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## Restoring Private to Privacy

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# ESSAY

## RESTORING PRIVATE TO PRIVACY

Jeffrey T. Renz\*

“With skies that reach from east to west  
And room to go and come  
I liked my fellow man the best  
When he was scattered some.”<sup>1</sup>

It was supposed to be an uneventful continuing legal education seminar at the Colonial Inn on May 9, 1986. The subject of the CLE, organized and sponsored by the ACLU of Montana, was Individual Rights and the Montana Constitution. Associate Justice Frank Morrison was the last speaker of the day. His topic was “Analysis of the Independent State Grounds Doctrine.” A discussion period followed.

During the discussion the uneventful became eventful. Someone began yelling at Frank. I do not remember who. It was either Ed Dobson or Dennis NettikSimmons.<sup>2</sup> Dobson

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\* Director, Criminal Defense Clinic, University of Montana School of Law. Prof. Renz wrote the ACLU of Montana’s amicus curiae brief in support of rehearing *State v. Long*.

1. Anonymous, *see State v. Long*, 216 Mont. 65, 76, 700 P.2d 153, 161 (1985) (Sheehy, J., dissenting).

2. NettikSimmons had graduated one year before. Dobson was then a law student. NettikSimmons had been the Montana Law Review’s executive editor. Dobson was to be its business manager. NettikSimmons had written an essay and co-authored two articles on state constitutional law, including the soon to be published *Right of*

recalls being present.<sup>3</sup> Nettiksimmons does not remember being there but agrees that he might have been.<sup>4</sup>

Whoever he was, he was hot about the Supreme Court's opinion in *State v. Long*.<sup>5</sup> And Justice Morrison had drafted the Court's opinion.

*Long* held that the privacy provision of our state constitution, Section 10 of the Montana Declaration of Rights,<sup>6</sup> proscribed only state action.<sup>7</sup> The majority, over a blistering dissent from Justice Skeff Sheehy, overruled or disapproved of eight earlier decisions to the contrary.

The *Long* opinion was not your usual case. The Court, you see, had taken the unusual step of establishing its new rule *sua sponte*. Neither party argued the issue that the Court decided. Faced with a line of authority that extended back 34 years to the time when Griff Pritchard decided to camp out in Frank and Katherine Welsh's parlor,<sup>8</sup> the State did not argue that the right of privacy did not apply to private actors. *Long*, of course, did not address it either. No one saw this one coming.

Montana's right of privacy pre-dates the 1972 Constitution. In *Welsh*, the Montana Supreme Court, confronted with the landlord's novel self-help mechanism, said, "That Pritchard invaded the privacy and right of privacy of the Welshs is beyond question."<sup>9</sup>

The second pre-1972 case concerned the stereotypical telephone eavesdropper--the in-laws.<sup>10</sup> In *Brecht*, the Court held that because the defendant's sister-in-law had listened in on an extension phone the prosecution could not use her testimony recounting Brecht's threats to his soon-to-be-late wife. This, the

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*Privacy.* See Larry M. Elison & Dennis NettikSimmons, *Federalism and State Constitutions: The New Doctrine of Independent and Adequate State Grounds*, 45 MONT. L. REV. 177 (1984); Dennis NettikSimmons, *Towards a Theory of State Constitutional Jurisprudence*, 46 MONT. L. REV. 261 (1985); Larry M. Elison & Dennis NettikSimmons, *Right of Privacy*, 48 MONT. L. REV. 1 (1987). Dobson had just authored a case note on the *Long* decision. See Edward MacDonald Dobson, Note, *Search by Private Persons: State v. Long*, 47 MONT. L. REV. 189 (1986).

3. Personal communication with Ed Dobson (Aug. 13, 2002).

4. Personal communication with Dennis NettikSimmons (Aug. 14, 2002).

5. *State v. Long*, 216 Mont. 65, 700 P.2d 153 (1985).

6. MONT. CONST. art. II, § 10.

7. 216 Mont. at 71, 700 P.2d at 157.

8. *Welsh v. Pritchard*, 125 Mont. 517, 241 P.2d 816 (1952). Pritchard wanted to evict his tenants but they were uncooperative about leaving. Pritchard decided that the best way to get them out was for him to move in. So he did.

9. 125 Mont. at 524, 241 P.2d at 819.

10. *State v. Brecht*, 157 Mont. 264, 485 P.2d 47 (1971).

Court concluded, violated Brecht's right to privacy. It mattered little that the sister-in-law was not a state actor. The Court said, "To distinguish between classes of violators is tantamount to destruction of the right itself."<sup>11</sup>

Up to this point (and keep in mind that we had not written the 1972 Constitution yet) the Court had developed both common law and federal privacy/due process rights that it applied to protect people against non-governmental privacy invasions. Then came the shining beacon.

Delegate Bob Campbell (who, with Delegate Dorothy Eck, were Montana's answer to James Madison) authored Section 10. Campbell was prescient. He foresaw the vast data gathering capabilities of the private sector and said this on the Convention floor in 1972, not long after I bought a new slide rule:

[P]olitical organizations, private information gathering firms, and even an individual can now snoop more easily and more effectively than ever before. We certainly hope that such snooping is not as widespread as some persons would have us believe, but with technology easily available and becoming more refined all the time, prudent safeguards against the misuse of such technology are needed.<sup>12</sup>

With that, the Convention and the people of Montana approved a document that said, without equivocation, "The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest."<sup>13</sup> This became the model for similar rights now found in the constitutions of other states and foreign nations.

What elegance! What precision! What happened?

Would the delegates' repeated references to private firms, collection agencies, and credit bureaus and its silence about overruling 20 years of authority persuade the Court that private actions were covered? In fact, they did. In a series of post-1972 decisions, the Court applied the exclusionary rule to exclude evidence discovered by prospective house buyers who liked to peek under beds,<sup>14</sup> self-deputized restaurant managers who searched their employees' clothing,<sup>15</sup> a snoop who entered his neighbor's garden to trim marijuana leaves,<sup>16</sup> and managers of a

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11. 157 Mont. at 270, 485 P.2d at 51.

12. 5 MONT. CONST. CONV. TR. 1681 (1972).

13. MONT. CONST. art II, § 10.

14. *State v. Hyem*, 193 Mont. 51, 630 P.2d 202 (1981).

15. *State v. Coburn*, 165 Mont. 488, 530 P.2d 442 (1974).

16. *State v. Helfrich*, 183 Mont. 484, 600 P.2d 816 (1979).

mini-storage unit who pulled the hinges of a storage unit to discover why its renter had a gun earlier in the day.<sup>17</sup>

In light of these cases, it would seem that a new landlord snooping case, especially considering the history of Griff Pritchard's camping trip to his tenant's parlor, would pose nothing new. But Millard Hultgren's tour of his tenant's attic, to satisfy his curiosity about his tenant's electricity bill, was to result in the chagrin and anger displayed by (those who I remember to be) the Montana Law Review's finest.

The *Long* majority concluded that the plain language of Section 10 dictated its outcome. The provision's exception, "without the showing of a compelling state interest," became the tail that bit the dog. Section 4's<sup>18</sup> express referral to "person, firm, corporation, or institution," Section 10's silence in this regard, and Section 10's reference to state interest, wrote Justice Morrison, commanded the conclusion that Section 10 applied only to state actors.<sup>19</sup>

At the CLE, Morrison defended the decision against the impassioned Colonial attack. He pointed out that the 1972 ballot language also did not refer to private actors. Then rose another commentator for the kill.<sup>20</sup> The voters' pamphlet, this speaker pointed out, said it very clearly.<sup>21</sup> Morrison, mortally wounded by this blow, conceded the point: "If only this had been called to our attention."<sup>22</sup> Justice Sheehy, in the audience, sat back, smiling, and enjoyed the show.

Alas, Bob Campbell was not prescient enough. Section 10 should have read:

The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest *and this means you, Griff Pritchard!*

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17. *State v. Van Haele*, 199 Mont. 522, 649 P.2d 1311 (1982).

18. MONT CONST. art II, § 4.

19. *Long*, 216 Mont. at 70, 700 P.2d at 156-157.

20. This, I remember to be Ed Dobson.

21. See Dobson, *supra* note 3, at 195 n.41.

22. (or words to that effect.)