A Bank Customer Has No Reasonable Expectation of Privacy of Bank Records: United States v. Miller

Francis X. Pray

Follow this and additional works at: https://digital.sandiego.edu/sdlr

Part of the Law Commons

Recommended Citation
Available at: https://digital.sandiego.edu/sdlr/vol14/iss2/5

This Comments is brought to you for free and open access by the Law School Journals at Digital USD. It has been accepted for inclusion in San Diego Law Review by an authorized editor of Digital USD. For more information, please contact digital@sandiego.edu.
A BANK CUSTOMER HAS NO REASONABLE EXPECTATION OF PRIVACY OF BANK RECORDS:
UNITED STATES v. MILLER

INTRODUCTION

Recent federal legislation accords privacy protection to individuals concerning information held and compiled by third parties.1 States have also recognized the need to protect a person's privacy interest in information no longer in his exclusive control or possession.2 This legislation, however, is aimed only at limited kinds of privacy problems. It does not represent a comprehensive solution to the modern privacy dilemma: Does an individual have a legitimate privacy claim to information held by third parties?3

Customer records held by third party banks serve as a prototype of the new privacy dilemma. A citizen finds it convenient, perhaps necessary, to conduct his business through customary banking channels. His bank is required by law to maintain complete records of most of these transactions.4 The bank customer is probably convinced that his accounts with the bank are a matter of strict privacy.5 Nonetheless, in the recent case of United States v. Miller,6 the Supreme Court of the United States concluded that subpoena of these records from the bank constituted no invasion of a bank customer's constitutional right of privacy although cus-


customer record keeping is mandated by law\textsuperscript{7} and the records are supplied without notice to the customer.\textsuperscript{8}

In Miller, the defendant was convicted of conspiring to defraud the United States of tax revenues otherwise assessable upon illegally distilled whiskey. Subpoenas issued by the United States Attorney’s office required the defendant’s bank to produce all records of accounts held in the name of the defendant Miller. The bank complied without notifying Miller. The records provided investigatory leads in Miller’s case. In addition, copies of checks were introduced at defendant’s trial to establish the purchase of materials allegedly used to further his illegal conduct. The Fifth Circuit Court of Appeals reversed the district court’s refusal to suppress the evidence thus acquired, holding that the subpoena did not satisfy legal process because it was not directed to the customer as the true party in interest.\textsuperscript{9}

Miller is worthy of close examination because it represents that class of cases in which common expectations of privacy and actual legal protections are not concordant. The reasoning of the Miller case and others like it must be scrutinized in order to determine the future development of constitutional privacy rights concerning information held by third parties with no real interest in nondisclosure.

A critical advantage in analyzing the Miller decision is derived from tracing the development of privacy rights. Such a back-


\textsuperscript{8} The question of whether both compelled record keeping and subsequent order for production of those records constituted an unlawful fourth amendment search and seizure was expressly reserved in California Bankers Ass’n v. Shultz, 416 U.S. 21, 53-54 n.24 (1974).

\textsuperscript{9} United States v. Miller, 500 F.2d 751, 758 (5th Cir. 1974). The court’s decision acknowledged the constitutionality of the Bank Secrecy Act as determined by California Bankers Ass’n v. Shultz, 416 U.S. 21 (1974). However, the court of appeals held that the government had violated Miller’s fourth amendment protections against unreasonable search and seizure by “first requiring a third party bank to copy all of its depositor’s personal checks and then, with an improper invocation of legal process, calling upon the bank to allow inspection and reproduction of those copies.” 500 F.2d at 757. The court found the subpoenas violative of legal process because not issued to the party “whose rights are threatened by the improper disclosure”—i.e., the bank depositor. Id. at 758.
The Legal Development of the Privacy Interest

The Right of Privacy in Tort

In 1890, Samuel Warren and Louis D. Brandeis advocated broad legal recognition of the need for privacy. Examining a wide spectrum of case authority, the writers conceded that the law concerning apparent privacy interests was in fact dominated by considerations of the plaintiff’s property interest in the area of intrusion. However, they also asserted that the true underlying value served by the decisions was a belief in the individual’s fundamental “right to be left alone.” The authors outlined an evolution of legal protections which originated with rights in corporeal property, expanded to include incorporeal property interests, and finally extended to defend the spiritual interests of the human personality. Warren and Brandeis pleaded for a new right of privacy in order to permit this evolution to keep pace with the threats of intrusion posed by an age of new industry and invention.

The power of the Warren-Brandeis article is its attempt to place the privacy interest upon a new conceptual framework. In making this attempt, the authors sought to sever their new right of privacy from the strict confinement imposed by traditional property analysis. However, the weakness of the Warren-Brandeis article is its failure to construct a complete privacy model. Brilliantly defining the purposes of the new privacy model, the authors neglected to suggest an analytical method sufficient to accomplish their goals. As an apparent consequence of this failure to offer

11. Id. at 203-04, 209, 211.
12. Id. at 204-05.
13. Id. at 193-94.
14. Id. at 195.
15. Id. at 205.
16. This indictment may be unfair in view of the enormity of the intellectual undertaking which would be required. See generally Bloustein, First Amendment and Privacy: The Supreme Court Justice and the Philosopher, 28 Rutgers L. Rev. 41 (1974). The perimeters of the privacy right are assuming sharper delineation through a decisional process which examines each case on its merits. See Note, Roe and Paris: Does Privacy Have a Principle?, 26 Stan. L. Rev. 1161 (1974). This method of development may be superior to efforts to fashion broad theoretical schemes without the benefit of case experience.
a workable alternative, subsequent privacy cases retained close conceptual affinity to traditional property law.17

Dean Prosser represents a second major influence on the law of privacy in tort. Prosser classified the privacy cases into four categories of law.18 These categories have close relatives in the law of defamation and property. For example, two privacy causes of action related to defamation are "public disclosure of private facts"19 and "false light in the public eye."20 As a prima facie element of his privacy case, the plaintiff must show a publication which a person of ordinary sensibilities would consider offensive.21 The two other categories of privacy law in tort have their correlates in property law. These causes of action are characterized as "the right to be left alone"22 and "wrongful appropriation of another's name or likeness for personal gain."23 The right to

19. However, a cause of action for tortious disclosure of private facts is unlike a defamation action in several ways. The gist of the privacy action is not damage to reputation but injury to feelings. See, e.g., Reed v. Real Detective Publishing Co., 63 Ariz. 294, 162 P.2d 133 (1945). Likewise, truth is not a defense in a privacy action, and in such an action proof of special damages is not necessary. See generally Wade, Defamation and the Right of Privacy, 15 VAND. L. REV. 1093 (1962).
20. A cause of action for "false light in the public eye" likewise can be differentiated from a defamation action in its emphasis on harm to feelings rather than harm to character. However, as with defamation, falsity of the publication is crucial. "The false light need not necessarily be a defamatory one, although it very often is, so that a defamation action will also lie." PROSSER, supra note 18, at 813.
21. In considering what a person of ordinary sensibilities would deem offensive, Prosser does little more than glibly refer to the probable influence of social mores. Id. at 809, 813. Prosser has come under attack for his unanalytical treatment in this regard. Bloustein, Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser, 9 N.Y.U. L. REV. 962 (1964).
22. An intrusion upon a person's right to be left alone consists of an encroachment upon the plaintiff's physical solitude or seclusion. The cause of action applies—e.g., to unauthorized prying into a person's bank account. E.g., Zimmerman v. Wilson, 81 F.2d 847 (3d Cir. 1936). See generally Nader v. General Motors Corp., 25 N.Y.2d 560, 255 N.E.2d 765, 307 N.Y.S.2d 647 (1970).
23. A cause of action for wrongful appropriation of another's name or likeness for personal gain does not require violation of a person's seclusion or secret life. Although the wrongful appropriation often involves publicity, this factor is not required. Neither does truth or falsity of the representation figure in the case. The essence of the action is material profit without compensation. See PROSSER, supra note 18, at 805, noting that the bulk of privacy actions has been in this area.
be left alone frequently corresponds to a trespass upon a plaintiff's area of possession or ownership. The appropriation of another's name or likeness for personal gain closely resembles a wrongful taking of another's property for personal profit. As a result, this latter form of privacy has been the easiest for the courts to accept.

The absence of a homogeneous rationale among the four categories of tort privacy is illustrated by Prosser's conclusion that these four forms of privacy have almost nothing in common. The case law supports Prosser's conclusion despite frequent assertion that the essence of the privacy right is the protection of human personality. If the right of privacy is founded on a common ideology, why has the tort law taken these four disparate forms? Ironically, the fault may lie with the liberal advocates of a broad privacy right. These writers have emphasized a need of the new privacy to further values of "human dignity," the sanctity of human feeling, or "the inviolability of the human personality." The difficulty these phrases pose as standards of judicial analysis is that they do not differentiate the values to be served by a law of privacy from the values which law serves generally. Therefore, it is understandable that the courts have relied so heavily on the defamation and property law analogues to provide concrete decisional guidelines.

The Constitutional Right of Privacy

The right of privacy is not explicitly provided for in the Constitution, yet it is said to have its origins in the first, third, fourth, fifth,

24. For an example of how the common law was adapted to vindicate privacy interests directly through property rights, see Harrison v. Rutland, [1893] 1 Q.B. 142.
26. Prosser, supra note 18, at 804.
32. See note 16 supra.
and ninth amendments to the Constitution. If the right of privacy did not exist, specific constitutional guarantees would represent inexplicable exceptions to a general right of government intrusion. Such a perverse constitutional interpretation was anticipated at the time the Bill of Rights was drafted, and it was expressly rejected.

In *Griswold v. Connecticut*, Justice Douglas adopted language intended to capture the essence of the constitutional right of privacy: "The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." As an illustration, Justice Douglas examined the right of association—a right characterized as greater than mere physical assembly. Expressly guaranteed in the first amendment, the right of free speech entails the greater freedom to express opinions through a right of association, which itself is entailed in the even more abstract right of privacy. To summarize, the penumbral theory of privacy is the concept that privacy incorporates inexplicit protections intimately and inseparably merged with the specific liberties found in the Bill of Rights. These broader related liberties form a "zone of privacy" surrounding particular guarantees. The zones themselves blend to form a superstructure of privacy values accorded constitutional protection. Without these general, implicit liberties, specific freedoms would not have meaning.

Although the penumbral theory suggests an expansive law of


34. See 2 ELLIOT, *DEBATES IN THE SEVERAL STATE CONVENTIONS OF THE ADOPTION OF THE FEDERAL CONSTITUTION* 436 (1836); 1 ANNALS OF CONG. 439 (Gales & Seaton eds. 1789).

35. 381 U.S. 479 (1965).

36. Id. at 484.

37. Id. at 482-83.

38. Id. at 484.

privacy, cases at the outer reaches of privacy protection reveal that the privacy right is confined not only to specific amendments, but also to several limited fact patterns. The judicial limitations imposed on the constitutional right of privacy are the result of several considerations. First, constitutional privacy law has concerned itself only with government intrusions, leaving the development of a general privacy law to the various states. Second, some degree of limitation inheres in judicial malcontent with substantive due process—that is, generally, the substitution of personal judicial values in lieu of primary reliance on established legal principles and precedent. Third, some limitation results from the Supreme Court's strategic anticipation of a time when the political and moral views of the country can be better confirmed. This factor is especially relevant in view of the markedly changing role of government in solving national problems and the continuing development of sophisticated techniques of accumulating and processing massive amounts of information in order to carry out modern governmental functions.

Even if an individual can demonstrate that his case does not fall outside an area of limited protection, he must nevertheless demon-


42. Katz v. United States, 389 U.S. 347, 350-51 (1967): "But the protection of a person's general right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual States."


44. See generally Granucci, "Nor Cruel and Unusual Punishments Inflicted: The Original Meaning," 57 CALIF. L. REV. 839 (1969). Note generally the Court's preoccupation with fitting legal rights in proper relation with past and present social values in Furman v. Georgia, 408 U.S. 23 (1972). One Justice appeared to advance the role of law as a shaper of future morality. Id. at 329-30, 360-62 (Marshall, J., concurring). "In other words, the question with which we must deal is not whether a substantial proportion of American citizens would today, if polled, opine that capital punishment is barbarously cruel, but whether they would find it to be so in light of all information presently available." Id. at 362.

strate that his expectation of privacy is reasonable. What is reasonable will depend on the traditional expectations of privacy surrounding the particular activity, the privacy commonly accorded the location where the act occurs, and the generally accepted privacy of the allegedly private object itself, as, for example, the human body. Even if several or all of these factors favor a finding of privacy, the government interest will possibly outweigh consideration of the privacy claim.

The reasonableness of the individual's privacy expectation is closely dependent on his property interest in the place or thing which is the focus of his privacy claim. Consequently, case analysis is often dominated by property law in place of an independent inquiry into the underlying social norms and legal policies which support or deny a subjective privacy expectation. Olmstead v. United States is an extreme example of how property rights were once determinative of the reasonableness of a privacy claim. In Olmstead, the issue was whether government interception of the defendants' telephone calls was a violation of their privacy.

46. Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). Reasonable is a term of art designating that class of privacy interests which are recognized as legally protectible. See United States v. White, 401 U.S. 745, 751 (1971): "Our problem is not what the privacy expectations of a particular defendant in particular situations may be or the extent to which they may in fact have relied on the discretion of their companions."

47. See note 41 supra.


49. Union Pacific Ry. v. Botsford, 141 U.S. 250, 251 (1891): "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person." This concept of self as its own object of possession is unique and initially startling. A new formulation of the privacy right, wishing to retain the analytical foundations of property law, could model itself around this basic philosophical premise.

50. The interest in effective tax collection was implied to be one such consideration in United States v. Miller, 96 S. Ct. at 1624. Cf. Couch v. United States, 409 U.S. 322, 336 (1973), denying petitioner claim to object to an IRS summons: "[R]espect of [constitutional] principles is eroded when they leap their proper bounds to interfere with the legitimate interest of society in enforcement of its laws and collection of the revenues."


52. E.g., Harris v. United States, 413 F.2d 316 (9th Cir. 1969).

53. 277 U.S. 438 (1928).
fourth amendment rights against unreasonable search and seizure. The surveillance was accomplished by cutting into a telephone line located off defendants' property. The Supreme Court held no fourth amendment violation occurred because of the absence of a technical trespass.

_Warden v. Hayden_54 overturned _Olmstead_ on this point. In _Warden_ the Supreme Court declared: "The premise that property interests control the right of the Government to search and seize has been discredited."55 In _Warden_, evidence was admitted which had been seized without a warrant by police who had entered onto private premises in "hot pursuit" of an armed robber. The exigencies of the circumstances militated against a mechanical application of the trespass doctrine used in _Olmstead_.

A more convincing denigration of _Olmstead_'s trespass requirement is found in _Katz v. United States_.56 In _Katz_, the police placed a "bug" outside a public phone booth. The lower courts admitted into evidence conversations thereby intercepted without a warrant.57 The Supreme Court reversed,58 stating that the absence of a technical government trespass was not determinative, "for the Fourth Amendment protects people, not places."69

This statement does not mean that the Court extended legal protections to all subjective expectations of privacy. Subsequent cases indicate that legal protections remain severely curtailed by limitations inherent in the reasonableness standard.60 These limitations still often turn on findings of _who_ possesses the allegedly private information or _where_ the allegedly private act occurred. The analytical transition which occurred between _Olmstead_ and _Katz_ may therefore represent little more than abolition of technical trespass as per se determinative of privacy protections.63 In summary, in cases not involving the several fundamental privacy interests,64 customary property analysis apparently controls the

55. Id. at 304.
57. _Katz v. United States_, 369 F.2d 130, 134 (9th Cir. 1966).
58. 389 U.S. at 359.
59. Id. at 351.
63. See note 60 _supra_. See also Comment, _The Reasonable Expectation of Privacy—Katz v. United States_, _A Postscriptum_, 9 Ind. L. Rev. 468, 480 (1976).
64. See notes 40 & 41 _supra_.

422
inquiry into alleged rights of privacy. The determination of the privacy right is thereupon made with little or no consideration of the underlying personal interests which are in peril.65

United States v. Miller66 represents one class of privacy cases in which the property analysis remains especially embedded in judicial thinking.67 The issue in these cases is whether a person has a constitutional right of privacy in records possessed by an independent third party. After Miller, the law is clearly that he does not. That law turns entirely on the simple question of who has possession of the allegedly private records.68 A probe into the future significance of the Miller decision must include a search of the possible policies which justify the Court's simplistic resolution of intricate privacy arguments.

ANALYSIS OF THE Miller Decision

Despite the redundant statement of issues and reiteration of arguments in the Miller opinion, the Supreme Court's reasoning actually proceeded in three basic steps. The first step may be characterized as an examination of the nature of the allegedly private documents. The second step identified the crucial factor of possession and its determination of the entire privacy issue. The third step focused upon the relationship between a bank and its customer in order to test the possibility of an exception to the decisive element of possession. These steps culminated in the Court's holding that the defendant had no fourth amendment privacy rights in "private papers"69 held by the bank because he had neither ownership nor possession of the records70 and because the bank did not hold the records as a "neutral agent"71 for the defendant.

Nature of the Documents

The Supreme Court noted that the microfilmed bank records

65. This is especially true in cases holding that the complainant does not have a sufficient interest to afford him a right of objection to agency subpoenas issued to a witness holding allegedly private records. See Foster v. United States, 265 F.2d 183 (2d Cir. 1959) and cases cited therein.
67. See generally Application of Carrol, 246 F.2d 762 (2d Cir. 1957); United States v. Peoples Deposit Bank & Trust Co., 212 F.2d 86 (6th Cir. 1954).
68. See notes 66 & 67 supra.
69. 96 S. Ct. at 1622.
70. Id. at 1623.
71. Id.
were not the private papers traditionally protected by the fourth amendment. The private papers concept is derived from the 1886 case of *Boyd v. United States*.

In *Boyd*, the Court declared unconstitutional a court order issued to defendants for production of an invoice which was sought as evidence against them for certain customs violations. The Court held the order to be a clear violation of "the right of the people to be secure in their . . . papers . . . against unreasonable searches and seizures . . . ." In *Boyd*, the Court declared unconstitutional a court order issued to defendants for production of an invoice which was sought as evidence against them for certain customs violations. The Court held the order to be a clear violation of "the right of the people to be secure in their . . . papers . . . against unreasonable searches and seizures . . . ."

*Boyd* is clearly and easily distinguishable from the facts in *Miller*. It would be impractical to structure a right of privacy to bank records within the factual limitations of the *Boyd* case. As a result, the Court's invocation of the circumstances in *Boyd* reached a foregone conclusion which effectively skirted a confrontation with the modern privacy problem actually present in *Miller*—whether to extend privacy protections to records not in the possession of the party actually to be injured by disclosure.

*Boyd* represents one aspect of constitutionally recognized privacy protection: A person has a reasonable expectation that personal papers kept in his possession will not be forcibly seized and used against him at trial. That rule is sound, but it should not be exhaustive. Today, information which a person once would keep in the privacy of his home or office necessarily finds its way into the dossiers of numerous private and public institutions. The individual's file is but one of hundreds, thousands, or possibly millions of such files which the institution retains for limited purposes. Compared to the interest of the individual, the institution has minimal concern with the consequences of disclosure of any particular file. In other words, the privacy interest has in fact followed the information, while the law has followed the material records as tangible objects of possession. It is this discordance between fact and law which undermines the reasoning used in cases such as *United States v. Miller*.

A second consideration in the Supreme Court's analysis of the nature of the allegedly private documents in *Miller* concerned the distinction between the privacy of negotiable instruments and microfilmed records. In fact, the Court examined the defendant's case in view of any alleged privacy right in the individual

---

72. 116 U.S. 616 (1886).
73. U.S. Const. amend. IV.
74. The possession shibboleth was not operative in *Boyd* because defendants themselves held the subpoenaed invoice.
76. 98 S. Ct. at 1623.
instruments rather than in the microfilmed record of those instruments. The Court apparently assumed that the defendant had a better case for privacy of the individual instruments than the microfilmed records because he had possession of the separate checks but not the microfilm.\textsuperscript{77} This assumption had the effect of locking the privacy right into a possession analysis. The Court's emphasis on the \textit{form} of the documents limited the issue to the privacy of the tangible commercial items as physical objects of possession. An analysis of the right of privacy to the information contained on the physical paper or microfilm was thereupon foreclosed.\textsuperscript{78}

Had the Supreme Court adopted an information rather than a possession analysis, the logical focal point for decision would have been the microfilmed bank records. The issue would then be the character and result of unwarranted disclosure by government seizure. This shift of attention would occur for at least two reasons. Foremost, an analysis of the separate instruments would not accurately serve to reach a conclusion concerning the composite information revealed by seizure of the microfilm. The pictures revealed are radically different.\textsuperscript{79} Second, the bank customer does not waive his privacy right by public exposure of the microfilm composite, although he may have done so in regard to the limited information contained on a single negotiable instrument placed in public commerce.\textsuperscript{80} Exposing the parts to sundry unrelated people is not equivalent to exposing the whole to one's bank for limited business purposes.\textsuperscript{81}

\textsuperscript{77} The Court avoids any explanation of why a possession analysis is superior generally or why it aids the defendant's case in particular.

\textsuperscript{78} A series of implicit assumptions concerning the possession of the records as the appropriate analytical criterion has the obvious effect of making the Court's conclusion appear inevitable.

\textsuperscript{79} "In the course of such dealings, a depositor reveals many aspects of his personal affairs, opinions, habits, and associations. Indeed, the totality of bank records provides a virtual current biography." Burrows v. Superior Court, 13 Cal. 3d 238, 248, 118 Cal. Rptr. 166, 172, 529 P.2d 590, 596 (1974).

\textsuperscript{80} The payee or endorsee of any one check is likely to be a stranger to the drawer, who neither comprehends nor cares about this check's significance as part of a pattern of activity.

\textsuperscript{81} Although a bank employee may see a customer's checks in bundles, the employee and customer are often unaware of the other's private life. In addition, brief business exposure is probably insufficient to permit the careful examination necessary to construct accurate conclusions about the customer's lifestyle.
These considerations reveal the relative complexity of an informational rather than a possessory right of privacy. However, the easy analysis ignores the fact that the true injury to the privacy right results from an unwarranted disclosure of private information rather than from the incidental fact that another person possesses the material medium of the information for some limited purpose. To permit unchecked government seizure of information held by largely indifferent third parties because the information is not in the form of the injured party's private papers represents a serious deficiency in the present constitutional law of privacy.

The Possession Factor and its Determination of the Privacy Issue

The Miller opinion held that the defendant had no protectable fourth amendment interest because "unlike the claimant in Boyd, respondent can assert neither ownership nor possession."82 The fact that the Bank Secrecy Act83 compelled the defendant's bank to keep the subpoenaed records was held immaterial to the government's right to seize the records without notice to a party not himself in possession of the records. These conclusions were reached by focusing upon the defendant's release of his separate checks into the possession of bank employees for processing.84 In effect, that voluntary dispossession was held to constitute a waiver of any privacy protections defendant might claim.85

The possession factor thoroughly pervades the Supreme Court's reasoning in Miller, as it does in similar cases.86 The possession-privacy analogue undoubtedly has merit in human experience and common understanding.87 However, decisions in this area typically lack discussion of the actual values and policies which support physical possession as a satisfactory and sometimes sufficient criterion of the privacy issue. Nonetheless, an assessment of the lasting merit of the possession factor requires a penetration of the considerations which may decide its continued use. The possible policies which support the possession-ownership analogue may be grouped into three broad categories: the property rights rationale, the ease of analysis rationale, and the sense of justice rationale.

82. 96 S. Ct. at 1623.
84. 96 S. Ct. at 1624.
85. Possession is treated as a finding necessary to cement subjective interests and legal protections.
86. See generally Application of Levine, 149 F. Supp. 642 (1956); United States v. United Distillers Products Corp., 156 F.2d 872 (2d Cir. 1946).
87. That is, people do commonly correlate privacy expectations with their possession of certain places and things.
A property rights rationale may be one explanation of the possession requirement. Privacy in this regard constitutes an aspect of property enjoyment. Unreasonable government search and seizure represents a wrongful interference with this right of enjoyment. Indeed, the concept of private incorporates the idea of an implicit barrier separating the individual's property from the reach of the public domain. 

A concept of privacy founded in the concept of property enjoyment would make the privacy right correspondent to the constitutionally protected uses of the property. For example, a special right of use of one's home has been held to include the right to possess and enjoy obscene materials and to smoke marijuana without fear of government invasion. These same activities may be so socially undesirable that no similar right of property enjoyment attaches to public property.

That the privacy interest is sometimes only a property right is illustrated by the cases of Stanley v. Georgia and Paris Adult Theatre I v. Slaton. In Stanley, the Supreme Court held that a person may not be convicted for the possession of obscene matter kept for private use in his home. Stanley is instructive because it illustrates how a limited right of property enjoyment can be misleadingly merged with spiritual and intellectual pleasures not necessarily dependent on property rights. Concerning a Georgia statute which made unlawful the possession of obscene material, Justice Marshall wrote in sweeping language: "[The] right to receive information and ideas, regardless of their social worth, is fundamental to our free society. . . . Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." The force of this language diverts attention from the fact that ultimately it may apply only as a right of private property, at least concerning information offensive to public morality. In Paris Adult Theatre, the petitioner relied on Stanley to argue that the state could not close a public pornographic theatre in At-

93. 413 U.S. 49 (1973).
94. 394 U.S. at 564-65.
lanta. It was argued that the state had no legitimate interest in controlling the moral content of a person's thoughts. The Court held that Georgia was constitutionally competent to determine whether such films provided grist for human mind or spirit. Distinguishing Stanley v. Georgia, the Court said:

If obscene material unprotected by the First Amendment in itself carried with it a "penumbra" of constitutionally protected privacy, the Court would not have found it necessary to decide Stanley on the narrow basis of the "privacy of the home," which was little more than a reaffirmation that "a man's home is his castle"... The idea of a "privacy" right and a place of public accommodation are, in this context, mutually exclusive.

The property rights rationale, however, cannot exhaustively explain those forms of privacy not so clearly aligned with a proprietary interest, as, for example, rights of privacy related to family, marriage, procreation, and child rearing. Nevertheless, the element of possession is frequently central even in cases of this type. Therefore, other rationales justifying the possession factor in privacy cases may be operative.

A second policy promoting the possession analogue in privacy analysis is the ease of analysis rationale. The purpose behind this rationale is to permit relatively simple evidentiary findings. These findings are useful because there is a high positive correlation between a person's exclusive physical possession of a place or thing and his expectation that that place or thing is private. Conversely, a finding of non-possession is identifiable with non-privacy. For example, non-possession or non-ownership of documents revealing information about one's self implies unqualified possession or ownership in another. Thereupon, a presumption arises that such information is not private, but rather public. Regarding the privacy of documents held by third parties, that presumption appears to be irrebuttable.

95. 413 U.S. at 67.
96. Id. at 69.
97. Id. at 66 (emphasis added).
98. Id. at 66 n.13: "Such protected privacy extends to the doctor's office, the hospital, the hotel room, or as otherwise required to safeguard the right to intimacy involved." Possession in this context means locational possession of a given physical space.
99. The physical constraints of clothing, automobile, bedroom, or house are more easily identified than the conceptual perimeters of philosophical discourse. To some extent, of course, the Justice must always play the role of Philosopher. See generally Bloustein, First Amendment and Privacy: The Supreme Court Justice and the Philosopher, 28 Rutgers L. Rev. 41 (1974).
100. An exception will apply in the event that the third party holds the
The fact that the presumption operates even though it ignores personal expectations of privacy to records held by a third party indicates other analytical aids are present. One such aid would be that the possession-privacy presumption imposes a logical limitation on the broad scope of possible privacy interests. The privacy right itself is not contained in any one protection alone. Therefore, the possession-privacy presumption is a convenient analytical aid in selecting the interests appropriate for constitutional protection. In addition, the possession-privacy presumption imposes a means of judicial restraint in cases in which there are otherwise no established principles for decision.

A third policy furthering the possession analogue in privacy analysis is the sense of justice rationale. A sense that the privacy law is just results from its predictability and its incorporation of commonly accepted values. The property law analogue accomplishes both these purposes. Although few people have a clear idea of what privacy means, many understand the basic legal significance of possession. Therefore, if privacy rights are correspondent to property rights, a person can predict what constitutes an invasion of privacy because he can easily identify the analogous property invasion.

Likewise, a privacy law modeled after property law will serve many of the same values. For example, both fields of law further a belief in individualism and exclusivity of right. On the one hand, property law emphasizes a person’s right to have his property left alone. On the other hand, privacy law focuses on the right of the person himself to be left alone. Similarly, a right to the privacy of one’s home, for example, reinforces the value of free enjoyment of property. Conversely, the free enjoyment of property reinforces the value in using the premises without fear of surveil-

---

101. By "logical" is not meant logical in all cases, but merely that the possession restriction does in fact often correspond to physical areas of privacy expectation. Obviously, Miller represents a particular subset of privacy expectations falling outside the class of legally protectible interests.

102. See note 33 supra.

103. Of course, this principle is less definite in application when privacy is treated as a fundamental interest. Nevertheless, it applies. See note 98 supra.

lance or observation. In conclusion, privacy law modeled after property law inherits qualities of both predictability and compatibility with basic values. These factors assure that privacy law, despite its unwieldy philosophical dimensions, will be harmonious with commonly accepted notions of justice.

Although some or all of these rationales may operate to justify the survival of the property analogue, countervailing considerations remain. For example, even if the property analogue is useful, is it necessary? With the emergence of modern data collection systems maintained by largely anonymous third parties, the property analogue may be suffering from a serious inability to adapt to new privacy needs and common expectations. Further, the analogue may represent a potential denial of due process in those cases in which the irrebuttable presumption of non-privacy shows no reasonable relation to commonly held values or to the facts of common experience.

Relationship Between Bank and Customer

In addition to examining the nature of the documents, the third step in the Supreme Court's opinion focused upon the relationship between a bank and its customer in deciding if Miller had a protectable expectation of privacy to records held by the bank. The Court expressly held that a bank is not a "neutral agent" in keeping records of its customer's transactions. Rather, the bank used the records pursuant to its own business operations. Therefore, only the bank had a legally protectible privacy interest to challenge the subpoena because of the two independent parties of interest, only the bank had possession. However, only Miller faced the prospect of real injury by disclosure.

An analysis of the Court's characterization of the bank-customer relationship first requires an examination of the opinion's use of the "neutral agent" concept. A neutral agency characterization will seldom save a bank customer's privacy expectation to records

---

105. See note 28 supra.
106. See note 45 supra.
An attack on the apparently irrebuttable presumption of non-privacy in bank privacy cases faces formidable obstacles not generally present in related cases. The presumption in Miller is not legislative, but decisional, and the presumption is one of law, not fact.
108. 96 S. Ct. at 1623.
in the possession of a third party institution. Such business entities almost always have some independent business purpose in keeping files on customers or potential customers. In the majority of cases, therefore, the apparent neutral agency exception to the possession requirement offers only shallow promise of relief for the bank customer.\textsuperscript{110}

Given the disproportionate interests in non-disclosure between bank and customer, the harshness of the Miller decision raises several policy issues concerning the appropriate legal relationship between a bank and its customer. One such relationship might be a legal bank-customer privilege of confidentiality. The Miller Court did not discuss the policies favoring the creation of a bank-customer privilege, unless that consideration is vaguely subsumed in the discussion of neutral agency.\textsuperscript{111}

There is evidence that banking institutions and their customers assume that a relation of confidentiality exists in their normal interactions.\textsuperscript{112} Whether such expectations should be accorded legal protection in the future will depend on an evaluation of the policies furthered by creating such a privilege. The new privilege would have the clear advantage of avoiding the ritualistic decision-making which characterizes the possession analysis. The privilege would recognize the fact that banks are inescapable intermediaries in modern commercial transactions. Indeed, an individual's release of information to his bank is unavoidable if he is to conduct business in modern society. Therefore, the privilege would spare the customer the unsavory dilemma of either not using the banking system or using it and waiving his protectible privacy interest. Most importantly, the creation of a bank-customer privilege would shift the privacy analysis to the party actually harmed by disclosure—the customer. In contrast, a neutral agency analysis, on finding an independent business interest in the bank, entirely ignores the customer's privacy interest.

In contrast, there are convincing arguments against the creation of a bank-customer privilege as a means to protect the customer's

\textsuperscript{110} See, e.g., Couch v. United States, 409 U.S. 322, 335 (1973), implying that an accountant cannot be deemed a neutral agent.

\textsuperscript{111} There is no right of privileged communication between bank and customer. See Stark v. Connelly, 347 F. Supp. 1242 (1972).

privacy interest. First, the privilege would protect that interest only indirectly. The real reason for the privilege would be to further commercial banking interests and customer confidence. Second, whatever aid the new privilege might offer to expansion of the privacy right, it would be limited to banks only. If the privilege were expanded to include other third party institutions, each privilege would require a tailor-made rationale to justify its extension to that particular relation. In short, the law of privacy would develop as a series of privileged exceptions, none of which promote the privacy interest directly. Third, privileges are generally an object of judicial disfavor because they have the effect of excluding relevant, material evidence.

These considerations indicate that an affirmative reformulation of the privacy right is necessary to adequately protect expectations of privacy to information held by third party institutions. Until that reformulation is accomplished, the rule in Miller goes unchallenged: A customer who reveals his commercial transactions to his bank assumes the risk of injury resulting from the bank's release of that information to a third party.

"Existing Legal Process"

A final holding of the Miller Court was that the Bank Secrecy Act does not accord the defendant greater due process rights than he was otherwise entitled to before the Act's passage. Therefore, the Court's general conclusion that the defendant had no due process rights whatever to object to his bank's disclosure of bank records remained true even in view of the Supreme Court's decision in California Bankers Association v. Schultz, which stated that the provisions of the Secrecy Act were to be enforced in conformity with "existing legal process." In effect, the Court found that the defendant had no reasonable expectation of privacy as a matter of law and therefore as a matter of law was not entitled to legal vindication of rights he did not possess. The Miller decision implies that it reached this conclusion in part because the exigencies of the tax collection system require unimpeded govern-

113. As to the basis of privileges, see 8 J. WIGMORE, EVIDENCE (McNaughton rev.) §§ 2192, 2197, & 2285 (1973).
114. Every privilege is an aspect of privacy, but there is no privacy privilege.
116. 96 S. Ct. at 1624, and cases cited therein.
119. Id. at 52.
ment power to investigate and prosecute evasions such as those in
Miller.\textsuperscript{120}

In view of the potential injury a bank customer may sustain by
disclosure of his bank records,\textsuperscript{121} it is difficult to understand why
Miller was denied any legal protection whatever. He might have
been afforded at least minimal due process notice that the subpoena
had been served on his bank. He would then have had an oppor-
tunity to intervene to demonstrate his interest in non-disclo-
sure.\textsuperscript{122} In this regard, the harshness of a strict possession
analysis is apparent as one realizes that the actual extent of injury
or intrusion to the customer is immaterial to the finding of non-
privacy. Furthermore, if it is true, as the Miller decision implies,
that the opinion was in part reached with deference to efficient
tax collection, it remains doubtful that the government interest so
overwhelmingly outweighs the individual's privacy interest.

\textbf{CONCLUSION}

The Miller case stands for the proposition that a bank customer
has no reasonable expectation of privacy to bank records in the
possession of his bank. As a consequence, the bank customer is
entitled to no protections of due process, not even notice that a
subpoena has been served on his bank pursuant to an investigation
directed against him. That conclusion is unaffected by the fact
that the government on the one hand requires that the bank com-
pile extensive records on its customer\textsuperscript{123} and on the other hand sub-
poenas those records from the bank without affording the cus-
tomer a right to object.\textsuperscript{124} This Comment has briefly traced the

\textsuperscript{120} 96 S. Ct. 1624. Cf. Couch v. United States, 409 U.S. 322, 328, & 335
(1973), implying that tax exigencies represent a significant independent
factor in privacy analysis.

\textsuperscript{121} See note 109 supra.

\textsuperscript{122} See Zimmerman v. Wilson, 81 F.2d 847 (3d Cir. 1936). Cf. Donald-
son v. United States, 400 U.S. 517, 523 (1971), definitively basing the privacy
right upon a proprietary interest.

generally Flippen, Internal Revenue Service Summons: An Unreasonable
Expense and Burden on Banks and An Invasion of the Depositor's Privacy,

\textsuperscript{124} This Comment has postulated that a taxpayer should have a protect-
ible privacy interest in bank records in the possession of his bank. This
postulate is distinct from the related inquiry into whether every privacy in-
jury shall have a remedy. For example, some forms of injury may be so
categorically minor as not to justify procedural impedance of the tax collec-
development of the privacy right, examined the policies supporting the possession rationale in determining that right, and evaluated the *Miller* decision in view of its particular analysis of a privacy claim to records in the possession of a third party bank. Because *Miller* unreflectingly adheres to possession as a sweeping determinant of privacy rights, the opinion does not represent a formidable contribution to the *raison d'être* of the possession factor in privacy law. Ironically, the true merit of the *Miller* opinion is that it may spur efforts to develop an adequate conceptual alternative to present privacy analysis concerning privacy rights to records in the possession of third parties.

FRANCIS X. PRAY

...