ARTICLE

GETTING GOVERNMENT OFF THE BACKS OF PEOPLE: THE RIGHT OF PRIVACY AND FREEDOM OF EXPRESSION IN THE OPINIONS OF JUSTICE WILLIAM 0. DOUGLAS

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I. INTRODUCTION

Justice William 0. Douglas was a character of many ironies and apparent contradictions. Although he was a flamboyant public personnage, Douglas was personally shy and insecure. A great champion of human rights, Douglas was reportedly often harsh and autocratic toward his family and office staff.[1] Among the most puzzling areas of apparent inconsistencies in Douglas' legal writing is his defense of individual privacy, simultaneously with his insistence on a nearly absolute freedom of expression. Because free expression, especially by the media, frequently interferes with individual privacy, Douglas seemed to be caught in a dilemma, unable fully to protect one individual right without infringing the other.

Any reconciliation of the various aspects of Douglas' legal views must begin with the recognition that Douglas was a restless man who relished surprises and enjoyed odd juxtapositions. Moreover, coming out of the tradition of legal realism, he resisted structuring and systematizing legal doctrine. At the beginning of the first volume of his autobiography, Go East *Young Man,* Douglas placed as an epigraph: "All your anxiety is because of your desire for harmony. Seek **dishar-**

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1. See J. SIMON, INDEPENDENT JOURNEY 2, 229-32, 282, 287, 370-82 (1980).

mony; then you will gain peace."[2] Such caveats about Douglas' self-conscious inconsistency[3] may even have fooled Ronald Dworkin into characterizing Douglas as possibly "a man with a guilty secret, a judge of incompatible philosophical convictions posing, mainly to himself, as a fraud."[4]

Although the purpose of this article is not to refute Dworkin, this analysis of Douglas' notions of the rights to privacy and free expression does offer an interesting counter example to the conclusion, which Dworkin shares with other Douglas critics, that Douglas' views amounted to, in Dworkin's words, "a kind of theoretical schizophrenia."[5] Although Douglas did not subscribe to Dworkin's rights thesis,[6] or any other highly structured analytic doctrine, there is a legal theory which underlies and ties together his opinions regarding the rights of privacy and freedom of expression. That legal doctrine is Douglas' conception of the individual's more general right to be let alone. What Douglas meant by the right to be let alone is perhaps best communicated by a characteristic phrase, almost a battlecry, which Douglas shared with another prominent American: "keep the government off the backs of the people."[7] Aside from the phrase, Ronald Reagan and William 0. Douglas appear to have shared relatively few common

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2. W. 0. DOUGLAS, GO EAST YOUNG MAN vii (1974).

3. Douglas was part of the tradition of legal realism which rejected classical systematization of legal rules and of Holmes who insisted that "the life of the law has not been logic: it has been experience." 0. W. HOLMES, THE COMMON LAW 1 (1881). Douglas also was a disciple of Emerson and the kind of self-reliance which urges the individual to define and re-define his or her own personality, irrespective of society's pressures to conform: "A foolish consistency is the hobgoblin of little minds" R. W. EMERSON, SELF-RELIANCE IN ESSAYS 14 (Riverside ed. 1880). Douglas seems to have taken Emerson's advice to heart.

4. Dworkin, Dissent *on Douglas, N. Y.* REV. OF BOOKS, Feb. 19, 1981, at 3-8.

5. *Id.* at *4. See also Note, Toward a Constitutional Theory of Individuality: The Privacy Opinions of Justice Douglas, 87 YALE* L.J. 1579 (1978).

6. R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

7. Douglas was apparently the first U.S. jurist to use the phrase in a legal opinion. He used it in roughly half a dozen opinions, beginning in the late 1960's: W.E.B. DuBois Clubs of America v. Clark, 389 U.S. 309, 318 (1967); Schneider v. Smith, 390 U.S. 17, 25 (1968) (dissenting); Olff v. East Side Union High School Dist., 404 U.S. 1042, 1044 (1972) (dissenting); Russol v. Byrne, 409 U.S. 1013, 1017 (1972) (dissenting); Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 162 (1973) (concurring in judgment). Even earlier, dissenting in one of the civil rights removal cases, City of Greenwood v. Peacock, 384 U.S. 808 (1966), Douglas foreshadowed the phrase when he wrote that the federal removal statute was intended to take the burden of defending state court prosecutions "off the backs of this persecuted minority and all who espouse the cause of their equality." *Id.* at 854.

views.

II. RIGHT TO BE LET ALONE

When, in 1952, Douglas asserted that "the right to be let alone is indeed the beginning of all freedom,"[8] he had a particular notion of the right to be let alone in mind. Douglas frequently used "the right to be let alone" interchangably with the right of privacy to refer to aspects of personal liberty which are protected by the Constitution from government interference. Douglas' right to be let alone was, thus, not a right against interferences by the world in general, but a constitutional right against interference by government. Douglas first made this point about the right to be let alone as an aspect of "liberty" protected by the due process guarantees of the fifth amendment in his dissent in *Public Utilities Commission v. Pollack*.[9] That was in 1952. Later, he made precisely the same point in describing the penumbral rights or emanations which give content to the liberty protected by the fourteenth amendment against deprivation without due process by state government.[10] Toward the end of his judicial career, Douglas described the right to be let alone, or right of privacy, as being based on "customary, traditional, and time-honored rights, amenities, privileges, and immunities that come within the sweep of 'the Blessings of Liberty' mentioned in the preamble to the Constitution . . . . [and] come within the meaning of the term 'liberty' as used in the Fourteenth Amendment.'"[11] In

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8. Pub. Util. Comm'n. v. Pollak, 343 U.S. 451, 467 (1952) (dissenting).

9. *Id.*

In his dissent, Douglas stated that:

> The case comes down to the meaning of 'liberty' as used in the Fifth Amendment. Liberty in the constitutional sense must mean more than freedom from unlawful governmental restraint; it must include privacy as well, if it is to be a repository of freedom. The right to be let alone is indeed the beginning of all freedom.

Id. at 467.

10. Douglas argued, again in dissent:

> As I indicated in my dissent in *Public Utilities Commh v. Pollak*, 'liberty' within the purview of the Fifth Amendment includes the right of 'privacy,' a right I thought infringed in that case because a member of a 'captive audience' was forced to listen to a government sponsored radio program. 'Liberty' is a conception that sometimes gains content from the emanations of other specific guarantees or from experience with the requirements of a free society.

Poe v. Ullman, 367 U.S. 497, 517 (1961) (dissenting).

11. Doe v. Bolton, 410 U.S. 179, 210-11 (1973) (concurring).

each instance Douglas' focus was on the government, federal, state or sometimes local, and on keeping it off the backs of the people.

It is interesting to note that government interferences were not the original focus of either the right to be let alone or the right to privacy. In 1879 Thomas Cooley wrote about the right to be let alone as a tort right of personal security against one's fellow citizens, not against the government.[12] Cooley, however, was primarily interested in physical security and, moreover, did not mention a right to privacy. It was not until 1890, some eight years before William 0. Douglas was born, that a law review article first argued that one aspect of the individual's more general right to be let alone was the right to privacy. This original right to privacy was aimed primarily at combatting unwanted newspaper gossip about peoples' private lives.[13] The main author of that law review article was Louis D. Brandeis, who four decades later as a Justice of the U.S. Supreme Court, argued that the right to privacy should also apply against government interferences with the individual's "right to be let alone-the most comprehensive of rights and the right most valued by civilized men."[14]

When Brandeis retired, Franklin Roosevelt chose William 0. Douglas to fill his seat on the U.S. Supreme Court, apparently at the suggestion of Brandeis himself.[15] Douglas considered himself ideologically close to Brandeis, whom Douglas described as "a revolutionary symbol . . . [who] wanted to put the individual and the individual's privacy first, and to establish only the controls that would keep the individual from being regimented."[16] In the first volume of his autobiography, Douglas notes that, beginning in 1934, he visited with Brandeis "about once a week."[17] Douglas' views about the right of privacy, like his seat on the U.S. Supreme Court, were at least partially the legacy of Louis D. Brandeis.

As do most legatees, Douglas transformed his inheritance

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12. T. COOLEY, A TREATISE ON THE LAW OF TORTS: OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 29 (1879).

13. Warren & Brsndeis, The Right to *Privacy*, 4 HARV. L. REV. 193, 196 (1890). See Glancy, *The* Invention of the *Right to Priuacy*, 21 ARIZ. L. REV. 1 (1979).

14. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

15. J. SIMON, *supra* note 1, at 189-91; W.O. DOUGLAS, *supra* note 2, at 449.

16. W.O. DOUGLAS, *supra* note 2, at 448-49.

17. *Id.* at 442.

and placed his own distinctive mark upon it. Douglas referred to a right of privacy instead of a right to privacy as Brandeis had. Moreover, Douglas focused his right of privacy on keeping only the government, not private gossip-mongers, off the backs of the people. Most importantly, he expounded a new and complex theoretical basis for a constitutional right of privacy against governmental interferences. Instead of a one-dimensional, single-focused constitutional right, Douglas envisioned the right of privacy as a collection, or in his words " a congeries of these rights."[18] He described the right of privacy as an umbrella concept, or principle, which like a shadow or aura, "emanates from the totality of the constitutional scheme under which we live."[19]

In his essay Privacy: ***One Concept*** or ***Many,*** Paul Freund described this type of legal concept as a legal principle rather than a legal rule.[20] Douglas saw the constitutional principle of an individual's right of privacy, or right to be let alone by the government, as embodied in a number of specific legal rules, protecting in different ways various "zones of privacy."[21] Toward the end of his judicial career, Douglas described these zones of privacy as if they were literally three concentric circles around the individual. Each circle protected different aspects of the individual's life against government interferences. As one moves outward from Douglas' central focus on the individual's conscience and beliefs, to her body, to her home and family, and to her freedom to move out into the world, her right to be let alone diminishes and reasonable government regulation becomes more constitutionally tolerable.[22] Sometimes, Douglas' right to be let alone appears to be a creation of mirrors; various parts of the Constitution both explicitly and implicitly project the principle of the right of privacy. In turn this principle reflects back particular express and implied rights against government interference.[23] Dazzling as it

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18. **W.O.** DOUGLAS, THE RIGHT OF THE PEOPLE 87 **(1958).**

19. Poe v. Ullman, 367 U.S. 497, 521 (1961) (dissenting).

20. Freund, *Privacy: One Concept or Many,* **[1971] Y.B. AM. SOC.** FOR POLITICAL AND LEGAL PHILOSOPHY, **NOMOS XIII:** PRIVACY 182.

21. Griswold v. Connecticut, 381 U.S. 479, 484-86 (1965).

22. See text accompanying notes 78-97 *infra.*

23. One is reminded of William James' description of the technique that his brother, Henry James used in writing novels as not:

> **naming it straight, but by dint of breathing and sighing all round and round it, to arouse in the reader who may have had a similar perception**

may seem, Douglas' theory was but an elaboration of enlightenment and nineteenth century notions of limited government, popularized by Jefferson and Madison in the ***Federalist Papers*** and by Thomas Cooley in his treatises on ***Constitutional Limitations***.[24]

III. THE RIGHT OF THE PEOPLE

One of Douglas' earliest and most interesting explanations of his views about the right to be let alone appeared in a series of lectures which he delivered in 1957 and later published as a book, ***The Right*** of ***the People.*** In the shadow of the McCarthy witch-hunts for supposed Communists, Douglas insisted, as he had earlier in his dissent in ***Public Utilities Commission*** *v.* ***Pollak,***[25] that individuals have a constitutional right of privacy which requires the government to let them alone. His very first sentence regarding "the right to be let alone" asserted **"[g]overnment** exists for man, not man for **government."**[26] The right of privacy, Douglas asserted, provides the individual with "protection from' government itself-from the executive branch, from the legislative branch, and even from the tyranny of **judges."**[27] This protection is based on essential liberties, which are

> **sometimes explicit and sometimes implicit in the Constitution . . . [which] . . . have a broad base in morality and religion to protect man, his individuality, and his conscience against direct and indirect interference by government . . . . [T]he penumbra of the Bill of Rights reflects human rights which, though not explicit, are implied from the very nature of man as a child of God.**[28]

According to Douglas:

> **already . . .** the illusion of a solid object, made . . . wholly out of impalpable materials, air, and the prismatic interference of light, ingeniously focused by mirrors upon empty apace.

Letter from William James to his brother Henry James (May 4, 1907), reprinted in 2 THE LETTERS OF WILLIAM JAMES 277 (2d ed. 1920).

24. A. HAMILTON, J. JAY, & J. MADISON, THE FEDERALIST (1888); T. COOLEY, CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (1874).

25. *343* U.S. 451 (1952).

26. W.O. DOUGLAS, *supra* note 18, at 87.

27. *Id.*

28. *Id.* at 87-90.

> Much of this liberty of which we boast comes down to the right of privacy. It is reflected in the folklore, which goes back at least as far as Sir William Staunford, that 'my house is to me as my castle.' But this right of privacy extends to the right to be let alone in one's belief and in one's conscience, as well as in one's home.**

Later, **in his opinion for the Court in *Griswold*,[30] Douglas articulated this same idea:**

> [S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. . . . Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one. . . . The Third Amendment in its prohibition against the quartering of soldiers 'in any house' in time of peace without the consent of the owner is another facet of privacy. The Fourth Amendment explicitly affirms the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: 'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.'[31]

Similarly, in his concurrence in *Doe v. Bolton*,[32] Douglas described "a catalogue of these rights"[33] against government interferences with the individual's general right to be let alone. He arranged these specific rights into three tiers of categories, beginning with the most important:

> First is the autonomous control over the development and expression of one's intellect, interests, tastes, and personality.
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> These are rights protected by the First Amendment and, in my view, they are absolute, permitting of no exceptions. . . .
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> Second is freedom of choice in the basic decision of

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29. *Id.* at 90.
30. Griswold v. Connecticut, 381 U.S. 479 (1965).
31. *Id.* at 464-85.
32. 410 U.S. 179 (1973).
33. *Id.* at 210.

> **one's life respecting marriage, divorce, procreation, contraception, and the education and upbringing of children.**
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> **These rights, unlike those protected by the First Amendment, are subject to some control by the police power. Thus, the Fourth Amendment speaks only of 'unreasonable searches and seizures' and of 'probable cause.' These rights are 'fundamental,' and we have held that in order to support legislative action the statute must be narrowly and precisely drawn and that a 'compelling state interest' must be shown in support of the limitations. . . .**
>
> **Third is the freedom to care for one's health and person, freedom from bodily restraint or compulsion, freedom to walk, stroll, or loaf.**
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> **These rights, though fundamental, are likewise subject to regulation on a showing of 'compelling state interest.'[34]**

To Douglas, these categories of specific individual liberties were variously protected aspects of the right of individuals to be let alone by the government. He frequently called this general right to be let alone the "right of **privacy."[35]**

IV. FREEDOM OF EXPRESSION

An absolute right to free expression headed Douglas' **cat**alogue of the specific rights within the right to be let alone. Under the first amendment, each individual's right to be let alone in "the development and expression of one's intellect, interests, tastes, and personality [is] absolute, permitting of no **exceptions."[36]** Douglas argued that in a democracy, self government requires that the exchange of information and ideas must be absolutely free from government intervention. Douglas' ideas about free expression were derived in part from the philosphy of Alexander Meiklejohn who published his seminal book, ***Free Speech and Its Relation to Self Government***, in **1948.[37]** But Douglas also reached back to **Jeffer-**

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34. *Id.* at 211-13 (original emphasis omitted).

35. *Id.* at 213.

36. *Id.* at 211.

37. See also T. I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970), a book which developed the Meicklejohn-Douglas doctrine of an absolute freedom of expression. Thomas Emerson had been a student of Douglas at the Yale Law School and was often quoted in Douglas' later First Amendment opinions. See *generally* Meiklejohn, *The First Amendment Is an Absolute,* 1961 SUP. CT. REV. 245. See also

son[38] and Madison,[39] as well as to Mill's familiar argument for a free trade in ideas.[40] Douglas' characteristically strong views regarding free expression gradually evolved during his almost four decades on the Supreme Court. The longer he served on the Court, the stronger these views became.

A former law clerk to Justice Douglas has already chronicled the evolution of Douglas' belief in an absolute right to freedom of expression.[41] There is no need to do that here. It does bear pointing out, however, that Douglas did not begin his tenure on the U.S. Supreme Court with the absolutist views about the first amendment for which he later became famous. Powe describes three general phases. When Douglas first joined the Court in 1939, he acquiesced to some government regulation of expression in cases such as the one which involved mail fraud prosecutions of members of a religious sect.[42] After World War II, Douglas began to insist on a "clear and present danger"[43] before expression could be restricted, regulated, or punished. But he nevertheless admitted that "the freedom to speak is not absolute."[44] Finally, in the late 1950's, beginning with decisions concerning censorship of obscenity, Douglas took the position that "the First Amendment

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CHAFFEE, THE BLESSINGS OF LIBERTY (1956).

38. "Truth is the proper and sufficient antagonist to error. . . . [W]ere it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter." Letter from Thomas Jefferson to Colonel Edward Carrington (Jan. 16, 1787), *quoted in* W.O. DOUGLAS, *supra* note 18, at 20.

39. "A popular Government, without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy; or, perhaps both. Knowledge will forever govern ignorance; and a people who mean to be their own governors, must arm themselves with the power which knowledge gives." Letter from James Madison to W.T. Barry (Aug. 4, 1822), *reprinted in 3* LETTERS AND OTHER WRITINGS OF JAMES MADISON 276 (1884), *quoted* in W.O. DOUGLAS, *supra note* 18, at 19-20.

40. [T]he peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.

J.S. MILL, ON LIBERTY 35-36 (7th ed. 1871) (1st ed. London 1859), *quoted in* W.O. DOUGLAS, *supra* note 18, at 24.

41. Powe, *Evolution to Absolutism: Justice Douglas and the First Amendment*, 74 COLUM. L. REV. 371 (1974).

42. United States v. Ballard, 322 U.S. 78 (1944).

43. Dennis v. United States, 341 U.S. 494, 585 (1950) (dissenting).

44. *Id.* at 581.

puts speech in a preferred position."[45] Conduct can be regulated and punished. The expression of ideas, however, is not subject to government control of any kind. Douglas asserted that unless expression "is so closely brigaded with illegal action as to be an inseparable part"[46] of that illegal conduct, the government must keep its hands, as well as its laws and its law enforcers, off. In these views, Douglas joined Justice Black in arguing that the words "no law" in the first amendment literally mean *no law*.[47] In other words, the individual's right to be let alone by the government, at least in regard to free expression, is absolute.

It was actually in a series of free expression cases, decided in the 1960's, that Douglas first popularized the slogan: "[G]et the government off the backs of the people."[48] In these cases, Douglas insisted that the first amendment was a Constitutional barrier against any government interference with expression. On one occasion, Douglas graphically described the government as eagerly climbing on the backs of the media. The only protection for the media was the Constitution's prohibition of such governmental media-riding.[49] Concurring in the Supreme Court's judgment that the Democratic National Committee could not use regulations under the Federal Communications Act to force broadcasters to give the Committee equal air time, Douglas decried the Fairness Doctrine as an attempt to put "a federal saddle on broadcast licensees."[50] He insisted that the first amendment announces "one hard and fast principle . . . that the Government shall keep its hands off of the press."[51]

At one time or another Douglas applied this laissez-faire first amendment principle to all types of expressive activities including, not only publishing, speaking, and receiving ideas, but also association and religion. Douglas described at least

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45. Roth v. United States, 354 U.S. 476, 514 (1957) (dissenting).

46. *Id.*

47. See, e.g., Barenblatt v. United States, 360 U.S. 109, 141-44 (1959) (Black, J., dissenting); Konigeberg v. State Bar of California, 366 U.S. 36, 61 (1961) (Black, J., dissenting); Beilan v. Board of Education, 357 U.S. 399, 412-16 (1958) (Douglas, J., dissenting).

46. See cases cited note 7 *supra*.

49. Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 163 (1973) (concurring in judgment).

50. *Id.* at 164.

51. *Id.* at 161-62.

four types of prohibited government interferences with free expression. Government cannot: censor expression in advance; punish expression after it has occurred; affirmatively require expression; nor force people to receive particular government-sponsored expression. Douglas' opinions regarding these four types of prohibited government interferences with expression are legion.

Douglas believed that government prohibitions of expression are particularly offensive to the first amendment.[52] Perhaps the most celebrated recent case enforcing the constitutional ban on government censorship or prior restraints was the Pentagon Papers case. In that case, the Court struck down the Nixon administration's efforts to prevent publication of certain secret government analyses of the Vietnam War.[53] Douglas concurred, stating his view that the first amendment leaves "no room for governmental restraint on the press."[54]

Douglas also took the position that punishing expression was tantamount to prohibiting it. In his view, because criminal or civil penalties tend to deter expression, punishment of expression violates first amendment rights just as much as prior restraints. Although dangerous conduct involving expression, which Douglas called "speech brigaded with action,"[55] might be punished, expression alone is absolutely protected against any sanctions.[56] Douglas wrote many opinions in this area. One of the most famous was *Terminello v. Chicago*,[57] in which the Court overturned a public speaker's conviction for breach of the peace. The substance of the speaker's crime was referring to a howling mob outside the auditorium as "slimy scum," "snakes" and "bedbugs."[58] No matter how offensive a speaker's words, Douglas wrote, "a function of free speech under our system of government is to invite dispute."[59] Even ugly and obnoxious speech is absolutely "protected against censorship or punishment."[60] He made similar argu-

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52 See T.I. EMERSON, *supra* note 31; L. LEVY, THE LEGACY OF SUPPRESSION (1960).

53. New York Times Co. v. United States, 403 U.S. 713 (1971) (per curiam).

54. *Id.* at 720 (concurring).

55. *E.g.*, Roth v. United States, 354 U.S. 476, 514 (1957) (dissenting).

56. *Id.*

57. 337 U.S. 1 (1949).

58. *Id.* at 17-21.

59. *Id.* at 4.

60. *Id.* See also Miller v. California, 413 U.S. 15, 37-47 (1973) (dissenting); Paris

ments in both obscenity cases[61] and several cases which involved punishing communists and ex-communists by denying them tax exemptions[62] or jobs in the merchant marine.[63] Expression, especially expression which is independent of dangerous conduct, should be free from governmental interference; for Douglas this principle applied equally to punishment and prior restraints.

Douglas likewise argued that under the first amendment, people cannot be punished for joining together to express and to exchange views. In *The Right of the People,* Douglas explained:

> **[J]oining is an innate American habit. It is a method of expression-an assertion of First Amendment rights. One joins to identify himself with certain objects of the group or to find a hospitable climate of opinion for the pursuit of ideas. . . .**
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> **One who fears retaliation for associating with groups, seemingly innocent and lawful, will confine himself to more orthodox activities. Under that climate of opinion the free spirit so necessary for research and teaching is greatly limited.[64]**

In those opinions where he objected to investigations aimed at exposing suspected subversive groups, Douglas asserted that the government had no power to investigate groups and associations, because such investigations infringe on freedom of expression by exposing, and thereby discouraging, people's associations.[65] Douglas was particularly outraged by the Army's surveillance of civilian gatherings to oppose the Viet Nam war because such surveillance was "at war with the principles of the First Amendment."[66] He described this Army surveillance, which had the effect of chilling free expression, as "a cancer in our body politic."[67] Douglas insisted that the First Amend-

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Adult Theater I v. Slayton, 413 U.S. 49, 70-73 (1973) (dissenting) J. SIMON, *supra* note 1, at 434.

61. See, e.g., Roth v. United States, 354 U.S. 476, 508-14 (1957).

62. See, e.g., Speiser v. Randall, 357 U.S. 513, 532-38 (1958) (concurring).

63. See, e.g., Schneider v. Smith, 390 U.S. 17, 24-27 (1968).

64. W.O. DOUGLAS *supra* note 18, at 133-34.

65. See, e.g., Gibson v. Florida Legislative Comm., 372 U.S. 539, 559-76 (1963) (concurring).

66. Laird v. Tatum, 408 U.S. 1, 28 (1972) (dissenting).

67. *Id.* Less than a year later, John Dean echoed this phrase in describing the Watergate cover-up to then-President Nixon as a "cancer on the presidency." Con-

ment forbade the government from prohibiting, punishing, or exposing people's associations and expressions because any government action in this area discourages the free expression which, to Douglas, was at the core of our democratic system of self-government.[68]

As a logical corollary to the Constitution's absolute prohibition of government abridgement of free expression, Douglas believed that the government could not affirmatively require expression any more than the government could prohibit, censor, or punish it. Douglas' committment to the right to silence was the earliest area in which Douglas developed his ideas about individuals' right to be let alone by the government. The famous cases involving compulsory flag salutes are typical of this aspect of Douglas' views. When Douglas first joined the U.S. Supreme Court, he voted with the majority that the public schools *could* compel students to salute the flag.[69] But three years later, Douglas changed his mind. Leaving Justice Frankfurter in dissent, Douglas joined a new majority holding, in *Barnette,* [70] that compelling expression contrary to an individual's religious principles violates the first amendment.?' According to Douglas, Frankfurter never forgave Douglas for his change of heart.[72] Douglas continued to insist that for government to force individuals to express themselves against their wills was a particularly obnoxious way for the government to fasten itself on the backs of the people. Particularly in the cases involving what Douglas called "The Despised Oaths," Douglas insisted that the first amendment forbids the government from interfering with the individual's right to keep silent.[73]

Finally, Douglas believed that the government interferes

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versation between John Dean and President Richard Nixon (March 21, 1973). In his book Blind *Ambition,* Dean explained that he borrowed the cancer image from Richard Moore. J. DEAN, BLIND AMBITION 196 (1976). But the image of a cancer on government is remarkably similar to that Douglas used in his *Laird v. Tatum* dissent issued less than a year earlier on June 26, 1972.

68. Laird v. Tatum, 408 U.S. 1, 28 (1972) (dissenting).

69. Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940).

70. Board of Educ. v. Barnette, 319 U.S. 624 (1943).

71. *Id.* at 643-44 (Black and Douglas, JJ., concurring).

72. It appears that after *Barnette,* Douglas compounded the bad feeling by sometimes taking a better-civil-libertarian-than-thou attitude toward Frankfurter. See J. SIMON, *supra* note 1, at 11-12.

73. W.O. DOUGLAS, supra note 18, at 124. Speiser v. Randall, 357 U.S. 513, 532-38 (1958); Elfbrandt v. Russell, 384 U.S. 11 (1966).

with the individual's right to be let alone when it forces people to listen to government-sponsored expression. Not only by censorship, but by forced propaganda, government intrudes on the right to receive whatever ideas one chooses. Douglas first developed these ideas in his famous dissent in *Public* Utilities Commission *v. Pollak*.[74] That case involved the licensing of public busses in the District of Columbia to broadcast music and news from a local radio station.[75] An unwilling listener argued that any regulation allowing the bus company to force passengers to listen was invalid. The U. S. Supreme Court upheld the broadcasts.[76] In his dissent, Douglas reminded the Court:

> **The right to be let alone is the beginning of all freedom. . . . If we remembered this lesson taught by the First Amendment, I do not believe we would construe 'liberty' within the meaning of the Fifth Amendment as narrowly as the Court does. The present case involves a form of coercion to make people listen."**

Although Justice Douglas' views regarding constitutional doctrines of freedom of expression did change and harden over the course of his long judicial career, his insistence on individual self-reliance and independence of belief and conscience never seemed to waver. Gradually Douglas came to see that if individuals were to maintain their essential independence, the government would have to be required to leave them alone, particularly in the areas of forming and expressing opinions and beliefs. From the beginning, Douglas held that *unreasonable* government regulation of expression is always impermissible. Later, Douglas came to see that even reasonable government regulation of expression tends to interfere with and endanger the free exchange of ideas. So he tightened the constitutional standard in requiring the government to establish that expression poses a clear and present danger before that expression could be regulated or punished. Travels in totalitarian countries and the dark days of the McCarthy Communist hunts seem to have brought home to Douglas that

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74. 343 U.S. 451 (1952).

75. *Id.* at 467-69 (dissenting).

76. *Id.* at 465. Justice Frankfurter excused himself; he explained that he did so because "my feelings are so strongly engaged as a victim of the practice in controversy that I had better not participate in judicial judgment upon it." *Id.* at 467.

77. *Id.* at 467-68 (dissenting).

it was dangerous for government to have even a limited power to regulate expression. Thus, Douglas came to believe that the ***only*** way to protect independent judgment was to outlaw any government interference with expression. Douglas eventually concluded that Justice Black was right, and that "no law" meant no law. This meant that the government must absolutely let the people alone in what they thought, read, heard, said, and published.

V. BALANCING PRIVACY

Douglas' insistence on an absolute first amendment right of free expression constituted a central part of his more general conception of the right to be let alone-the Constitution's command that the government keep off the backs of the people. However, aspects of the right to be let alone which were outside first amendment protection were not absolute. Against these non-first amendment aspects of the individual's right of privacy, Douglas was willing to balance other important government interests. Nevertheless, any government regulation of even these nonabsolute aspects of the right to privacy should in his views, be both narrowly and precisely drawn and justified by compelling state interests.[78]

Douglas contemplated at least two general types of non-first amendment, and therefore nonabsolute, protections for the individual's right of privacy, or right to be let alone by the government. He saw some areas of individual privacy as nearly absolutely protected; this would include those rights associated with individual choices about marriage, sex, and the family. Douglas believed that it was extremely important to protect these intimate relationships, perhaps because they provide an essential environment for the development of individual personality, belief and expression. The sanctuary of the home was particularly important to Douglas.[79]

Outside of these intimate areas, where one's expectation of privacy is strongest, Douglas found a more generalized con-

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78. Doe v. Bolton, 410 U.S. 179, 211 (1973) (concurring). Brandeis had originally described the right to privacy as just such a nonabsolute part of a more general right to be let alone. Warren & Brandeis, *supra* note 13.

79. It is interesting to note, however, that even the home remains subject to government intrusion, provided the government plays by the rules established in the fourth amendment, i.e., goes to an independent magistrate and establishes probable cause to secure a warrant particularly describing the limits of the search.

stitutional right to be let alone, free from unreasonable government restraint or compulsion. For example, Douglas argued that the right to travel was part of the individual's general right to be let alone by the government. That meant that before regulating such aspects of one's private life, the government must show "a compelling state interest."[80] As one moves out from Douglas' central focus on the individual's personality and conscience, to her bodily integrity, to her relationships with her spouse and family, to her home, to other areas she expects to be private, to her activities generally, the individual's right of privacy, or right to be let alone by the government, gradually diminishes.[81]

It is interesting to place some of Douglas' opinions along this privacy continuum. In some out-in-the-open circumstances there is no privacy interest involved at all. One of Douglas' shortest majority opinions, as well as a rare Douglas opinion for a unanimous Court, involved an air pollution cease-and-desist order based on smoke plumes observed and measured by an inspector who, without a warrant, went on the premises of an animal feed processor. Applying what Holmes had earlier called the "open fields" exception to the fourth amendment's privacy protections,[82] Douglas found no privacy right in such publicly observable business activities. Similarly, Douglas found no privacy or other constitutionally protected interests infringed by a small town's zoning ordinances which forbade more than two unrelated people from living together.[83] Perhaps because of Douglas' strong beliefs that the environment must be preserved, he decided that the village's interests in saving its small-town environment outweighed any privacy interests of students who wanted to live together in group homes or communes.[84]

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80. Doe v. Bolton, 410 U.S. at 211.

81. *One* of Douglas' law clerks, who not only later went on to write such books as *The Greening of America* and *The Sorcerer of Bolinas Beach,* but also helped Douglas to decide to retire from the Supreme Court, developed this idea of concentric circles of privacy in his famous article, Reich, *The New Property, 73 YALE* L.J. 733 (1964).

82. Air Pollution Variance Bd. v. Western Alfalfa Corp., 416 U.S. 861, 865 (1974).

83. Village of Belle Terre v. Boraas, 416 U.S. 1 (1974).

84. In dissent, Justice Marshall vigorously argued that Douglas' opinion for the majority had not properly weighed the privacy interests of the college students challenging the ordinance when Douglas balanced the students' right to live together against the town's interests in preserving its small town environment. *Id.* at 13-16.

On the other hand, Douglas argued that bank customers do "have a Constitutionally justifiable expectation of privacy in the documentary details of the financial transactions reflected in their bank accounts."[85] In his dissent in *California Bankers Association v. Schultz*,[86] Douglas argued that although the Constitution does not absolutely wall off one's private financial records from the government, the government is required to follow proper warrant procedures and demonstrate a compelling state interest. Similarly, Douglas wrote, in a case involving a welfare mother's refusal to let welfare inspectors enter her home without a warrant, that: "Isolation is not a Constitutional guarantee; but the sanctity of the sanctuary of the *home* is such-as marked and defined by the Fourth Amendment."[87] Disagreeing with the majority of the Court, Douglas argued that the fourth amendment requires that any intrusion into the privacy of the welfare mother's home be justified by probable cause and be accompanied by a warrant issued by a magistrate. The government could not penalize the welfare mother by cutting off her welfare benefits simply because she exercised her privacy right and refused to allow inspectors to enter her home without a warrant. The government could not "buy up" her constitutional right to be let alone in the privacy of her home by conditioning her welfare benefits on the surrender of her right of privacy. After all, Douglas argued, privacy "is as important to the lowly as to the mighty."[88]

The intimacy of the marriage relationship was for Douglas even more important than the privacy of the home. Arguing that laws outlawing the use of contraceptives almost literally reached "into the intimacies of the marriage relationship,"[89] Douglas asserted that any enforcement of such laws could "reach the point where search warrants issued and officers appeared in bedrooms to find out what went on."[90] The bodily integrity involved in abortion cases was even more intimate than the marriage relationship. But Douglas did not argue that a woman's privacy right to decide whether

85. California Bankers Ass'n v. Shultz, 416 U.S. 21, 82 (1974) (dissenting).
86. 416 U.S. 21 (1974).
87. Wyman v. James, 400 U.S. 309, 335 (1971) (dissenting).
88. *Id.* at 333.
89. Poe v. Ullman, 367 U.S. 497, 519 (1961) (dissenting).
90. *Id.* at 520.

or not to have an abortion is absolute. Douglas asserted that "The state has interests to protect,"[91] which might on occasion outweigh the woman's right of privacy.[92]

Perhaps the easiest of all of the privacy cases for Douglas was a case involving the dissemination of birth control information and devices to unmarried people.[93] The majority used an equal protection analysis and held that unmarried people had just as much right to contraceptive information and materials as married couples. But Douglas considered the case to be "a simple First Amendment case"[94] because it was a prosecution for giving a lecture on birth control. Such "educational lectures,"@" which incidentally included distributing samples of contraceptives to the audience, were expression which must be absolutely protected from government interference.[96] Douglas believed that a person's right to give and to receive information is even more carefully insulated from the government than is her body.[97]

VI. WHEN PRIVACY AND FREE EXPRESSION COLLIDE

There were only a few cases during Douglas' tenure on the Supreme Court in which individuals asserted their right to privacy against invasion of privacy by nongovernmental publication of information about their private lives. These cases appeared to pose a classic confrontation between the right of privacy and freedom of expression-two of Douglas's highest priorities. Nevertheless, for Douglas, they were easy cases, because the individuals were not complaining about government interferences with privacy, Douglas' constitutional conception of the right of privacy did not apply. His notion of the right of privacy involved keeping the government, not the news media, off the backs of the people. His right of privacy was a right to be let alone by the government, not by the communications industry.

Of course, even had the right of privacy been involved in these cases, Douglas believed that privacy could be compro-

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91. Doe v. Bolton, 410 U.S. 179, 215 (1972) (concurring).
92. *Id.* at 216.
93. Eisenstadt v. Baird, 405 U.S. 438, 455-60 (1972) (concurring).
94. *Id.* at 455.
95. *Id.* at 460.
96. *Id.*
97. See text accompanying notes 26-34 *supra.*

mised in the face of other important societal interests. For Douglas, the single most important societal interest was free expression. The first amendment absolutely commanded that the government, including its judicial system, could not abridge free expression. This meant that the courts were absolutely prohibited from awarding damages for harmful publications. Concurring in the denial of damages for harmful publicity to the father of a murdered rape victim, Douglas insisted that the first amendment freedom to publish was not subject to any balancing against other state or individual interests. To do any balancing at all in such cases would raise "a specter of liability which must inevitably induce self-censorship by the media, thereby inhibiting the rough-and-tumble discourse which the First Amendment so clearly protects."[98]

Similarly, Douglas dissented from the Supreme Court's approval of a damage action for invasion of privacy brought by the family of a man killed in a bridge disaster. The defendants were a newspaper and its reporter who had published a distorted human-interest feature article about the family. Douglas asserted that there would have to be a constitutional amendment before a Court could award damages for such invasions of privacy by publication.[99] Likewise, in the Supreme Court's first privacy damage action, *Time v. Hill,*[100] Douglas insisted that the exercise of first amendment rights could never be subject to any legal liability, regardless of whether the publications were true or false. After all, Douglas argued, "a trial is a chancy thing."[101]

Douglas made a similar point in a very different context when he concurred with the majority's decision to strike a Jacksonville City ordinance which restricted the showing of films involving nudity at drive-in theaters. Although sympathetic to the privacy interests of what he termed "captive audiences,"[102] Douglas argued that these "legitimate interests"[103] could be balanced. Moreover, such interests could not justify government censorship of free expression, which is ab-

98. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 501 n.* (1975) (concurring in judgment).

99. Cantrell v. Forest City Publishing Co., 419 U.S. 245, 255 (1974) (dissenting).

100. 385 U.S. 374 (1967).

101. *Id.* at 402 (concurring).

102. Erzoznick v. City of Jacksonville, 422 U.S. 205, 218 (1975) (concurring).

103. *Id.*

solutely protected by the first amendment.[104]

More often Douglas described the constitutional guarantees of privacy and free expression as working together. Douglas dissented when the Supreme Court rejected a first amendment "newsmen's privilege"[105] which would have allowed reporters to refuse to reveal confidential sources. His dissenting opinion illustrates his view of the way constitutional protections for privacy and free expression come together to protect the individual's right to be let alone by the government. Douglas described news reporters as doubly protected against government compulsion to reveal their sources. First, just like anybody else, news reporters have a privacy right to be let alone. Second, they have a right to keep silent about whatever information they generate in the course of formulating and testing their opinions and beliefs. On another level, the first amendment prohibits any, even indirect, government interference with "a steady, robust, unimpeded, and uncensored flow" of news and information.[106] Other aspects of a reporter's privacy might, just like anybody else's, be balanced against other important societal interests, but his or her role as a channel of free expression can not be balanced, chilled, or deterred. "My belief is that all of the 'balancing' was done by those who wrote the Bill of Rights. By casting the first amendment in absolute terms, they repudiated the timid, watered-down, emasculated versions of the first amendment"[107] which would allow the courts to compel news reporters to reveal their confidential sources.

VII. CONCLUSION

During the course of his long and controversial public life, Douglas himself was rarely let alone by the news media. But Douglas seemed to take most of these invasions of his privacy philosophically. He was a strong-minded person who felt that he was smart and able to protect himself against invasions of his privacy by the media. Douglas seemed to believe that, just as in climbing a mountain or surviving a snow storm, the truly independent individual will prevail over and gain strength

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104. *Id.*
105. Branzburg v. Hayes, 408 U.S. 665, 674 (1972) (dissenting).
106. *Id.* at 715 (concurring).
107. *Id.* at 713.

through adversity, including privacy invasions by the press.

The government, however, was another matter. The McCarthy era of the 1950's, as well as Douglas' travels to Russia and other totalitarian regimes, demonstrated to Douglas that government can crush even the most independent-minded individuals by squelching unconventional thought and expression into a mindless conformity. Douglas devoted his life and judicial career to insisting that government respect the individual's privacy right to be let alone, most especially when it came to matters of conscience and belief. In other words, Douglas' life work was trying to make sure the government kept off the backs of the people.