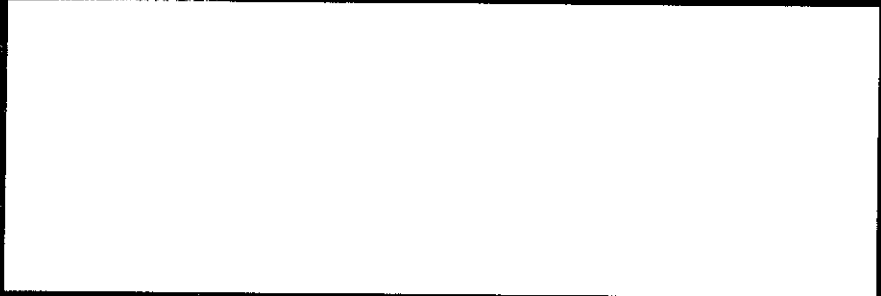
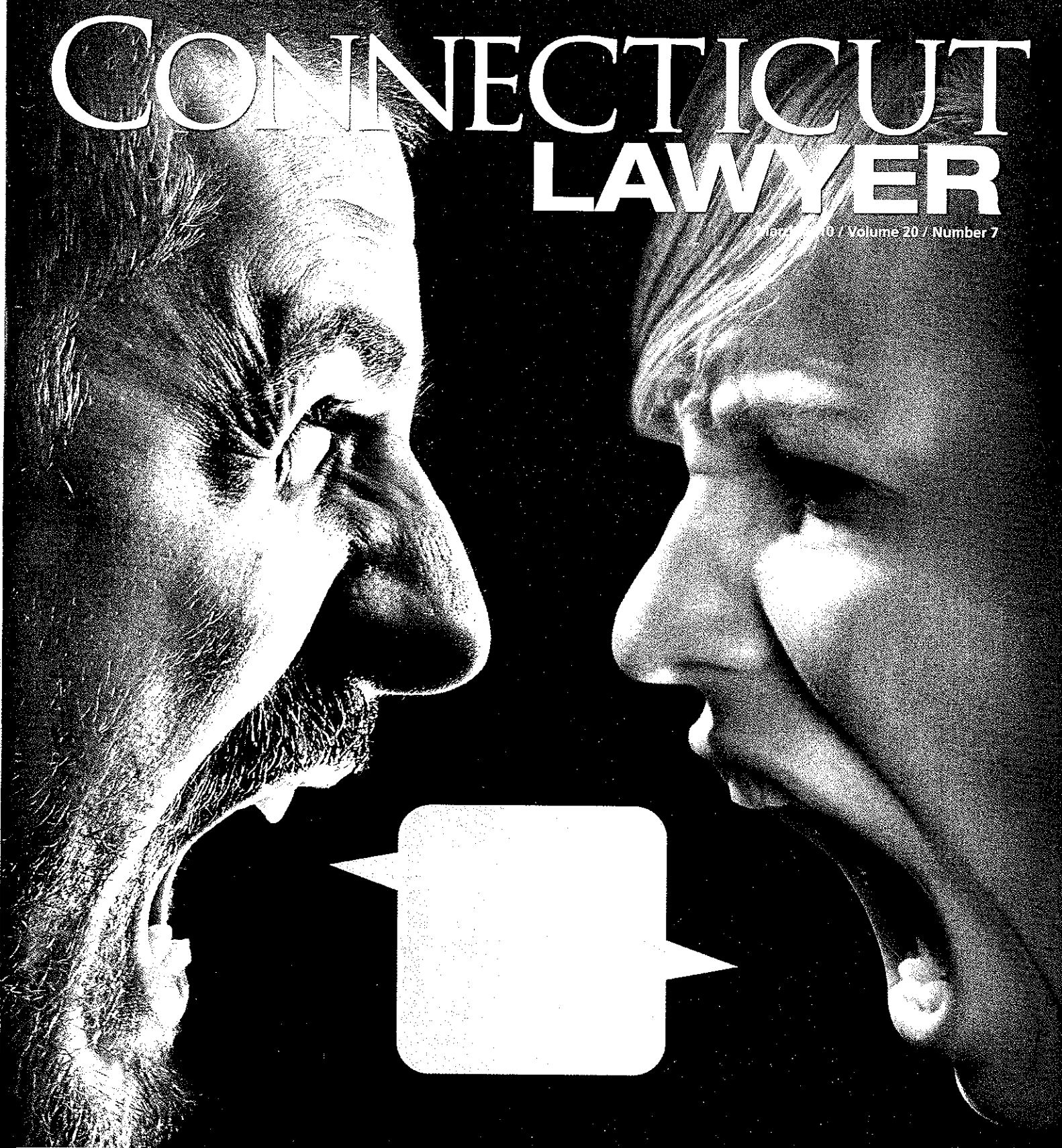
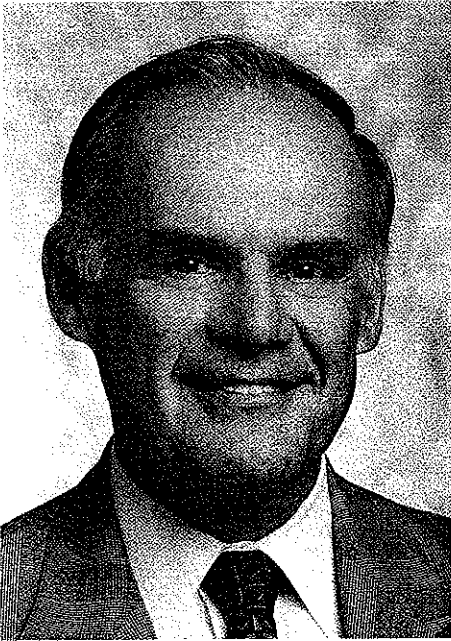
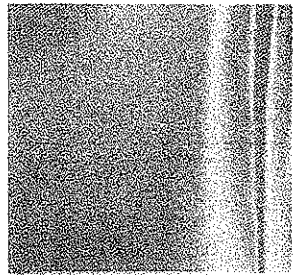


# CONNECTICUT LAWYER

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**Bloggers Beware  
Second Circuit Cases  
Rule Changes  
50 States in 50 Years**



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# There's Something Happening Here...

**"There's something happening here  
What it is ain't exactly clear  
There's a man with a gun over there  
Telling me I got to beware"**

**—"For What It's Worth" by Buffalo Springfield**

By Francis J. Brady

The something that is happening is the erosion of the right to privacy. Instead of a gun, the man often has a computer or a wiretap or a camera.

Two recent experiences illustrate the growing concern. When the American Bar Association held its mid-year meeting in Orlando, a personal side trip to Disney World's Epcot seemed in order. Only after purchasing a ticket did the burdensome price of admission become evident. Admission required submission to a fingerprint recording protocol—to protect everyone from the potential of improper reentry. Second, a contribution to the campaign of a prominent federal official was gratefully received. It was later learned, however, that the actual price of admission to the event also involved the disclosure of various personal information, including each guest's Social Security number. The fact that the adoption of the Social Security statute was premised on the assurance that a citizen's Social Security number could only be used for its limited, stated purpose—and not as the precursor for a national identity card—appeared only as a quaint bit of history.

Such personal anecdotes are confirmed by broad federal policy probably best known today (although little known for most of the past 30 years) as the operation of the Foreign Intelligence Surveillance Court as created by FISA in 1978.<sup>1</sup> Contrary to the fundamental structure of the American Judiciary, the FISA Court can only be described as secretive. It meets in private and, at one point, even its membership was confidential. That court has the authority to approve warrants for the electronic surveillance and collection of foreign intelligence information. The government's success rate in securing such wiretaps was some 23,000 approved as compared to five rejected through 2006. Notwithstanding this impressive record, the prior administration thought the process not secretive enough. It, therefore, bypassed even the FISA Court and monitored telephone communications without any court approval whatsoever. One brave judge resigned in protest, but only one.

The current administration has its own approach to warrantless surveillance. By way of example, the government is currently attempting to track its citizens through their

cell phones. Apparently, the average cell phone contains a device that effectively transmits its location to its cellular phone provider at virtually all times. In its appeal to the Third Circuit,<sup>2</sup> the Department of Justice seeks to compel those cellular phone providers to search and disclose the locations of selected citizens—all without a warrant.

The erosion of privacy has not been confined to actions at the federal level. The states have their own realm of responsibility, as particularly considered in a new book by Assistant Professor Jeannie Suk of the Harvard Law School, *At Home in the Law: How the Domestic Violence Revolution is Transforming Privacy* (Yale University Press, 2009). This slim, but scholarly, work does not focus on Connecticut protocol. Its concerns are national in scope.

Professor Suk raises the question whether domestic violence protective orders have given rise to the unintended consequence of the invasion of the privacy of the home. She acknowledges the ancient premise that a "man's home is his castle." She then evaluates that premise within the context of do-

mestic violence, which historically often gave rise to the corollary of “a woman’s home is her prison.” During recent years, domestic violence has been recognized for what it is: a crime principally directed against women. Each state has taken steps to protect the abused spouse. It is the consequence of these steps that serves as the focus of *At Home in the Law*.

Quite simply, Professor Suk questions whether the law has gone too far. Is the advance of the salutary goal of protecting the abused spouse worth the invasion of the most private American sanctuary—the marital home? Indeed, it is this sanctuary which fostered the very pronouncement of the Constitutional right of privacy.<sup>3</sup>

Professor Suk’s concerns link the domestic violence “protection orders” (restraining orders) with their enforcement by the criminal authorities. While at one time the police would consistently exercise their discretion by declining to interfere with the marital home, today they are often deprived of the discretion to do anything but arrest.

Among her several points, Professor Suk maintains that, because of shifting law enforcement priorities, “[T]he home is becoming a space in which criminal law’s goal is coercively to reorder and *control* intimate relationships” *Id.* at 10 (emphasis in original). In support, she describes the “de facto” divorce nature of a criminal domestic violence protection order. That would ban the defendant spouse from the marital home and from contact with his spouse or children. Unlike formal dissolution proceedings, however, such orders have no provision for those fundamental concerns of child visitation, financial support, and division of property. Moreover, if the parties wished to reconcile, the defendant would do so at some risk to his liberty. A simple call by a neighbor could draw the police to the marital home and set in motion the arrest and prosecution machinery—all over the objection of the innocent spouse.<sup>4</sup>

These several threads all tie to the principle that privacy is a fundamental liberty and any justification for the erosion of that liberty

is worthy of concern, if not resistance. To paraphrase Benjamin Franklin, if we cede that liberty to big government (or big business) in order to gain some sense of security, we risk losing both liberty and security. Accordingly, while the challenges of twenty-first century America may demand extraordinary measures, a pause in our “progress” in this regard may be warranted. Attention to such a pause is the purpose of this brief commentary—for what it’s worth. **CL**

## Notes

1. See 50 U.S.C. 1803.
2. The trial court’s ruling from which the government took its appeal is reported at *In Re United States for an Order Directing Provider of Elec. Commun. Serv. to Disclose Records*, 2008 U.S. Dist. Lexis 98761 (W.D. Pa., Sept. 10, 2008).
3. *Griswold v. Connecticut*, 381 U.S. 479 (1965)
4. “State-imposed de facto divorce goes meaningfully beyond the prohibition and punishment of violence per se. It seeks to criminalize intimate relationships that adults have chosen for themselves and have not chosen to end.” *At Home in the Law* at 52.

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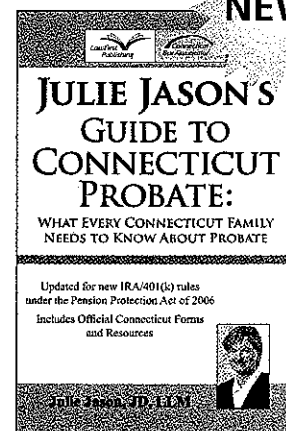
# Connecticut Probate

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