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# City of Santa Barbara v. Adamson: New Protection for Alternate Life Style Decisions

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# *CITY OF SANTA BARBARA v. ADAMSON*: NEW PROTECTION FOR ALTERNATE LIFE STYLE DECISIONS

## I. INTRODUCTION

In 1972, the California electorate voted to amend the state constitution to add privacy to the list of inalienable rights contained in article I, section 1.[1] In *White v. Davis*,[2] the first case to address the scope of this amendment, the California Supreme Court identified the principal "mischiefs" to which the amendment was directed. These mischiefs were "(1) 'government snooping' and the secret gathering of personal information; (2) the overbroad collection and retention of unnecessary personal information by government and business interests; (3) the improper use of information properly obtained . . . ; and (4) the lack of a reasonable check on the accuracy of existing records."[3]

In *City of Santa Barbara v. Adamson*,[4] the California Supreme Court declared that the right to privacy encompassed more than protection from the dangers inherent in the gathering and dissemination of information. The court suggested that the right to privacy included the right of persons to make intimate life style decisions free from unnecessary government interference. Thus, the court held that a zoning ordinance which defined families in terms of legal and biological relationships violated the privacy rights of those who chose to live in an alternate family.[5]

This note discusses whether precedent supports the extension of the right to privacy beyond the narrow concerns outlined in *White*. This note also examines the reasons for protecting the choice of household companions and concludes by indicating the failings of the Santa Barbara ordinance at issue in *Adamson*.

## II. FACTS OF THE CASE

In 1977, Beverly Adamson acquired a residence in Santa Barbara,

1. CAL. CONST. art. I, § 1 reads: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, *and privacy*." (emphasis added).

2. 13 Cal. 3d 757, 533 P.2d 222, 120 Cal. Rptr. 94 (1975).

3. *Id.* at 775, 533 P.2d at 234, 120 Cal. Rptr. at 106.

4. 27 Cal. 3d 123, 610 P.2d 436, 164 Cal. Rptr. 539 (1980).

5. *Id.* at 134, 610 P.2d at 442, 164 Cal. Rptr. at 545.

California. The twenty-four room house was hidden from the street by trees and a fence.[6] It was located in one of the city's most desirable sections, commonly referred to as the Riviera.[7] The Riviera was zoned exclusively for single-family dwellings. A single family was defined as any number of persons related by blood, marriage or legal adoption or, alternatively, a group of not more than five unrelated persons.[8]

The appellants were three of a group of twelve unrelated persons occupying the house. On January 18, 1978, they received notice that they were in violation of the zoning ordinance.[9] The appellants conceded the violation. They argued, however, that the ordinance violated their right to privacy guaranteed by article I, section 1 of the California Constitution.[10] The appellants recognized that they were not a family

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6. The house had 6,231 square feet of floor space, ten bedrooms, and six bathrooms. *Id.* at 127-28, 610 P.2d at 438, 164 Cal. Rptr. at 541.

7. The Riviera was described in the Santa Barbara General Plan as "one of the most popular residential sections as it affords sweeping views of the city, harbor, ocean, Channel Islands, and Mesa Hills." CITY OF SANTA BARBARA GENERAL PLAN at 57 (1975).

8. The ordinance defined a family, in relevant part as: "(1) An individual, or two (2) or more persons related by blood, marriage or legal adoption living together as a single housekeeping unit in a dwelling unit. . . . (2) A group of not to exceed five (5) persons, excluding servants, living together as a single housekeeping unit in a dwelling unit." SANTA BARBARA, CAL., MUNICIPAL CODE § 28.04.230 [hereinafter cited as *Zoning Ordinance*].

9. "On January 18, 1978, the City Attorney of Santa Barbara informed each of the residents that he or she was in violation of Code Section 28.10.030 and that they were liable for a fine not to exceed $500.00 or six (6) months in jail, or both." Defendants-Appellants' Brief for Petition for Hearing at 2, City of Santa Barbara v. Adamson, 27 Cal. 3d 123, 610 P.2d 436, 164 Cal. Rptr. 539 (1980) [hereinafter cited as Petition for Hearing]. "The residents were given five (5) days to comply," which they did not do. *Id.*

On February 9, 1978, the city attorney filed a complaint for a temporary restraining order and injunctive relief. A restraining order was issued on March 7, 1978, and a preliminary injunction on March 29, 1978. 27 Cal. 3d at 127, 610 P.2d at 438, 164 Cal. Rptr. at 541. The appellate court had affirmed the judgment of the trial court in favor of the City of Santa Barbara.

10. *See* note 1 *supra*. The appellants summarized the arguments they advanced before the California Supreme Court as follows:

> [The] City of Santa Barbara's zoning ordinance violates the appellants' federal and state constitutional rights to equal protection and due process of law.
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> . . . .
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> The ordinance also violates the appellants' fundamental state and federal rights to privacy and freedom of association. The appellants have a constitutional right to choose their household companions.
>
> The City's ordinance also violates the Due Process Clause of the Fourteenth Amendment by being irrational and arbitrary. The ordinance creates an irrebuttable presumption that groups of more than five unrelated persons create more population, noise, traffic, overcrowding and blight problems than do the same number of related persons.

Petition for Hearing, *supra* note 9, at 4-5.

The *Adamson* majority confined its decision to the appellants' claim to a right to privacy under California's constitution. In a footnote, the court suggested that the result might have been different under the federal constitution. 27 Cal. 3d at 130 n.3, 610 P.2d at 440 n.3,

in the traditional sense, but stated that they viewed themselves as the functional equivalent of a family.[11] As a functional family, they asserted a constitutional "right to be left alone—the right to be free in the sphere of private action."[12]

## III. Reasoning Of The Court

The supreme court framed the issue of the case as whether an ordinance "written to help promote and protect values that family life enhances . . . may deny to individuals who are not family members certain benefits that family members enjoy."[13] The court concluded that Santa Barbara's ordinance violated the appellants' right to privacy, and reversed the trial court's order granting a preliminary injunction.[14]

The supreme court's approach in reaching its decision was twofold. First, the court inquired whether the right to privacy encompassed the freedom to live in an alternate family. The court rejected the city's contention that the constitutional amendment was enacted merely "to place effective restraints on the information gathering activities of government and business."[15] Instead, the court, relying on broad language in *White v. Davis*,[16] stated that " 'the general concept of privacy relates, of course, to an enormously broad and diverse field of personal action and belief . . . .' "[17] Agreeing with the appellants that they were, in essence, a family,[18] the *Adamson* court concluded that the right to pri-

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164 Cal. Rptr. at 543 n.3. The court concluded, however, that the "federal right of privacy in general appears to be narrower than what the voters approved in 1972 when they added 'privacy' to the California Constitution." *Id.* (citing White v. Davis, 13 Cal. 3d 757, 533 P.2d 222, 120 Cal. Rptr. 94 (1975)). By resting its decision on the state constitution, the court made further reference to federal precedent unnecessary. *See* notes 128-30 *infra* and accompanying text.

11. The appellants stated that their "group functions as a family, even though its members are not related by blood, marriage or adoption. The appellant family shares the same values and interactions as a traditional family: love, respect, unity and cohesiveness." Appellants' Opening Brief at 11-12, Santa Barbara v. Adamson, 90 Cal. App. 3d 31, 153 Cal. Rptr. 508 (1979), *vacated*, 27 Cal. 3d 123, 610 P.2d 436, 164 Cal. Rptr. 539 (1980).

12. *Id.* at 14.

13. 27 Cal. 3d at 128, 610 P.2d at 438, 164 Cal. Rptr. at 541.

14. *Id.* at 137, 610 P.2d at 444, 164 Cal. Rptr. at 547. *See* note 9 *supra*.

15. Plaintiff and Respondent's Answer to Petition of Hearing before the Supreme Court at 6, Santa Barbara v. Adamson, 27 Cal. 3d 123, 610 P.2d 436, 164 Cal. Rptr. 539 (1980).

16. 13 Cal. 3d 757, 533 P.2d 222, 120 Cal. Rptr. 94 (1975).

17. 27 Cal. 3d at 129, 610 P.2d at 439, 164 Cal. Rptr. at 542 (citation omitted).

18. The court noted that after the appellants chose to live together they became a "close group with social, economic, and psychological commitments to each other." 27 Cal. 3d at 127-28, 610 P.2d at 438, 164 Cal. Rptr. at 541. The court stated that "[a] living arrangement like theirs concededly does achieve many of the personal and practical needs served by traditional family living. It could be termed an alternate family." *Id.*

vacy encompassed at least this group's decision to live together.[19]

Second, the court stated that the amendment did not prohibit all governmental incursion into individual privacy.[20] Rather, the city was required to justify any intrusion by showing a compelling public interest.[21] To meet this burden, the city had to demonstrate that (1) the ordinance was intended to promote such interests, (2) the ordinance "truly and substantially help[ed] effect" these interests, and (3) there were no means of achieving the interests that were less restrictive of individual freedom.[22]

The court found that the "over-all intent" of the zoning ordinance was " 'to serve the public health, safety, comfort, convenience and general welfare and to provide the economic and social advantages resulting from an orderly planned use of land resources, and to encourage, guide and provide a definite plan for future growth and development.' "[23] The court summarily dismissed this general purpose as insufficient to justify restricting the appellants' freedom.[24]

The court implicitly accepted the "more specific intent" underlying the creation of single-family zones—the interest in preserving a residential environment suitable for family life, limiting density and protecting the area's essential characteristics[25]—as sufficient to justify

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19. The court left open the question of whether the right to privacy encompassed the right to live with whomever one wished. *Id.* at 130, 610 P.2d at 439-40, 164 Cal. Rptr. at 542-43. The court cited favorably to the dissenting opinion in Village of Belle Terre v. Boraas, 416 U.S. 1, 16 (1974) (Marshall, J., dissenting), which stated that:

> The choice of household companions—of whether a person's 'intellectual and emotional needs' are best met by living with family, friends, professional associates, or others—involves deeply personal considerations as to the kind and quality of intimate relationships within the home. That decision surely falls within the ambit of the right to privacy protected by the Constitution.

For further discussion, *see* notes 135-42 *infra* and accompanying text.

The court in *Adamson* also noted that it would not follow federal authority because it appeared that federal law offered less protection to individuals than that provided under California law. 27 Cal. 3d at 130 n.3, 610 P.2d at 440 n.3, 164 Cal. Rptr. at 543 n.3. *See* note 10 *supra*. In so stating, the court referred to CAL. CONST. art. I, § 24, which provides that "[r]ights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution." *See also* note 128 *infra*.

20. 27 Cal. 3d at 131, 610 P.2d at 440, 164 Cal. Rptr. at 543.

21. *Id.* For a discussion of what constitutes a compelling state interest, *see* People v. Privitera, 23 Cal. 3d 697, 730, 591 P.2d 919, 939, 153 Cal. Rptr. 431, 451 (1979) (Bird, C.J., dissenting), *cert. denied*, 444 U.S. 949 (1979); Perry, *Modern Equal Protection: A Conceptualization and Apprisal*, 79 COLUM. L. REV. 1023, 1074-83 (1979).

22. 27 Cal. 3d at 131-34, 610 P.2d at 440-42, 164 Cal. Rptr. at 543-45.

23. *Id.* at 131, 610 P.2d at 440, 164 Cal. Rptr. at 543 (citing *Zoning Ordinance*, *supra* note 8, at § 28.01.001).

24. 27 Cal. 3d at 131, 610 P.2d at 440, 164 Cal. Rptr. at 543.

25. *Id.* at 131-33, 610 P.2d at 440-41, 164 Cal. Rptr. at 543-44.

restrictions upon the right to privacy. The court concluded, however, that the ordinance in question did not "truly and substantially help effect those goals."[26] In reaching this conclusion, the court stated that the creation and maintenance of a residential environment was not dependent upon biological or legal relationships among household members.[27] The "rule-of-five"[28] did not limit the density of a given area because the ordinance did not limit the size of traditional families.[29] Finally, the court dismissed the city's contention that the rule-of-five promoted essential characteristics of single family districts by controlling less internally stable groups and the concomitant problems of noise, traffic and parking congestion.[30]

The court speculated that the ordinance might also be premised on the assumption that groups of unrelated persons present the hazard of an "immoral environment for families with children."[31] The court held that this method of combatting such a hazard would not be legitimate.[32]

Additionally, the court held that the ordinance failed to pass constitutional muster because each of the city's goals could be accomplished by means "less restrictive of freedom than is the rule-of-five."[33] The court stated that residential character could be preserved by restricting transient and institutional uses; density could be controlled by regulating with reference to floor space or facilities; and noise, morality, traffic and parking problems could be dealt with by way of police ordinances and criminal statutes.[34] The court concluded that generally "*zoning ordinances are much less suspect when they focus on the use than when they command inquiry into who are the users*."[35]

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26. *Id.* at 132, 610 P.2d at 441, 164 Cal. Rptr. at 544.

27. *Id.* For example, the court noted that transiency was not determined by the lack of a biological or marital relationship. *Id.*

28. The court adopted the term "rule-of-five" to refer to the numerical limit which the zoning ordinance placed upon the number of unrelated persons who could make up a family. *Id.*

29. *Id.* The court rejected the city's argument that related groups have a natural limit, and that by controlling unrelated groups the density of an area could be maintained. *Id.*

30. *Id.* at 133, 610 P.2d at 441, 164 Cal. Rptr. at 544. In this regard the court dismissed the city's argument that traditional families were always quieter, more disciplined, or owned fewer cars than an alternate family. *Id.*

31. *Id.*

32. *Id.* (citing Atkisson v. Kern County Hous. Auth., 59 Cal. App. 3d 89, 130 Cal. Rptr. 375 (1976) (an absolute ban against unmarried cohabiting adults violated right to privacy because it rested upon an improper irrebuttable presumption)).

33. 27 Cal. 3d at 133, 610 P.2d at 441-42, 164 Cal. Rptr. at 544-45.

34. *Id.*

35. *Id.* (emphasis in original).

Thus, the court implicitly held that the goals of promoting a family style of life were compelling ones which a city could seek to effectuate through reasonable regulations. The city could not pursue those goals at the expense of an individual's right to privacy, however, unless it could demonstrate that the regulation truly and substantially helped effectuate those goals, and that there were no alternatives that would be less restrictive of individual freedom. The City of Santa Barbara failed to meet either of these burdens.[36]

## IV. ANALYSIS

### *A. The Scope of California's Right to Privacy*

By specifically adding a right to privacy to the state constitution, the people of California intended that greater protection be given to the individual than had been provided under existing law.[37] It is not certain, however, that the constitutional guarantee was supposed to encompass the right invoked by the appellants.[38] Thus, the first issue the

36. The court concluded that the ordinance was not saved by the fact that it set forth conditional use permit or variance procedures. Both procedures raised "[t]roubling questions" because the constitutional attack was meritorious and the procedures gave the city great discretion to deny the permit or variance, and thereby deprived the appellants of their fundamental rights. *Id.* at 135, 137, 610 P.2d at 442-43, 444, 164 Cal. Rptr. 545-46, 547. In addition, the court noted that the procedure for a conditional use permit would require that the appellants move to a non-single-family zone. The conditional use permit argument advanced by the city rested on the assumption that Ms. Adamson ran a boarding house, an improper use of a dwelling in a single-family zone. The court questioned the reasonableness of requiring the appellants to move, thus depriving them of the benefits of a residential area which traditional families enjoyed. *Id.* at 135, 610 P.2d at 443, 164 Cal. Rptr. at 546. When the relationship was defined as an "alternate family," the assumption that the living arrangement was a boarding house disappeared. In conclusion, the court quoted the concurring opinion in Moore v. City of East Cleveland, 431 U.S. 494, 512-13 (1977), which stated that "the existence of the variance procedure serves to lessen neither the irrationality of the definition of 'family' nor the extent of its intrusion into family life-style decisions. . . . We have now passed well beyond the day when illusory escape hatches could justify the imposition of burdens on fundamental rights." 27 Cal. 3d at 137, 610 P.2d at 444, 164 Cal. Rptr. at 547.

37. "[T]he people of California amended the state Constitution to provide explicit protection to every individual's interest in 'privacy.' " White v. Davis, 13 Cal. 3d at 773, 533 P.2d at 233, 120 Cal. Rptr. at 105. The proponents of the amendment argued that because there were "no effective restraints on the information [gathering] activities of government and business," the amendment was necessary to create such a right. Proposed Amendments to Constitution, Propositions and Proposed Laws Together With Arguments at 26 (California Election Pamphlet, General Election (Tuesday, Nov. 7, 1972)) [hereinafter cited as *Election Brochure*].

38. There is strong authority for the narrow view that the amendment only protects against the unjustified gathering and dissemination of personal information by government and business. *See, e.g.*, People v. Privitera, 23 Cal. 3d 697, 709, 591 P.2d 919, 926, 153 Cal. Rptr. 431, 438, *cert. denied*, 444 U.S. 949 (1979) ("[T]he moving force behind the new consti-

court in *Adamson* had to address was the proper scope of California's privacy right.

The majority, relying upon selected language from the election brochure, concluded that the voters intended to "ensure a right of privacy . . . in one's family . . . [and] home."[39] The court then asked whether the right of privacy also comprehended the right to "live in an alternate family with persons not related by blood, marriage, or adoption."[40] This question was implicitly answered in the affirmative, but without discussion. The legislative history, however, is consistent with a broad reading of the amendment. In addition, case law supports extension of the privacy right beyond the traditional family.

### 1. The election brochure

In interpreting a constitutional amendment, courts are required to give effect to the intent of the voters who adopted it.[41] In *Adamson*, the election brochure was the only available legislative history.[42] The *Adamson* court, in reaching its conclusion, quoted from the election brochure which stated that the right to privacy protected "our *homes*, our *families* . . . our *freedom of communion*, and our *freedom to associate with the people we choose*."[43] In view of this language, the *Adamson* court concluded that the voters intended to ensure a right of privacy in one's family and home.[44]

The majority's conclusion was consistent with the arguments made

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tutional provision was a more focused privacy concern, relating to the accelerating encroachment on personal freedom and security caused by increased surveillance and data collection activity in contemporary society."); White v. Davis, 13 Cal. 3d at 774, 533 P.2d at 233, 120 Cal. Rptr. at 105 (same proposition as *Privitera*); People v. Davis, 92 Cal. App. 3d 250, 260, 154 Cal. Rptr. 817, 823 (1979) (California's constitutional right to privacy protected the limited concern of "encroachment upon personal freedom and security caused by increased surveillance and data collection activity."). *But see* Note, *People v. Privitera*, 68 CALIF. L. REV. 737, 740 (1980), in which the author stated that it was doubtful that the court in *White* intended the narrow interpretation of the amendment contained in *Privitera*; Comment, *The Right to Choose an Unproven Method of Treatment*, 13 LOY. L.A.L. REV. 227, 235-37 (1979) [hereinafter cited as *The Right to Choose*], in which the author criticized *Privitera* on the ground that California's privacy right was intended to provide broad protection.

39. 27 Cal. 3d at 130, 610 P.2d at 439, 164 Cal. Rptr. at 542 (footnote omitted).

40. 27 Cal. 3d at 130, 610 P.2d at 439-40, 164 Cal. Rptr. at 542-43.

41. Kaiser v. Hopkins, 6 Cal. 2d 537, 538, 58 P.2d 1278, 1279 (1936); *In re* Quinn, 35 Cal. App. 3d 473, 482, 110 Cal. Rptr. 881, 887 (1973).

42. "California decisions have long recognized the propriety of resorting to such election brochure arguments as an aid in construing legislative measures and constitutional amendments adopted pursuant to a vote of the people." White v. Davis, 13 Cal. 3d at 775 n.11, 553 P.2d at 234 n.11, 120 Cal. Rptr. at 106 n.11.

43. 27 Cal. 3d at 130, 610 P.2d at 439, 164 Cal. Rptr. at 542 (emphasis in original).

44. *Id.*

by both the opponents and proponents of the constitutional amendment. The opponents had claimed that it was unnecessary to guarantee the right to privacy explicitly because that right was already "recognized by the law and the courts . . . particularly in the enjoyment of home and personal activities."[45] In rebuttal, the proponents had contended that the right to privacy was "much more than 'unnecessary wordage' " because it would extend the court decisions on privacy.[46] Both arguments suggest that the voters intended that the new amendment protect privacy in areas already "recognized by the law and the courts."[47] The right to privacy in one's family and home is one such area.[48]

### 2. The case law

The California Supreme Court first addressed the scope of the privacy amendment in *White v. Davis*.[49] In *White* the court held that the superior court had erred in sustaining a demurrer to a complaint which alleged that police surveillance of university classrooms and university recognized organizations was in violation of California's guarantee of privacy. The court concluded that the primary purpose of the amendment was to protect against the proliferation of information of a personal nature gathered by government and business, which the individual was virtually powerless to prevent or monitor.[50]

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45. *Election Brochure*, *supra* note 37, at 27.

46. *Id.* at 28.

47. *Id.* at 27.

48. *E.g.*, Moore v. City of East Cleveland, 431 U.S. 494, 506 (1977) (right to live with members of one's extended family in single-family zone); Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (law which forbad use of contraceptives held unconstitutional because it had a "maximum destructive impact upon [the marital] relationship"); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (marriage and procreation were fundamental rights, justifying strict scrutiny); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (right of parents and guardians to direct the upbringing and education of their children); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (right to marry, establish a home and bring up children were among the individual's fundamental liberties); Committee to Defend Reproductive Rights v. Myers, 29 Cal. 3d 252, 284, 625 P.2d 779, 798, 172 Cal. Rptr. 866, 885 (1981) (the decision whether to bear a child is explicitly protected by the right of privacy provision contained in the California Constitution); Atkisson v. Kern County Hous. Auth., 59 Cal. App. 3d 89, 98, 130 Cal. Rptr. 375, 380-81 (1976) (the right to privacy includes the right of a parent to live with his or her child). *See also* Whalen v. Roe, 429 U.S. 589, 599-600 (1977) (characterizing the right of privacy as (1) an interest in avoiding disclosure of personal matters and (2) an interest in autonomy in making certain important decisions).

49. 13 Cal. 3d 757, 533 P.2d 222, 120 Cal. Rptr. 94 (1975).

50. *Id.* at 774-76, 533 P.2d at 233-34, 120 Cal. Rptr. at 105-06. The court indicated that the driving force behind the privacy amendment was the voters' intent to prevent snooping. Looking to the election brochure, the *White* court identified the primary "mischiefs" to which the provision was directed. They were (1) the secret gathering of personal informa-

In a footnote, however, the *White* court indicated that the general concept of privacy was broad enough to include the privacy of marital relationships, of one's personal library, of one's financial affairs and of the psychotherapist-patient relationship.[51] Thus, the *White* court stated that snooping was the primary reason for amending the constitution, but recognized that the concept of privacy was much more inclusive.[52]

The *Adamson* court adopted a broad reading of *White*.[53] The position taken by the *Adamson* majority was that the constitutional privacy right encompassed not only the right to be free from government snooping, but that, in addition, it protected "an enormously broad and diverse field of personal action and belief."[54] The dissent, however, viewed the *White* decision as laying down the "broad area of concern" to which the constitutional amendment was addressed.[55] Extending the constitutional right beyond protecting individuals from offensive gathering and dissemination of information was, according to the dissent, inconsistent with the holding of *White*.[56]

The *White* decision could be read as consistent with the opinions of both the majority and dissent in *Adamson*. It is significant, however, that the lower courts, after *White*, addressed the right to privacy in expansive terms.

In *Porten v. University of San Francisco*,[57] the court held that an individual's right to privacy was violated when his grades, obtained for one purpose, were released for an unrelated purpose.[58] The court

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tion, (2) the overbroad collection of unnecessary personal information, (3) the use of properly obtained information for an improper purpose and (4) the lack of an adequate check on the accuracy of existing records. *Id.* at 775, 533 P.2d at 234, 120 Cal. Rptr. at 106.

51. *Id.* at 774 n.10, 533 P.2d at 233 n.10, 120 Cal. Rptr. at 105 n.10 (citing Stanley v. Georgia, 394 U.S. 557 (1969) (privacy in one's personal library)); Griswold v. Connecticut, 381 U.S. 479 (1965) (privacy in decision to use contraceptives); *In re* Lifschutz, 2 Cal. 3d 415, 467 P.2d 557, 85 Cal. Rptr. 829 (1970) (privacy of psychotherapist-patient relationship); City of Carmel-By-The-Sea v. Young, 2 Cal. 3d 259, 466 P.2d 225, 85 Cal. Rptr. 1 (1970) (privacy in one's financial affairs)).

52. The *White* court stated that "[a]lthough the full contours of the new constitutional provision have as yet not even tentatively been sketched, we have concluded that the surveillance and data gathering activities challenged in this case do fall within the aegis of that provision." 13 Cal. 3d at 773, 533 P.2d at 233, 120 Cal. Rptr. at 105. *See* note 50 *supra*.

53. 27 Cal. 3d at 129, 610 P.2d at 439, 164 Cal. Rptr. at 542.

54. *Id.* (quoting White v. Davis, 13 Cal. 3d at 774, 533 P.2d at 233, 120 Cal. Rptr. at 105).

55. 27 Cal. 3d at 142, 610 P.2d at 447, 164 Cal. Rptr. at 550 (Manuel, J., dissenting).

56. *See id.* at 142-43, 610 P.2d at 447-48, 164 Cal. Rptr. at 550-51.

57. 64 Cal. App. 3d 825, 134 Cal. Rptr. 839 (1976).

58. *Id.* at 832, 134 Cal. Rptr. at 843. As a result, the demurrer to the plaintiff's complaint was overruled. The complaint had prayed for damages from the University of San Francisco for sending appellant's grades, from another university, to the State Scholarship

noted in dicta that the constitutional amendment was "apparently intended to be an expansion of the privacy right."[59] Quoting from the election brochure, the court stated that "[t]his simple amendment *will extend various court decisions* on privacy to insure protection of our basic rights."[60]

In *Fults v. Superior Court*,[61] the court held that over-broad interrogatories regarding the plaintiff's sexual relations violated her right to privacy. In reaching this conclusion, the court explicitly recognized "a well established 'zone of privacy' [in] one's sexual relations."[62]

Although these cases concerned problems inherent in data gathering and dissemination, the language used by the appellate courts indicated that the right was much broader. Thus, the decisions support the broad reading of *White* adopted by the *Adamson* majority.

In *People v. Privitera*,[63] however, the California Supreme Court appeared to retreat from an expansive reading of the privacy amendment. In *Privitera*, the court held that the right to privacy did not extend to the use of unproven substances in the treatment of cancer. The court stated that to rule otherwise would be unjustified absent evidence that the voters, in amending the constitution, intended such an extension.[64] The *Privitera* decision casts doubt on the lower court's dicta by appearing to limit the scope of the amendment to concerns regarding the gathering and dissemination of information.[65]

The dissent in *Adamson*, relying on *Privitera*, concluded that there

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and Loan Commission despite assurances by U.S.F. that the grades would only be used to evaluate Porten's application for admission. *Id.* at 827, 134 Cal. Rptr. at 840. This case falls within the third mischief mentioned in *White*: improper use of information gathered for another purpose. 13 Cal. 3d at 775, 533 P.2d at 234, 120 Cal. Rptr. at 106.

59. *Id.* at 829, 134 Cal. Rptr. at 841. *See also* Central Valley Chapter of 7th Step Foundation, Inc. v. Younger, 95 Cal. App. 3d 212, 235, 157 Cal. Rptr. 117, 130 (1979) ("The adoption of the amendment [adding the right to privacy] was intended to strengthen the right of privacy.").

60. 64 Cal. App. 3d at 829, 134 Cal. Rptr. at 842. (quoting *Election Brochure*, *supra* note 37, at 28) (emphasis added by the court)). *See generally* notes 45-47 *supra* and accompanying text, and cases cited at notes 48 & 51 *supra*.

61. 88 Cal. App. 3d 899, 152 Cal. Rptr. 210 (1979).

62. *Id.* at 904, 152 Cal. Rptr. at 213 (citing Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965)). Because this case falls within the second mischief mentioned in *White*, overbroad collection of personal information, recognition by the court of an established zone of privacy must be treated as dicta.

63. 23 Cal. 3d 697, 591 P.2d 919, 153 Cal. Rptr. 431, *cert. denied*, 444 U.S. 949 (1979).

64. *Id.* at 709-10, 591 P.2d at 926, 153 Cal. Rptr. at 438. *Cf.* Note, People v. Privitera, 68 CALIF. L. REV. 737, 740 (1980) (*White* did not intend a narrow interpretation of the privacy amendment.); *The Right To Choose*, *supra* note 38, at 235, 237.

65. 23 Cal. 3d at 709-10, 591 P.2d at 926, 153 Cal. Rptr. at 438 (California's privacy right was intended to provide broad protection.).

was also "no evidence of any kind that the voters . . . intended to establish a 'right to live with whomever one wishes or, at least, to live in an alternat[e] family.' "[66] To further their position, the dissenters noted that in *People v. Davis*[67] the court of appeal held that the right to privacy did not encompass the right to use cocaine.[68] The court in *Davis* stated that "[t]he *Privitera* court reaffirmed its view of the California Constitution's right of privacy provision as being intended to protect a very limited privacy concern, that is, to prevent encroachment upon personal freedom and security caused by increased surveillance and data collection activity."[69]

The *Adamson* majority did not discuss *Privitera*, nor did it explain

66. 27 Cal. 3d at 143, 610 P.2d at 448, 164 Cal. Rptr. at 551 (Manuel, J., dissenting) (quoting *id.* at 130, 610 P.2d at 439-40, 164 Cal. Rptr. at 542-43 (majority opinion)). The dissent also noted that "[t]he necessary condition precedent to the application of strict scrutiny, and the search for a 'compelling state interest' which it entails, is the determination that the right at stake is one lodged in the fabric of our Constitution." *Id.* at 142, 610 P.2d at 447, 164 Cal. Rptr. at 550. The dissent posited that the majority had proceeded "too hastily" in finding that the appellants had a right to privacy under the California Constitution. "The relevant authorities . . . do not support the conclusion that 'the right to live with whomever one wishes or, at least, to live in an alternat[e] family with persons not related by blood, marriage, or adoption' is one enjoying of that status." *Id.* (quoting *id.* at 130, 610 P.2d at 439-40, 164 Cal. Rptr. at 542-43 (majority opinion)).

67. 92 Cal. App. 3d 250, 154 Cal. Rptr. 817 (1979).

68. *Id.* at 261, 154 Cal. Rptr. at 823.

69. *Id.* at 260, 154 Cal. Rptr. at 823. However, two of the three justices in *Davis* criticized the holding of *Privitera*. Presiding Justice White stated that:

> I have concluded that Justice Scott with his customary acumen has correctly stated the *Privitera* court's view that California's right of privacy was intended 'to prevent encroachment upon personal freedom and security caused by increased surveillance and data collection activity.' However, I do not understand this to be necessarily Justice Scott's personally held view as to the metes and bounds of the right of privacy. It is certainly not my view. . . . I continue to read and understand what our Supreme Court in *White v. Davis* [citation omitted] recognized, that 'the general concept of privacy relates, of course, to an enormously broad and diverse field of personal action and belief . . . .' I agree with the observation of our Chief Justice in her dissent in *Privitera*, '[t]he right of privacy is a concept of as yet undetermined parameters.'

*Id.* at 261, 154 Cal. Rptr. at 823.

Justice Halvonik was of the view that the case before the court should have been disposed of by citation to *Privitera*. Everything else in Justice Scott's opinion was characterized by Justice Halvonik as dicta:

> Some of the majority's dicta . . . distresses me. . . .
>
> I am distressed by the implication . . . that the right to privacy guaranteed by article I, section 1 of the California Constitution is essentially directed at data gathering. . . . *White* did not invite us to concentrate on the single set of facts there under consideration but to look to the brochure. . . . The argument contained in that brochure incorporates the conceptual structure of *Griswold v. Connecticut* (citation omitted) and the dissent of Justice Brandeis in *Olmstead v. United States*
>
> . . . .
>
> 'The most comprehensive of rights,' it should go without saying, is profoundly concerned with more than surveillance and data gathering.

the apparent shift from the *Privitera* court's interpretation of the right to privacy.[70] Once it is realized that the California privacy amendment incorporated existing privacy rights, however, the cases are consistent. In discussing the right under the federal constitution, the *Privitera* court recognized an established privacy right in making "important decisions" involving " 'matters relating to marriage, procreation, contraception, *family relationships*, and child rearing and education.' "[71] The court noted that the right had never included decisions involving medical treatment.[72] *Adamson*, unlike *Privitera*, dealt with family relationships. The right of privacy in one's family and home is an area which had already gained judicial recognition.[73] Reading *Privitera* and *Adamson* together, it is clear that a majority of the California Supreme Court is inclined to find a fundamental privacy right in an area which has been judicially recognized, but is not willing to extend the right beyond such established areas. Thus, *Adamson* is consistent with the legislative history of the privacy amendment and with precedent.

3. Application of the court's reasoning to the alternate family

Having concluded that the right to privacy encompassed decisions involving one's family and home, the question remaining before the *Adamson* court was whether the appellants' "alternate family" was entitled to similar protection. In addressing this issue, the *Adamson* majority noted the parallels between the Adamson household and a traditional family. The court stated that the appellants regarded themselves as a family.[74] Some of the members of the Adamson family had children who regularly visited.[75] When the children visited, they enjoyed the benefits of the quiet residential area in which the appellants lived. The court also noted that the appellants were a "close group with social, economic, and psychological commitments to each other."[76] Like any other family, they shared common responsibilities,

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*Id.* at 262-63, 154 Cal. Rptr. at 824.

It thus appears that the court in *Davis*, in an appropriate situation, would have given the right to privacy force beyond the narrow concern argued for by the *Adamson* dissent.

70. Justices Tobriner and Mosk signed the majority opinions in both *Privitera* and *Adamson*, although the cases appear to support contradictory interpretations of the scope of California's privacy right.

71. 23 Cal. 3d at 702, 591 P.2d at 922, 153 Cal. Rptr. at 434 (emphasis added) (citation omitted).

72. *Id.*

73. *See* note 48 *supra* and accompanying text.

74. 27 Cal. 3d at 128, 610 P.2d at 438, 164 Cal. Rptr. at 541.

75. *Id.* at 127, 610 P.2d at 438, 164 Cal. Rptr. at 541.

76. *Id.*

rotated chores, shared expenses and contributed to the upkeep and improvement of the house.[77] They ate their evening meals together and shared their leisure time with one another.[78] The group enjoyed the benefits of mutual "[e]motional support and stability."[79] The court concluded that the appellants were a family.[80] As such, their association was protected by the privacy amendment.[81]

Thus, the conclusion that the Adamson household was a family flowed from the facts of the case. In addition, the court questioned whether the right to live with whomever one wished was constitutionally protected,[82] but did not answer this question. It is not clear from the *Adamson* decision what factors would be critical to this determination. But the answer would appear to depend, as it did in *Adamson*, upon the facts of the case. When a zoning ordinance is drafted in terms of a single family zone, whether an unrelated group could live in that zone should depend on how closely the group resembles a family.

In this regard, the court suggested two possible factors to aid in a determination of whether such a group shares the characteristics of a family. The first is whether the group is a "close group with social, economic, and psychological commitments to each other,"[83] and the second whether "[e]motional support and stability are provided by the members to each other . . . ."[84] These factors do not lend themselves to generalization. It is apparent, however, that the court was looking to the underlying values which motivated each decision on the part of particular unrelated individuals to live with one another. The more closely the values pursued resemble those of a traditional family, the more likely the decision to live together will be protected by the right to privacy.[85]

Therefore, *Adamson* is not a radical departure from existing pri-

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 128, 610 P.2d at 438, 164 Cal. Rptr. at 541.

81. The *Adamson* court, while recognizing that the issue before it was whether the right of privacy included the right to live in an alternate family, *id.* at 130, 610 P.2d at 439-40, 164 Cal. Rptr. at 542-43, never directly answered this question. Rather, the court simply went on to address whether the ordinance "truly and substantially" effected the city's goals. *See id.* at 131-34, 610 P.2d at 440-42, 164 Cal. Rptr. at 543-45. However, the application of a strict standard of review necessarily presupposes that the right of privacy was implicated. *Id.* at 142, 610 P.2d at 447, 164 Cal. Rptr. at 550 (Manuel, J., dissenting).

82. *Id.* at 130, 610 P.2d at 439-40, 164 Cal. Rptr. at 542-43.

83. *Id.* at 127, 610 P.2d at 438, 164 Cal. Rptr. at 541.

84. *Id.*

85. *See* notes 119-26 *infra* and accompanying text.

vacy cases. Under *Adamson* unrelated individuals cannot live wherever they wish. Rather, in order to be able to invoke the right to privacy, they must demonstrate that their decision was motivated by certain important values.

### *B. An Alternative to the "Rule-of-Five"*

Because the right to privacy encompassed the right to live in an alternate family,[86] the *Adamson* court placed upon the city the burden of showing that the ordinance was "justified by a compelling public interest."[87] Yet, the court never addressed the issue of whether the goals of the zoning ordinance expressed such an interest. Instead, the court implicitly accepted that the goals underlying the establishment of single-family zones met this requirement[88] and went on to address the issue of whether the "ordinance's rule-of-five truly and substantially help[ed] effect those goals."[89]

The court concluded that the city's goals were not effectuated by the rule-of-five. The court was unpersuaded that "a close group with social, economic, and psychological commitments to each other"[90] would have an adverse affect on the residential environment of the Riviera. The court rejected the city's argument that the rule-of-five had the effect of maintaining population density because traditional families have a natural limit on size.[91] The court stated that the city had not shown that unrelated groups did not also have a natural limit.[92] Moreover, had such a showing been made, the ordinance still only regulated unrelated groups while leaving overcrowded related groups uncontrolled.[93] The court also held that the ordinance was an inappropriate solution to the problems of increased noise, traffic and parking[94] because in a more mobile modern society, traditional families were as likely to generate as much noise, traffic and parking problems as were unrelated groups.[95]

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86. *See* note 81 *supra*.

87. *Id.* at 131, 610 P.2d at 440, 164 Cal. Rptr. at 543.

88. *Id.* at 131-32, 610 P.2d at 440-41, 164 Cal. Rptr. at 543-44. The goals of the city were preservation of an area's residential environment, low density, and the essential characteristics which make that area suitable for family life. *See* note 25 *supra* and accompanying text.

89. 27 Cal. 3d at 132, 610 P.2d at 441, 164 Cal. Rptr. at 544. *See* note 22 *supra* and accompanying text.

90. 27 Cal. 3d at 127, 610 P.2d at 438, 164 Cal. Rptr. at 541.

91. *Id.* at 132, 610 P.2d at 441, 164 Cal. Rptr. at 544.

92. *Id.*

93. *Id.*

94. *Id.* at 133, 610 P.2d at 441, 164 Cal. Rptr. at 544.

95. *Id.*

It is clear from the court's reasoning that the rule-of-five was both over and underinclusive. It allowed related groups to live in the district even though they were detrimental to its residential character. At the same time, it excluded unrelated groups who sought to emulate the values which Santa Barbara wanted to accommodate.

The court suggested that "a concept more rationally and substantially related to the legitimate aim of maintaining a family style of living"[96] would be to define single-family dwellings as a " 'reasonable number of persons constituting a *bona fide* housekeeping unit.' "[97] The term *bona fide* housekeeping unit implies use of a common area by all of the residents.[98] It also implies that the use is not merely institutional or organizational.[99] The ordinance would then focus on the use without reference to whether the residents are a family.

Thus, a house physically divided between two couples would not constitute a single housekeeping unit because it lacks mutual use of the common areas.[100] Use of a residence as a boarding house would fail to meet the definition because of its institutional nature, and a fraternity house would not meet the requirement because of its organizational character.[101] The members of such groups are also transient in nature with new members replacing old ones periodically.[102] In each case, however, it is the nature of the use of a dwelling, rather than the relationships among the residents, which makes such uses objectionable.[103]

The *Adamson* court implied that if a single housekeeping unit were not involved, the city could regulate or prohibit the use.[104] Thus, while at one point in its opinion the *Adamson* court suggested that California's privacy right might "comprehend the right to live with whomever one wish[ed],"[105] it qualified this right when it accepted the idea that the setting up of single family zones was a compelling public inter-

96. *Id.* at 133-34, 610 P.2d at 442, 164 Cal. Rptr. at 545.

97. *Id.* at 134, 610 P.2d at 442, 164 Cal. Rptr. at 545. (citation omitted). *See also* Comment, *"Burning the House to Roast the Pig": Unrelated Individuals and Single Family Zoning's Blood Relation Criterion*, 58 CORNELL L. REV. 138 (1972). The author of this comment supports use of the concept of a single housekeeping unit.

98. *See* Brady v. Superior Court, 200 Cal. App. 2d 69, 77-78, 19 Cal. Rptr. 242, 247 (1962) (defining the term "single family dwelling" as used in a zoning ordinance).

99. *See id.* at 78, 19 Cal. Rptr. at 248.

100. *See id.* at 77, 19 Cal. Rptr. at 247.

101. *See id.* at 78, 19 Cal. Rptr. at 248.

102. Moore v. City of East Cleveland, 431 U.S. 494, 519 (1977) (Stevens, J., concurring).

103. 27 Cal. 3d at 133-34, 610 P.2d at 442, 164 Cal. Rptr. at 545.

104. *See id. See also* Moore v. City of East Cleveland, 431 U.S. at 515-19 (Stevens, J., concurring) (suggesting the scope of the term "single family dwelling"); Brady v. Superior Court, 200 Cal. App. 2d 69, 19 Cal. Rptr. 242 (1962) (same proposition as *Moore*).

105. 27 Cal. 3d at 130, 610 P.2d at 439-40, 164 Cal. Rptr. at 542-43. The court found it

est.[106] It would thus appear from the court's reasoning that a city could place restrictions upon the right of a person to live with whomever she wished in a single family zone.

The recent Connecticut case of *Prospect Gardens Convalescent Home, Inc. v. City of Norwalk*[107] is illustrative of how the standard of the single housekeeping unit has been applied. The ordinance in *Prospect Gardens* defined a family as "any number of individuals living and cooking together as a single housekeeping unit."[108] The plaintiff owned three homes. The occupants of the houses were twenty-eight to thirty-one of the plaintiff's employees. The plaintiff sought to compel Norwalk's zoning inspector to issue approval of repairs which were ordered by the fire marshal. The inspector refused, contending that the plaintiff was running an unlicensed boarding house, an illegal use in a single family zone. The plaintiff argued that the occupants of the houses were a family within the meaning of the statute, and that therefore, the use was not illegal.

The Connecticut Court of Common Pleas held that the occupants were not a single housekeeping unit within the meaning of the zoning ordinance.[109] The court noted that the employees worked different shifts and paid rent to the plaintiff as individuals. They were not related, did not eat meals together, and did not share any factors of "cohesiveness or . . . unitary living . . . which would qualify [them] for classification as a 'single housekeeping unit'."[110]

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unnecessary to decide whether California's privacy right was this broad because it found that appellants were an alternate family. *See* notes 144-46 *infra* and accompanying text.

106. *Id.* at 131-32, 610 P.2d at 440-41, 164 Cal. Rptr. at 543-44.

107. 32 Conn. Supp. 214, 347 A.2d 637 (1975). While the question of whether a fundamental right was violated was not at issue in *Prospect Gardens*, this case is included for its interpretation of a single housekeeping unit.

108. *Id.* at 217, 347 A.2d at 640. In 1974, the ordinance was amended to define a family as "[o]ne . . . or more persons occupying a single dwelling unit, provided that unless all members are related by blood or marriage (or adoption), no such family shall contain more than five . . . persons." *Id.*, 347 A.2d at 639. The validity of this amendment was not an issue before the court. *See id.* at 218-19, 347 A.2d at 640.

109. *Id.* at 220, 347 A.2d at 641.

110. *Id.* at 219, 347 A.2d at 640. Unlike the appellants in *Adamson*, the decision of the employees to live together was not for the benefits of family style living. Rather, it appears that the decision was motivated solely by economics and by convenience. The rooms were close to work, and rented for only $16.60 a week. This does not appear to be a matter of intimate choice to which the right to privacy should be extended. *Cf.* Association For Educ. Dev. v. Hayward, 533 S.W.2d 579 (Mo. 1976). In *Hayward*, the appellants challenged a zoning ordinance which defined family in terms of biological and legal relationships, arguing that the ordinance violated their freedom of religion. The appellants were a group of persons living together because of their religious beliefs. The court upheld the ordinance. Under the rationale of *Adamson*, the right to privacy would probably have been extended to

Within the framework of a single housekeeping unit, a city could further its legitimate goals by non-discriminatory police power regulations. The *Adamson* court noted that a city could, for example, preserve the residential character of an area by regulating transient and institutional uses.[111] Low population density could be maintained, the court concluded, by regulating with reference to the floor space or facilities.[112] Finally, the court stated that the city could pursue regulations designed to control noise, traffic and parking problems.[113]

The Adamson household would not be excluded from the zone under such a regulatory scheme. The court in *Adamson* noted that the appellants constituted a single housekeeping unit.[114] There was no overcrowding in the house in which they lived,[115] nor could they be characterized as a nuisance to other residents of the Riviera. Their house was hidden from the street, and had off-street parking for at least twelve cars.[116] The appellants presented no greater burden or infringement on their neighbors than would any large family.[117] If a single-family dwelling is defined in terms of a *bona fide* single housekeeping unit, then there is no room for the distinction between traditional and alternate families which characterized the Santa Barbara ordinance.[118]

Other unrelated groups which do not claim to be a family would also benefit from such a definition of single-family dwelling. Such groups would not be required to demonstrate that they are entitled to be protected under the right to privacy, but only that they are a single housekeeping unit within the meaning of the zoning ordinance.

The *Adamson* court also implied that, as long as a group pursues the values of family living,[119] there is no basis for discriminating against them in favor of traditional families. The court cited with ap-

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protect their lifestyle decision, because they were a single housekeeping unit and were seeking the benefits of a family lifestyle.

111. 27 Cal. 3d at 133, 610 P.2d at 441-42, 164 Cal. Rptr. at 544-45.

112. *Id.*

113. *Id.*

114. *Id.* at 128, 610 P.2d at 438, 164 Cal. Rptr. at 541.

115. *Id.*

116. *Id.*

117. *Id.* The court noted:

> Appellants have built a wall around part of the property and a new, private driveway to help isolate them from neighbors' houses. There is no evidence of overcrowding though, after appellants had arrived, some neighbors did notice a larger number of cars parked on the property and an understandable increase in the number of residents.

*Id.*

118. *See id.* at 133-34, 610 P.2d at 442, 164 Cal. Rptr. at 545.

119. *Id.*

proval the New York case of *City of White Plains v. Ferraioli*.[120] In *Ferraioli*, the New York Court of Appeals was faced with the question of whether a couple with two natural children and ten foster children[121] living in a dwelling located in a single-family zone had violated the city's zoning ordinance.[122]

The *Ferraioli* court recognized that devoting districts to preserve family or youth values was a proper purpose of zoning.[123] Yet, the defendant's "group home" was neither a temporary nor a non-traditional living arrangement. The very purpose of the home was to "emulate the traditional family and not to introduce a different 'life style.' "[124] The court concluded that "[s]o long as the group home bears the generic character of a family unit as a relatively permanent household, and is not a framework for transients or transient living, it conforms to the purpose of the ordinance."[125]

In sum, there is no basis for distinguishing between unrelated and traditional family households, when both are single housekeeping units. The unrelated household which shares the " 'generic character of a family . . .' should be equally as entitled to occupy a single family dwelling as its biologically related neighbors."[126] Both households may be subject to non-discriminatory regulations to control problems of population density, noise, congestion and morality.[127] Thus, this regulatory scheme should allow a city to pursue legitimate zoning goals, without placing unnecessary restrictions upon individual freedom.

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120. 34 N.Y.2d 300, 313 N.E.2d 756, 357 N.Y.S.2d 449 (1974).

121. Of the ten children, seven were siblings and three were unrelated youngsters. The house was leased by Abbott House, a non-profit corporation licensed by the state to care for neglected and abandoned children. Abbott House hired the couple who cared for the children. Salary and all household expenses were paid by Abbott House with substantial funding by the City of New York. *Id.* at 303-04, 313 N.E.2d at 757, 357 N.Y.S.2d at 451.

122. The ordinance defined a family as "one or more persons limited to the spouse, parents, grandparents, grandchildren, sons, daughters, brothers or sisters of the owner or the tenant . . . living together as a single housekeeping unit with kitchen facilities." *Id.* at 304, 313 N.E.2d at 758, 357 N.Y.S.2d at 451. The issue presented in *Ferraioli* was whether the defendant's "group home" fit within the definition. *Id.* at 303, 313 N.E.2d at 757, 357 N.Y.S.2d at 451.

123. The court stated:

> Hence, toward that end [zoning for youth and family values] those uses which conflict with a stable, uncongested single family environment may be restricted. High density uses, for example, may be restricted; so too those uses which are associated with occupancy by numbers of transient persons may be limited.

*Id.* at 305, 313 N.E.2d at 758, 357 N.Y.S.2d at 452.

124. *Id.*

125. *Id.* at 305-06, 313 N.E.2d at 758, 357 N.Y.S.2d at 453.

126. 27 Cal. 3d at 134, 610 P.2d at 442, 164 Cal. Rptr. at 545-46 (quoting City of White Plains v. Ferraioli, 34 N.Y.2d at 306, 313 N.E.2d at 758, 357 N.Y.S.2d at 453).

127. *See* 27 Cal. 3d at 132-33, 610 P.2d at 441-42, 164 Cal. Rptr. at 544-45.

### C. The Federal Privacy Cases

The *Adamson* court rested its decision squarely on the state constitution, with only a passing reference to United States Supreme Court privacy cases.[128] In doing so, the majority stated that the California right to privacy appeared to be broader than that provided by the federal constitution.[129] In addition, the *Adamson* court noted that it was dealing with a case of first impression in California.[130] Two federal cases, *Village of Belle Terre v. Boraas*[131] and *Moore v. City of East Cleveland*,[132] however, have addressed issues similar to those presented in *Adamson*. The *Adamson* decision can be read consistently with these cases. Thus, *Adamson* suggests a basis for giving greater protection under the federal right to privacy to an individual's decision to live with unrelated persons.

In *Village of Belle Terre v. Boraas*[133] the United States Supreme Court was faced with a zoning ordinance very similar to the one at issue in *Adamson*.[134] The Court summarily dismissed the argument made by three cohabitating students that the ordinance violated federal privacy rights.[135] The Court stated that what was under consideration was merely economic and social legislation in which the legislature had to draw lines between what was permissible and what was not.[136] The Court held that it would respect the legislative judgment as long as the ordinance was reasonable and bore a rational relationship to a proper legislative objective.[137]

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128. *See id.* at 130 n.3, 610 P.2d at 440 n.3, 164 Cal. Rptr. at 543 n.3. The court, in prior cases, had recognized that in the area of "fundamental civil liberties" protected by the declaration of rights in article I, section 1, the first reference should be to California law. *Privitera*, 23 Cal. 3d at 726, 591 P.2d at 937, 153 Cal. Rptr. at 449 (Bird, C.J., dissenting). Federal cases are to be treated as persuasive authority, but are not to be followed if they provide less protection than California law. *Id.*

129. 27 Cal. 3d at 130 n.3, 610 P.2d at 440 n.3, 164 Cal. Rptr. at 543 n.3.

130. *Id.* However, *Privitera* suggests that the court will consider whether the "important decision" at issue is within an area previously protected. *See* notes 70-73 *supra* and accompanying text.

131. 416 U.S. 1 (1974).

132. 431 U.S. 494 (1977).

133. 416 U.S. 1 (1974).

134. "The word 'family' as used in the ordinance means, '[o]ne or more persons related by blood, adoption, or marriage, living and cooking together as a single housekeeping unit, . . . . A number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit . . . .'" *Id.* at 2.

135. *Id.* at 7-8.

136. *Id.* at 8.

137. *Id.* The Court's approach in *Belle Terre* is consistent with its prior decisions involving land use regulation. The only limitation placed on the legislature is that the regulation not be "clearly arbitrary and unreasonable, having no substantial relation to the public

The Court in *Belle Terre* held that the police power may properly be used to "lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people."[138] A limit on the number of unrelated persons who may live together was reasonable in relation to this goal because it excluded "boarding houses, fraternity houses, and the like [which] present urban problems."[139] The Court treated the ordinance as a proper solution to the problems of more people occupying a given space; of more cars continuously passing by; of more cars being parked; of more noise which travels with crowds.[140]

In a footnote, the *Adamson* majority questioned whether *Belle Terre* still enunciates federal law.[141] In the same footnote, the *Adamson* court cited favorably to the *Belle Terre* dissent, where it was argued that the decision of "whether a person's 'intellectual and emotional needs' are best met by living with family, friends, professional associates, or others—involves deeply personal considerations as to the kind and quality of intimate relationships within the home."[142] Such decisions, the dissent in *Belle Terre* concluded, should fall within the right to privacy protected by the Federal Constitution.[143]

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health, safety, morals, or general welfare." Village of Euclid v. Amber Realty Co., 272 U.S. 365, 395 (1926). In Berman v. Parker, 348 U.S. 26, 33 (1954), the Court illustrated the scope of this standard by finding a proper legislative purpose in developing a better balanced and more attractive community. The Court in *Berman* thus sustained the condemnation of land in the District of Columbia for the purpose of ridding the area of slums and creating a more attractive and balanced community. Given this judicial deference to legislative judgment, little, if any, protection for the individual can be expected.

138. 416 U.S. at 9.

139. *Id.*

140. *Id.*

141. 27 Cal. 3d at 130 n.3, 610 P.2d at 440 n.3, 164 Cal. Rptr. at 543 n.3. For a discussion of *Belle Terre*, *see* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-18, at 975-80; § 15-21 at 990 n.30 (1978), arguing that the decision could be understood in terms of the transiency of the residents or in terms of the lack of enduring relationships between the student occupants; Comment, *A Taxonomy of Privacy: Repose, Sanctuary and Intimate Decision*, 64 CALIF. L. REV. 1447, 1470 (1976), stating that behind the court's decision "in *Belle Terre* was the unspoken recognition that the intimate decision at issue was merely a foundation for a lifestyle associated with many other decisions that were certainly not private, and almost all of which were antithetical to the majority views of the community."; *Developments in the Law - Zoning*, 91 HARV. L. REV. 1427, 1572 (1978), arguing, *inter alia*, that the "*Boraas* household was apparently the product simply of the students' desire to live together, and not of serious economic hardship or the loss of a crucial family member."

142. 27 Cal. 3d at 130 n.3, 610 P.2d at 440 n.3, 164 Cal. Rptr. at 543 n.3 (quoting *Belle Terre*, 416 U.S. at 16 (Marshall, J., dissenting)).

143. 416 U.S. at 16-17 (Marshall, J., dissenting). *See also* Eichbaum, *Towards an Autonomy-Based Theory of Constitutional Privacy: Beyond the Ideology of Familial Privacy*, 14 HARV. C.R.-C.L. L. REV. 361 (1979), arguing that the right to privacy should not be based on the narrow familial privacy model.

In citing to the dissent in *Belle Terre*, the *Adamson* court suggested that the right to privacy protected by California's constitution may be broad enough to protect the choice to live with whomever one wished. The majority stated that the voters, in enacting the constitutional amendment, had intended to protect not only one's familial decision, but also decisions concerning the home.[144] If so, then the composition of the home is a decision which may be protected by California's privacy right. However, the court avoided answering this broader question by characterizing the appellants as an alternate family,[145] thus bringing their decision to live together under the privacy umbrella.[146] The students in *Belle Terre*, unlike the Adamson household, were apparently planning to live together only temporarily and lacked enduring familial ties.[147]

Illustrative of the protection afforded to the family by the Federal Constitution is the decision in *Moore v. City of East Cleveland*.[148] In *Moore*, the appellants challenged a zoning ordinance which prohibited them from living together in a single family residential zone.[149] That ordinance, unlike the one in *Belle Terre*, excluded certain members of the extended biological family from the definition of family. As a result, Ms. Moore was in violation of the ordinance because she lived with her son and two grandsons, who were first cousins rather than brothers.

In *Moore*, four justices regarded the extended family as deserving

144. 27 Cal. 3d at 130, 610 P.2d at 439, 164 Cal. Rptr. at 542 (footnote omittted).

145. *Id.* at 128, 610 P.2d at 438, 164 Cal. Rptr. at 541.

146. *See* notes 74-81 *supra* and accompanying text.

147. *See* note 141 *supra*.

148. 431 U.S. 494 (1977).

149. The ordinance provided:

'Family' means a number of individuals related to the nominal head of the household or to the spouse of the nominal head of the household living as a single housekeeping unit in a single dwelling unit, but limited to the following:
(a) Husband or wife of the nominal head of the household.
(b) Unmarried children of the nominal head of the household or of the spouse of the nominal head of the household, provided, however, that such unmarried children have no children residing with them.
(c) Father or mother of the nominal head of the household or of the spouse of the nominal head of the household.
(d) Notwithstanding the provisions of subsection (b) hereof, a family may include not more than one dependent married or unmarried child of the nominal head of the household or of the spouse of the nominal head of the household and the spouse and dependent children of such dependent child. For the purpose of this subsection, a dependent person is one who has more than fifty percent of his total support furnished for him by the nominal head of the household and the spouse of the nominal head of the household.
(e) A family may consist of one individual.

*Id.* at 496 n.2.

of special protection.[150] The plurality opinion characterized the ordinance as an "intrusive regulation of the family," and stated that the rule of *Belle Terre*, with its deference to legislative judgments, did not govern.[151] The Court concluded that "when the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation."[152]

The Court stated that the governmental goals of preventing overcrowding, traffic and parking congestion, and financial burdens on the school system were legitimate.[153] The Court held, however, that the ordinance was too broad in its sweep and only marginally served these goals.[154]

The Court's concern in *Moore* was with the government's unneces-

150. Justice Powell announced the judgment of the Court in which Justices Brennan, Marshall and Blackmun joined. Justice Brennan filed a concurring opinion in which Justice Marshall joined. Justice Stevens filed an opinion concurring in the judgment, but resting on grounds other than the right to privacy. Justices Stewart, Rehnquist, White and Chief Justice Burger dissented, arguing that the right to privacy should not be extended.

151. 431 U.S. at 499. *See* Comment, *The Collision of Zoning Ordinances and the Constitutional Rights of Privacy and Association: Critique and Prognosis*, 30 CASE W. RES. L. REV. 155, 161-64 (1979) [hereinafter cited as *Collision*], where the author gives a history of state court reactions to attempts by government to control the internal composition of groups living in single family dwellings.

152. 431 U.S. at 499.

153. *Id.* at 499-500. While the Court accepted the goals of single family zoning as legitimate, it did not decide whether or not they were compelling. As one commentator has noted:

> *Moore* did not apply a strict scrutiny test . . . . The test applied by the Court in determining whether or not the state regulation of the family is constitutionally infirm leaves ample room for state regulation of family affairs: '[W]hen the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation.' [*Moore*, 431 U.S. at 499.] *Moore* does not hold that the governmental interests urged must be compelling. Nor is it clear that a weighing of the interests urged is required. The Court never reached that issue because it found that the means adopted did not serve the ends championed.

Jensen, *From* Belle Terre *to* East Cleveland: *Zoning, the Family, and the Right of Privacy*, 13 FAM. L. Q. 1 (1979) [hereinafter cited as Jensen].

154. The Court noted:

> For example, the ordinance permits any family consisting only of husband, wife, and unmarried children to live together, even if the family contains a half dozen licensed drivers, each with his or her own car. At the same time it forbids an adult brother and sister to share a household, even if both faithfully use public transportation. The ordinance would permit a grandmother to live with a single dependent son and children, even if his school-age children number a dozen, yet it forces Mrs. Moore to find another dwelling for her grandson John, simply because of the presence of his uncle and cousin in the same household.

*Id.* at 500.

sary interference with intimate family decisions. The Court noted that protection of personal choice in familial decisions was not a new concept,[155] and rested its determination on history and tradition.[156] It is through the family that a society's values, moral and cultural, are passed on from one generation to the next. A concurring opinion[157] expressed a broader concern, lamenting that the ordinance displayed "a depressing insensitivity toward the economic and emotional needs of a very large part of our society."[158]

The *Adamson* decision is consistent with *Moore*. The *Adamson* majority noted that the appellants were like a traditional family, in terms of the values they pursued in their decision to associate.[159] They gave each other emotional support and stability, enjoyed the economic advantages inherent in family living, and developed social, economic and psychological commitments to each other.[160] Because the appellants pursued these values, the *Adamson* court held that they should be treated like a family.[161]

The *Adamson* court's approach is better reasoned than that which has been used by the United States Supreme Court. In *Belle Terre* and in *Moore*, the Court held that the decision of biologically related individuals to live together is protected by the right to privacy, while the decision to live with unrelated individuals is not.[162] An unrelated group, however, may seek the same values as a related group. Thus,

155. *Id.* at 499 (and cases cited therein). *See Collision*, *supra* note 151, at 171-78; Jensen, *supra* note 153, at 9-10, where Jensen argued that while cases prior to *Moore* had stated "a principle of protecting the family," *Moore* raised that principle to a constitutional dimension; Note, *Constitutionally Protected Notions of Family*: Moore v. City of East Cleveland, 19 B.C. L. REV. 959, 973 (1978), stating that *Moore* was both a synthesis and an extension of earlier cases.

156. 431 U.S. at 503-05. The Court stated that its prior "decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." *Id.* at 503. *See also Collision*, *supra* note 151, at 171-78, and Note, Moore v. City of East Cleveland, Ohio: *The Emergence of the Right of Family Choice in Zoning*, 5 PEPPERDINE L. REV. 547, 571-72 (1978), where the author discusses the possible extension of *Moore* to include unrelated "families."

157. Justice Brennan joined in the plurality opinion and stated "I write only to underscore the cultural myopia of the arbitrary boundary drawn by the East Cleveland ordinance in light of the tradition of the American home that has been a feature of our society since our beginning as a Nation . . . ." *Id.* at 507 (Brennan, J., concurring).

158. *Id.* at 507-08. The "poor and deprived minorities of our society" were analogized to the generations of Americans for whom the extended family was a source of social services, economic and emotional support. *Id.* at 508.

159. 27 Cal. 3d at 128, 610 P.2d at 438, 164 Cal. Rptr. at 541.

160. *Id.* at 127, 610 P.2d at 438, 164 Cal. Rptr. at 541.

161. *Id.* at 128, 610 P.2d at 438, 164 Cal. Rptr. at 541.

162. 416 U.S. at 9; 431 U.S. at 499.

recognition of a fundamental right should not rest upon a criterion such as blood relationship.

In deciding *Moore*, the United States Supreme Court articulated certain values which make the traditional family worthy of protection under the federal right to privacy.[163] While the *Adamson* decision is consistent with federal precedent protecting the family, the *Adamson* court went one step further. The court recognized that if the values which make a traditional family worthy of protection are involved in one's decision to live in an alternate family, then that decision should also be elevated to the status of a fundamental right. By following the lead of *Adamson*, the United States Supreme Court could reaffirm its holding that the right to privacy protects important individual decisions,[164] and not just biological relationships.

## V. CONCLUSION

The California Supreme Court, in deciding *Santa Barbara v. Adamson*, asserted that California's constitutional right to privacy is not limited to the dangers of mass gathering and dissemination of information by government and business. The right also includes the right to privacy in one's family and home. Prior to *Adamson*, this right had only been recognized for traditional families. *Adamson*, therefore, represents an extension of the right. Under *Adamson* the choice to live in an alternate family is also protected. A person may now reside in a single family zone and enjoy the benefits of such residential areas even though he chooses to live in an alternate family.

The reasons for extending the right to privacy to the alternate family are clear. It is through our family life that our "most cherished values, moral and cultural"[165] are preserved, shared and passed on. It is from our personal life style choices that we derive both economic and emotional support.[166] As our society changes and becomes more mobile, the way in which familial values are expressed changes. A couple may decide to cohabit rather than marry; a couple may decide that communal living better serves their emotional and economic needs; divorced persons may decide to live together in order that their children might receive more attention. The decision is a personal one, and is so central to the human condition as to be entitled to the status of a fundamental right.

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163. 431 U.S. at 503-05.

164. *E.g.*, Whalen v. Roe, 429 U.S. 589, 599-600 (1976), and cases cited therein.

165. Moore v. City of East Cleveland, 431 U.S. at 504.

166. *See id.* at 508 (Brennan, J., concurring).

The *Adamson* court also recognized that a city has an interest in regulating an area for the benefit of the community. The court suggested that this interest was compelling, and encouraged such regulation. The court required, however, that any ordinance be well reasoned, rather than overly broad in its scope. The court suggested that the city could preserve single-family residential zones by defining a single family in terms of a *bona fide* single housekeeping unit and, within this framework, the city could pass non-discriminatory police regulations.

Thus, the *Adamson* court has reaffirmed the right to privacy as encompassing a broad area of personal action and belief. In so doing, it has indicated that the lower courts must look to the election brochure to determine the proper applications of the privacy amendment. The exact scope of the amendment remains to be seen. What is clear from *Adamson*, however, is that the amendment is not limited to information gathering and dissemination. One area clearly protected is privacy in one's choice of living arrangements, when such arrangements emulate traditional family values.

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