. Const. art. II, § 4.

20. E.g. Eric Lichtblau & James Risen, *Domestic Surveillance: The Program; Spy Agency Mined Vast Data Trove, Officials Report*, N.Y. Times A1 (Dec. 24, 2005).

21. E.g. Josh Meyer, *Five Years After: Hidden Depths to U.S. Monitoring*, L.A. Times A12 (Sept. 11, 2006).

22. E.g. Alan Cowell, *U.S. “Thumbs Its Nose” at Rights, Amnesty Says*, N.Y. Times A10 (May 26, 2005).

23. Associate Justice, U.S. Supreme Court, 1956–1990.

liberties would expose the United States to unacceptable security risks, but rather from the episodic nature of our security crises. After each perceived security crisis ended, the United States has remorsefully realized that the abrogation of civil liberties was unnecessary. But it has proven unable to prevent itself from repeating the error when the next crisis came along.²⁴

The people who fly planes into tall buildings are not the only enemies of our personal privacy and freedoms. In truth and in many instances, our problems are closer to home. As Pogo was wont to say, "We have met the enemy, and he is us."²⁵

Have you ever stopped to think about the sort of stuff we dispose of every day? Food, paper, electronics. We are a throw-away society. My garbage can contains the remains of what I eat and what I drink. It contains discarded credit card receipts along with yesterday's newspaper and junk mail. It might hold some personal letters, bills, receipts, vouchers, medical records, photographs, and items that are imprinted with a multitude of assigned numbers that allow me access to the global economy and *vice versa*. Frighteningly, my garbage can contains my DNA.

What we voluntarily throw away—that is, what we discard, what we abandon—is fair game for roving animals, for scavengers, for busybodies, for crooks, and for those seeking evidence of criminal enterprise. Yet, as I expect with most people, when I take out the day's trash each night, neatly packaged in opaque plastic bags, I give little consideration to what I am throwing away and less thought still for what might become of my refuse. I don't necessarily envision that someone or something is going to paw through it looking for a morsel of food, a discarded treasure, a steal-able part of my identity or a piece of evidence, but in my own career and in my own life, I have seen that happen enough times to understand that there is nothing sacred in whatever privacy interests I think I have retained in my trash once it leaves my control, the Fourth Amendment to the federal Constitution, and Article II, sections 10 and 11 of the Montana Constitution notwithstanding.

Like it or not, we live in a society that accepts virtual strip searches at airports. We accept surveillance cameras, discount

24. William J. Brennan, Jr., Lecture, *The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crises* (Hebrew U. of Jerusalem, Dec. 22, 1987), in 18 *Isr. Y.B. Hum. Rts.* 11, 11 (1988).

25. Walt Kelly, *Zeroing In on Those Polluters: We Have Met the Enemy and He Is Us*, in *The Best of Pogo: Collected from the Okefenokee Star* 224, 224 (Mrs. Walt Kelly & Bill Crouch Jr. eds., Simon & Schuster 1982).

cards that record our buying habits, bar codes, cookies and spyware on our computers, on-line access to satellite technology that can image our backyards, and microchip radiofrequency identification devices already implanted in the family dog, soon to be integrated into our groceries, our credit cards, our cash, and our new underwear.

I know that the notes from my visit to the doctor's office may be transcribed in some overseas country under an outsourcing contract by a person who couldn't care less about my privacy. I know that there are all sorts of businesses that have records of what medications I take and why. I know that information taken from my blood sample will wind up in databases and be put to uses that the boilerplate on the sheaf of papers that I signed to get medical treatment does not even begin to cover. I know that my insurance companies and my employer know more about me than does my mother. I know that many aspects of my life are available on the Internet. Even a black box in my car—an event-data-recorder, as they are called—is ready and willing to spill the beans on my driving habits if I have an “event.” (I really trusted that car too.)

I also know that my most unwelcome and paternalistic relative, Uncle Sam, is with me from womb to tomb, fueled, as I have already noted, by the paranoia of “ists” and “isms.” Sam has the capability of spying on everything and everybody and, as we have recently learned, is doing precisely that. But Sam says it's for my own good.

In short, I know that my personal information is recorded in databases, servers, hard drives, and file cabinets all over the world. I know that these portals to the most intimate details of my life are restricted only by the degree of sophistication and goodwill or malevolence of the person, institution, corporation, or government that wants access to my data. I also know that much of my life can be reconstructed from the contents of my garbage can.

I don't like living in Orwell's *1984*,²⁶ but I do, and the best we can do is to keep Sam and the sub-Sams on a short leash. So, my friends, it is a good time to talk about the late, great, right of privacy. If we are to keep this most precious right alive, a right that is essential to the well-being of a free society, if we are to prevent it from fading in times when we are in hot water—like the words

26. George Orwell, *1984* (New Am. Lib. 1977).

on my coffee mug—then we must know and understand the right of privacy in all its forms. We must know and understand the sorts of attacks that are, and will be, brought to weaken this right. We need to ferret out the bogeymen, and we have got to conquer the enemies of our right to be let alone, whether those enemies are foreign, domestic, or personal.

The staff of the *Montana Law Review* has put together what I believe you will find an absolutely incredible symposium on this right to privacy. They have brought here to the Montana School of Law world-class presenters from across the country. We have heard from Professor Teresa Collett. Her remarks challenged the courts to fashion a coherent jurisprudence of privacy, one that identifies the person within the context of human relationships.²⁷ After my remarks, Norm Stamper, an advisor and board member of Law Enforcement against Prohibition, will discuss another of America's ongoing wars, the war on drugs, and the effects of that war on our civil liberties.²⁸ Judith Waxman, Vice-President and Director of Health and Reproductive Rights at the National Women's Law Center, will discuss the genesis and evolution of the right to choose and how that intersects with the rights of privacy, dignity and equality.²⁹

We will hear from Barry Steinhardt, Director of the ACLU Program on Technology and Liberty.³⁰ Mr. Steinhardt will talk about the surveillance monster that modern technologies have spawned, and how data-mining, which has been so much in the news of late, affects our rights and individual privacy. Kathryn Tucker, Director of Legal Affairs of Compassion and Choices, will examine the rights of individual privacy and dignity as those rights apply to end-of-life decisions.³¹ Finally, Professor Vincent Samar will discuss privacy and dignity concerns in the context of same-sex marriage.³² I urge you to attend each of these presenta-

27. Teresa Collett, *The Courts' Confused (and Confusing) Understanding of the Creation and Taking of Human Life*, 68 Mont. L. Rev. 265 (2007).

28. Norm Stamper, *America's Drug War and the Right to Privacy*, 68 Mont. L. Rev. 285 (2007).

29. Judith G. Waxman, *Privacy and Reproductive Rights: Where We've Been and Where We're Going*, 68 Mont. L. Rev. 299 (2007).

30. Barry Steinhardt, Video Conference, *Taming the Surveillance Monster: Technology and Privacy Issues* (U. of Mont. Sch. of L., Missoula, Mont., Oct. 12, 2006) (copy on file with *Montana Law Review*).

31. Kathryn L. Tucker, *Privacy and Dignity at the End of Life: Protecting the Right of Montanans to Choose Aid in Dying* 68 Mont. L. Rev. 317 (2007).

32. Vincent J. Samar, *Privacy and Same-Sex Marriage: The Case for Treating Same-Sex Marriage as a Human Right*, 68 Mont. L. Rev. 335 (2007).

tions, because each addresses different facets of the right of individual privacy. I know that you are going to find all of these discussions challenging and enlightening and thought-provoking.

I love talking to law students. At least when I was a law student, there was a sense of idealism burning within your chests, which is wonderful. Unfortunately, for many, that idealism fades as time goes on. I suggest to you that we need to forge a new vessel for our Bill of Rights, one that does not allow our rights to fade when somebody pours in a little hot water. This symposium is a great place to start, and you are the people to start that work. Thank you.