costs this additional coverage,[28] while the insured is usually unaware of the possibility of non-coverage or additional medical expenses. The primary purpose of insurance is spreading the loss as well as the risk.[29] This purpose is thwarted if the insured is not allowed to recover in situations similar to that presented in the *Hein*[30] case.

In deciding the *Hein* case, the Iowa supreme court relied heavily on the *Thomas*[31] and *Hoehner*[32] cases, which require a contract or prepayment of future medical expenses as a condition to recovery. The *Thomas* case necessitated having an attorney[33] to contract physicians for future services, while *Hoehner* required the insured to have the money to pay for the entire future medical costs before the termination of the fixed period. Generally people do not consult an attorney to file a claim with an insurer but usually wait until they have difficulty collecting.[34] If the insured does consult an attorney before the fixed period lapses, the problem of a speculative contract is encountered.[35] Since the attorney will wish to cover all possible anticipated medical expenses for future services, which may not be readily ascertainable, he will see to it that the contract is for the maximum amount of the policy. Some of these funds may never be needed, or the contract may be void for lack of definiteness.[36] The interpretation that would require an advance payment to the physician defeats another basic reason for having insurance. One purchases insurance to avoid the possibility of paying large medical bills all at once, or to avoid the possibility of no treatment at all due to a poor financial condition.[37] The policy of requiring a person to pay the entire sum before the lapse of the fixed period obviously favors the wealthier person.

While an actual tender of an advance payment to the physician or a contract for future medical expenses are convenient tools to secure the insurer's liability,[38] they are unnecessary. The purpose of the one year limitation or any other such period of limitation is to assure that a claim is the result of the initial accident.[39] It would appear that a simple statement of cause

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[28] *See generally* A. MOWBRAY, R. BLANCHARD, & C. WILLIAMS, INSURANCE—ITS THEORY AND PRACTICE IN THE UNITED STATES, Ch. 4 (6th ed. 1969).

[29] *See, e.g.*, Jordan v. Group Health Ass'n, 107 F.2d 239 (D.C. Cir. 1939); Home Title Ins. Co. v. United States, 50 F.2d 107 (2d Cir. 1931), *aff'd* 285 U.S. 191 (1932); W. VANCE, INSURANCE § 1 (3d ed. 1951); Note, *Insurance: Regulation: What Constitutes Insurance?*, 23 CORN. L.Q. 188 (1937).

[30] Hein v. American Family Mut. Ins. Co., 166 N.W.2d 363 (Iowa 1969).

[31] Maryland Cas. Co. v. Thomas, 289 S.W.2d 652 (Tex. Ct. Civ. App. 1956).

[32] Hoehner v. Western Cas. & Sur. Co., 8 Mich. App. 708, 155 N.W.2d 231 (1967).

[33] For a more complete discussion, *see* Woodroof, *Survey of Iowa Law*, 19 DRAKE L. REV. 368 (1970).

[34] CHANGING TIMES, Sept. 1968, at 24.

[35] Woodroof, *Survey of Iowa Law*, 19 DRAKE L. REV. 368 (1970). *See also* Faude, *supra* note 23 at 648. While Faude speaks in terms of an advance contract and Woodroof speaks in terms of a speculative contract, both have exactly the same concept in mind.

[36] *See generally* L. SIMPSON, CONTRACTS § 43 (2d ed. 1965).

[37] Fontenot v. Wabash Life Ins. Co., 243 La. 1049, 150 So. 2d 10 (1963).

[38] Note, *Medical Payment Coverage Within Liability Insurance Policies*, 25 WASH. & LEE L. REV. 308 (1968).

[39] Faude, *supra* note 23, at 648. "This requirement, of course, is present in order to establish a definite cut-off date and to bar claims which speculatively attribute present

from the doctor would accomplish this more satisfactorily.

Perhaps the entire situation may be best remedied by insurance companies themselves[40] or by the state insurance commissions. However, the insurance companies can hardly be expected to welcome this added coverage if they can avoid it, as they have been permitted to do by the *Hein* decision, and the insurance departments of most states appear to be unaware of the problem.[41]

The third interpretation—that liability arises if medical services were caused within the fixed time period from the date of the injury—presents none of the problems mentioned herein and actually promotes the social purpose of insurance. The Iowa supreme court failed to consider any decision presenting this viewpoint when it decided the *Hein* case. Perhaps when the situation is again presented the court will take notice of cases following the third viewpoint, and then adopt this more advantageous approach.

PATRICK H. PAYTON

Parent and Child—THE DOCTRINE OF PARENTAL IMMUNITY DOES NOT APPLY WHERE BOTH THE PARENT AND CHILD ARE DECEASED AS A RESULT OF THE ALLEGED TORTIOUS CONDUCT.—*Brinks v. Chesapeake & Ohio R.R.* (W.D. Mich. 1969).

Steven Brinks, an unemancipated minor, and his mother were killed in an automobile accident when they collided with defendant. Plaintiff, the father, brought this action individually and as administrator of the estate of the child, alleging that the negligence of the defendant was the proximate cause of the accident. The defendant filed a third party complaint alleging that the negligence of the mother was also a proximate cause of the accident, and therefore her estate was to be treated as a joint tort-feasor as to any judgment recovered against the defendant. Plaintiff moved to dismiss the third party complaint because of the parental immunity doctrine, urging that since the estate of the child could not recover from the estate of his mother, neither can the child's estate recover indirectly by third party contribution. The court denied plaintiff's motion and *Held* that the doctrine of parental immunity does not apply where both the parent and child are deceased as a result of the alleged tortious

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expenses to an accident occurring long before." *See also* French v. Fidelity & Cas. Co., 135 Wis. 259, 115 N.W. 869 (1908); Cary v. Preferred Acc. Ins. Co., 127 Wis. 67, 106 N.W. 1055 (1906).

[40] "Such cases in time may also illustrate the need of revising this one-year requirement, lest the premium on foresight should become distorted to a temptation for the claims-conscious." Faude, *supra* note 23, at 648.

[41] The fact that litigation of this problem is so infrequent probably accounts for this. However, the problem will not remain this way as medical techniques are improved. *See* Note, *Medical Payment Coverage Within Liability Insurance Policies*, 25 WASH. & LEE L. REV. 308, 312 (1968).

conduct. *Brinks v. Chesapeake & Ohio R.R.*, 295 F. Supp. 1318 (W.D. Mich. 1969).

The court's first duty was to determine what the Michigan supreme court's judgment would be if it was to decide this same case.[1] The main problem in determining the sufficiency of the motion to dismiss was to ascertain the law of Michigan as pertaining to the doctrine of parental immunity.

The Michigan supreme court first ruled on the doctrine in 1926, in *Elias v. Collins*,[2] and upheld the doctrine by stating that it was a rule of common law that a minor could not sue his parent in tort based on negligence. The rule had its beginning in the interest of the peace of the family and of society, and was supported by sound public policy. The court, however, was not entirely in accord with this rule for they acknowledged plaintiff's argument that the doctrine should be modified because, with the advent of the automobile and insurance, the reasons for the rule had changed. The court agreed there could be a "spice" of good sense in this argument, but that if the rule was to be changed or modified, it was a job for the legislature and not the courts.

The decision was, and is, consistent with the majority view[3] of the courts that have decided this issue. There were three cases prior to 1891 dealing with tort liability of parents. In all three, support was given to the idea of liability, at least in the case of acts which were cruel and injurious to the life or health of the child,[4] in the case of malice or wicked motives or an evil heart in punishing the child,[5] and in the case of gross negligence.[6]

Nevertheless, in 1891, in *Hewellette v. George*,[7] the Mississippi supreme court, citing no authorities and relying solely upon public policy, ruled in favor of parental immunity. The court held that so long as the parent is under an obligation to care, guide and control, and the child is under a reciprocal obliga-

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[1] Union Bank & Trust Co. v. First Nat'l Bank, 362 F.2d 311 (5th Cir. 1966). It is the duty of federal courts to apply state law, and if there are no state appellate court decisions precisely on point, the federal court is to determine what the decision of the state court would be.

[2] 237 Mich. 175, 211 N.W. 88 (1926).

[3] Zaccari v. United States, 130 F. Supp. 50 (D. Md. 1955); Owens v. Auto Mut. Indem. Co., 239 Ala. 9, 177 So. 133 (1937); Purcell v. Frazer, 7 Ariz. App. 5, 435 P.2d 736 (1967); Rambo v. Rambo, 195 Ark. 832, 114 S.W.2d 468 (1938); Perkins v. Robertson, 140 Cal. App. 2d 536, 295 P.2d 972 (Dist. Ct. App. 1956); Begley v. Kohl Madden Printing Ink Co., 157 Conn. 445, 254 A.2d 907 (1969); Strahorn v. Sears, Roebuck & Co., 50 Del. 50, 123 A.2d 107 (1956); Bulloch v. Bulloch, 45 Ga. App. 1, 163 S.E. 708 (1932); Harralson v. Thomas, 269 S.W.2d 276 (Ky. 1954); Luster v. Luster, 299 Mass. 480, 13 N.E.2d 438 (1938); Skillin v. Skillin, 130 Me. 223, 154 A. 570 (1931); Pullen v. Novak, 169 Neb. 211, 99 N.W.2d 16 (1959); Weinberg v. Underwood, 101 N.J. Super. 448, 244 A.2d 538 (1968); Tucker v. Tucker, 395 P.2d 67 (Okla. 1964); Castellucci v. Castellucci, 96 R.I. 34, 188 A.2d 467 (1963); Fowler v. Fowler, 242 S.C. 252, 130 S.E.2d 568 (1963); Ownby v. Kleyhammer, 194 Tenn. 109, 250 S.W.2d 37 (1952); Aboussie v. Aboussie, 270 S.W.2d 636 (Tex. Ct. Civ. App. 1954); Brumfield v. Brumfield, 194 Va. 577, 74 S.E.2d 170 (1953); Stevens v. Murphy, 69 Wash. 2d 939, 421 P.2d 668 (1966); Securo v. Securo, 110 W. Va. 1, 156 S.E. 750 (1931); Ball v. Ball, 73 Wyo. 29, 269 P.2d 302 (1954).

[4] Gould v. Christianson, 10 F. Cas. 857 (No. 5636) (D.C.S.D. N.Y. 1836).

[5] Lander v. Seaver, 32 Vt. 114, 76 Am. Dec. 156 (1859).

[6] Nelson v. Johansen, 18 Neb. 180, 24 N.W. 730 (1885).

[7] 68 Miss. 703, 9 So. 885 (1891).

tion to aid, comfort and obey, then for the peace of society, and of the families composing society, sound public policy prohibits such actions. This decision was followed by and upheld in *McKelvey v. McKelvey*[8] and *Roller v. Roller*.[9] These three decisions were the parturient of parental immunity doctrine, and have been referred to as the "great trilogy."[10] Other reasons offered to support the doctrine is that domestic tranquillity, parental discipline and control would be disturbed by the action.[11]

Public policy was not long in chipping away at the doctrine, when the court in *Dunlap v. Dunlap*[12] held that the immunity is not absolute, that it is imposed for the protection of family control and harmony, and exists only where a suit might disturb this family relationship. This was amply stated in *Borst v. Borst*,[13] when the court held that the immunity is not the product of any inherent disability of the child to sue his parent, but rather is based upon the interest that society has in preserving harmony in domestic relations.

Other courts followed in theory and continued to restrict the doctrine by creating exceptions to the general rule to allow a child to maintain an action against his parent. Some of these were where the child had been emancipated,[14] where the child was injured in the course of business rather than the personal activity of the parent,[15] where the wrongdoer stood in *loco parentis* as a guardian,[16] where the injury had been wilful,[17] and where the injury was caused by negligence.[18]

The doctrine was constantly changing when the Michigan supreme court next considered the issue of immunity in *Rodenbaugh v. Grand Trunk Western R.R.*[19] The court recognized that no state had completely abrogated the rule, but there was a definite trend to modify and carve exceptions to the rule. They felt a duty to reevaluate judicial precedents in light of the changing circumstances of life in America, for as society evolves so, too, must the law. They

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[8] 111 Tenn. 388, 77 S.W. 664 (1903).
[9] 37 Wash. 242, 79 P. 788 (1905).
[10] Hebel v. Hebel, 435 P.2d 8, 10 (Alas. 1967).
[11] Hewellette v. George, 68 Miss. 703, 9 So. 885 (1891); Cook v. Cook, 232 Mo. App. 994, 124 S.W.2d 675 (1939); Damiano v. Damiano, 6 N.J. Misc. 849, 143 A. 3 (1928); Roller v. Roller, 37 Wash. 242, 79 P. 788 (1905); McCurdy, *Torts Between Parent and Child*, 5 VILL. L. REV. 521 (1960).
[12] 84 N.H. 352, 150 A. 905 (1930).
[13] 41 Wash. 2d 642, 251 P.2d 149 (1952).
[14] Martinez v. Southern Pac. Co., 45 Cal. 2d 244, 288 P.2d 868 (1955); Shea v. Pettee, 19 Conn. Supp. 125, 110 A.2d 492 (1954); Wright v. Wright, 85 Ga. App. 721, 70 S.E.2d 152 (1952); Murphy v. Murphy, 206 Misc. 228, 133 N.Y.S.2d 796 (Sup. Ct. 1954).
[15] Trevarton v. Trevarton, 151 Colo. 418, 378 P.2d 640 (1963); Signs v. Signs, 156 Ohio St. 566, 103 N.E.2d 743 (1952).
[16] Brown v. Cole, 198 Ark. 417, 129 S.W.2d 245 (1939); Bricault v. Deveau, 21 Conn. Supp. 486, 157 A.2d 604 (1960); Steber v. Norris, 188 Wis. 266, 206 N.W. 173 (1925).
[17] Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955); Nudd v. Matsoukas, 7 Ill. 2d 608, 131 N.E.2d 525 (1956); Brumfield v. Brumfield, 194 Va. 577, 74 S.E.2d 170 (1953); Stevens v. Murphy, 69 Wash. 2d 939, 421 P.2d 668 (1966).
[18] Briere v. Briere, 107 N.H. 432, 224 A.2d 588 (1966); Nuelle v. Wells, 154 N.W.2d 364 (N.D. 1967).
[19] 4 Mich. App. 559, 145 N.W.2d 401 (1966).

reasoned that a sensible rule should allow children to sue for damages resulting from acts outside of the parental relationship, but should not subject the parents to legal action for commonplace failures in performance of parental duties. The court held that the rule adopted in *Elias* is modified to the extent that "unemancipated minors may bring suit against their parents for personal injuries resulting from intentional acts, gross negligence, and wanton and wilful misconduct in activities which do not involve an exercise of parental care, discipline, and control."[20]

Another Michigan case the court relied on in reaching its decision in the instant case was *Mosier v. Carney*.[21] The estate of the deceased spouse, due to the alleged negligence of the other living spouse, was permitted to maintain an action against such spouse. The court reasoned that upon the death of one of the spouses, the rationale of the marital immunity loses whatever force it might otherwise have had. Where the marriage has been terminated by death, then any danger of domestic discord arising from that action has likewise terminated. Although *Mosier* is distinguishable because it dealt with interspousal rather than parental immunity, the reasoning is appropriate in the instant case. Since both the son and mother are deceased, there is no domestic harmony to preserve, no peace of society to maintain, no parental discipline and control to be disturbed; therefore, there is no reason for the parental immunity. Similar reasoning was applied in *Teramano v. Teramano*[22] and *Borst v. Borst*[23] when the Ohio and Washington supreme courts ruled that if the parental relationship is abandoned, or the tort is committed by the parent while dealing with the child in a nonparental transaction, the reason for the immunity ceases to exist.

Applying these decisions, the court in the instant case held that the doctrine of parental immunity in Michigan, as first expressed in *Elias* and modified by *Rodenbaugh*, does not apply to cases where both the parent and child are deceased. The law should be flexible and able to adapt to the changing nature of human affairs. This decision is typical of the recent cases which provide remedies to the child for wrongs committed by the parent where previously none had been declared.

Iowa's first encounter with the doctrine[24] was not directly on the issue of parental immunity since the unemancipated minor was suing a partnership, of which the parent was a partner. The Iowa supreme court held that a partnership is a separate and distinct entity and that a judgment against it is not a judgment against the individual members. Iowa's only other case on parental immunity is *Barlow v. Iblings*.[25] In *Barlow*, the child was injured when he stuck his hand into an electric meat grinder located in the kitchen of his father's

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20 *Id.* at 567, 145 N.W.2d at 405-06.
21 376 Mich. 532, 138 N.W.2d 343 (1965).
22 6 Ohio St. 2d 117, 216 N.E.2d 375 (1966).
23 41 Wash. 2d 642, 251 P.2d 149 (1952).
24 Cody v. J.A. Dodds & Son, 252 Iowa 1394, 110 N.W.2d 255 (1961).
25 261 Iowa 713, 156 N.W.2d 105 (1968).

cafe. The child alleged that his father's negligence, leaving him alone in the area of the meat grinder, was the proximate cause of these injuries. The Iowa supreme court followed the majority rule and held that the father should not be held liable for his tortious acts based upon ordinary negligence. The court felt that domestic tranquility, proper parental discipline and control, and family unity along with social responsibilities were ample grounds to sustain the policy that this type of action is not maintainable. They noted that nothing in the record disclosed or implied intentional or even thoughtless disregard of intra-family responsibilities and duties. These responsibilities fundamentally do not rest on any hard-set rule of law or statute, but derive mainly from the mutual love and affection that exists in the home.

However, if a factual situation similar to the instant case arose in Iowa, it would not be necessary to abolish the doctrine or create an exception nor would it be necessary to disturb the holding in *Barlow*. The Iowa supreme court could apply the same reasoning, as was done in *Mosier* and in the instant case, to allow recovery where the reasons for the immunity have lapsed.

It is self-evident that the reasons the Iowa supreme court gave to sustain the doctrine in *Barlow*, weakening of domestic tranquillity and family unity, the disruption of proper parental discipline and control, are not likely to occur when the child's suit is against the estate of his deceased parent. Therefore, such reasons would not apply and there is no longer any basis for the application of the doctrine.

The court in *Parks v. Parks*[26] used similar reasoning when they decreed that the doctrine of intra-family immunity, which prohibits suits by a member of the family, expires upon death of the person protected and does not extend to a decedent's estate for the reason that death terminates the family relationship and there is no longer any relationship in which the state or public policy has an interest.

Thus, there is still immunity from suit between parent and child when both are alive because such action might have an effect upon domestic tranquility and family unity. But upon death, such reasons would be of no validity and there would be no logical justification to apply the doctrine of parental immunity.

The Supreme Court of Iowa could look to *In re Morison*[27] as authority to find conclusions of law that would be just and right to support the theory that the doctrine does not apply in a factual situation similar to the instant case. In *Morison* the court ruled that a child has a right to the care, support and affection of his parents and the parents have a right to custody unless by their conduct they forfeit that right. It would seem a reasonable analogy that if the parent commits an intentional tort against his child, that by this conduct he theoretically loses his right to custody. This in turn eliminates the intra-family responsibilities that derive mainly from the mutual love and affection that exists

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[26] 390 Pa. 287, 135 A.2d 65 (1957).
[27] 259 Iowa 301, 144 N.W.2d 97 (1966).

in the home, thus displacing the reasons for the parental immunity, as it did in *Mosier* and *Brinks*.

By finding premises in other areas of the law and converging them to one point, the Iowa supreme court may find authority, reason and logic to circumvent the public policy upon which the doctrine of absolute parental immunity was first based.

A principle of primary importance is that the doctrine of parental immunity is a court-made rule.[28] As such, it is the duty of the judiciary to examine it and determine its application. In recent years, economic, social and legislative changes, modern business methods, and the significant influence of automobile and liability insurance have placed the parties in different positions. Therefore, the effect of the earlier decisions must be considered in relationship to the occasion, facts and laws upon which they were based. *Stare decisis* must give way to the rule of reason. The law is not static, it is a progressive science, and when reason and logic cannot support a particular area of the law, it must change or fall.[29] This is particularly true when the specific law is founded on public policy alone. It must sway and move with the public breeze. Granted, parents should enjoy some type of immunity, but only to the extent when the reasons for such immunity exist. However, where the circumstances are similar to the instant case, no such shield of protection is necessary.

RICHARD L. MCCOY

Search and Seizure—PROBABLE CAUSE FOR THE ISSUANCE OF A SEARCH WARRANT DOES NOT EXIST UNLESS THE MAGISTRATE IS APPRISED OF THE UNDERLYING FACTS AND CIRCUMSTANCES THAT LEAD THE OFFICER TO HIS CONCLUSIONS THAT THE UNDISCLOSED INFORMANT IS RELIABLE, AND SOME OF THE CIRCUMSTANCES FROM WHICH THE INFORMANT DREW HIS CONCLUSIONS.—*State v. Spier* (Iowa 1970).

Defendant's automobile was searched pursuant to a warrant issued by a magistrate who was neither aware of the source of the information, an undisclosed informant, nor the grounds upon which the undisclosed informant founded his beliefs. A narcotics agent came to the home of the magistrate, named the defendant, and asked for a warrant to search his auto for narcotics.

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[28] Barlow v. Iblings, 261 Iowa 713, 156 N.W.2d 105 (1968); Briere v. Briere, 107 N.H. 432, 224 A.2d 588 (1966); Gelbman v. Gelbman, 23 N.Y.2d 434, 245 N.E.2d 192, 297 N.Y.S.2d 529 (1969).

[29] Recently New York has abolished the doctrine of intrafamily immunity, stating that the public policy reasons no longer exist. Howell v. Perry, 60 Misc. 2d 871, 304 N.Y.S.2d 156 (Sup. Ct. 1969); Gelbman v. Gelbman, 23 N.Y.2d 434, 245 N.E.2d 192, 297 N.Y.S.2d 529 (1969).

The agent obtained his information from his superior, who, in turn, had learned about the narcotics through a "tip" from an undisclosed informant. At the hearing on the motion to suppress, there was a discrepancy between the testimony of the agent and that of the magistrate regarding whether the magistrate was told that another agent had received the information and passed it on to the affiant for the purpose of obtaining the warrant. The motion to suppress was denied, and Spier was convicted of possession of narcotics, and he appealed. *Held*, reversed and remanded, three justices dissenting. The magistrate was not informed sufficiently as to the underlying circumstances from which the informant reached his conclusions, and upon which the agent concluded that the informant was reliable, and thereby a finding of probable cause for the issuance of a search warrant was not supportable. *State v. Spier*, 173 N.W.2d 854 (Iowa 1970).

The abuse of search warrants in England and in the American colonies[1] led to the requirements of the fourth amendment to the United States Constitution[2] which prohibit *unreasonable* searches and seizures, and limit the issuance of search warrants to when there has been a finding of *probable cause.*

The mechanics involved in the issuance of search warrants is a matter of local law, as long as the federal standards of due process[3] are not abridged. Most states have restrictions in their constitutions[4] similar to those of the fourth amendment.

The fourth amendment and its State counterpart do not require that a *magistrate* issue the warrant,[5] but the use of the terms "Oath or affirmation" indicates that someone in authority must issue or administer the warrant. As yet, any variance from the use of a magistrate has not been brought before the Supreme Court of the United States, so the question of the result of a deviation from the use of a magistrate remains untested. The spirit of the constitutional guaranty appears to indicate that a judicial "cross-check" on the police power is the desired effect.

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[1] Sgro v. United States, 287 U.S. 206 (1932).

[2] "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

[3] In Mapp v. Ohio, 367 U.S. 643, 655 (1961), the Court said:

> Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government. Were it otherwise, then . . . the assurance against unreasonable federal searches and seizures would be "a form of words," valueless and undeserving of mention in a perpetual charter of inestimable human liberties, so too, without that rule the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court's high regard as a freedom "implicit in 'the concept of ordered liberty.' "

[4] *See, e.g.*, IOWA CONST. art. I, § 8.

[5] For example, the Attorney General of New Hampshire can issue a search warrant although he is also actively engaged in prosecution. State v. Coolidge, 106 N.H. 186, 208 A.2d 322 (1965).