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A Footnote to "Penumbra" in Griswold V. Connecticut.

Henry T. Greely

A FOOTNOTE TO "PENUMBRA" IN *GRISWOLD v. CONNECTICUT*

*Henry T. Greely**

> The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.[1]
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> Penumbra . . . 1. The partially shaded region around the shadow of an opaque body, where only a part of the light from the luminous body is cut off; the partial shadow, as distinguished from the total shadow or *umbra; esp.* that surrounding the total shadow of the moon, or of the earth, in an eclipse . . . .
> 4. . . . A partial shade or shadow (in various metaphorical applications), esp. regarded as bordering upon a fuller or darker one.[2]

Since Justice Douglas's opinion for the Court in *Griswold v. Connecticut*, the source of the federal constitution's right to privacy has been fixed in the penumbras of the Bill of Rights. A penumbra seems a strange place to find rights to use contraception, to own obscene literature, or to have an abortion. Penumbra is an obscure word, known to few (and fewer still before *Griswold*). If the reader knows its meaning, it calls to mind shadows and darkness, unfortunate connotations for affirmative rights. The source of the *Griswold* opinion's privacy right has been controversial and critical commentary has focused on the absence of a concrete constitutional anchor for this asserted right.[3]

Why did Justice Douglas use penumbra to describe the source for the privacy right? Penumbra did not appear in any of the briefs in *Griswold* or in the lower court decision. It was not used in the academic commentary on privacy referred to in the opinion or the briefs. It had not been featured in earlier opinions concerning privacy or the scope of the Bill of Rights. This essay explores that question through an examination of the history of the judicial use of

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1. Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

2. 7 THE OXFORD ENGLISH DICTIONARY 660 (1933).

3. The criticism started as early as one of the dissenting opinions in *Griswold*, where, after reviewing the first, third, fourth, fifth, ninth, and fourteenth amendments, Justice Stewart asks "What provision of the Constitution, then, does make this state law invalid?" 381 U.S. at 530.

penumbra before *Griswold*.[4]

Astronomer Johannes Kepler coined the word penumbra in 1604 from the Latin words *paene*, meaning almost, and *umbra*, for shadow. Kepler was describing eclipses and invented penumbra to be able to distinguish between the sharp, deep shadow, or umbra, of the earth on the moon during a full lunar eclipse and the less distinct shading that surrounds the umbra and produces a partial lunar eclipse.

This technical meaning is still the primary meaning of the word, but in the last three hundred eighty-five years, penumbra has acquired other meanings, including two other technical definitions: in astronomy, the lighter portion at the periphery of a sunspot, and in art, the part of a painting where shadow fades into light. It has also acquired the figurative sense relevant to this inquiry. The Oxford English Dictionary traces this metaphorical use of penumbra back at least as far as 1801, when a female English novelist (not, unhappily, Jane Austen) wrote "I will defend him, madam, . . . against every shadow, every penumbra of aristocratic insolence."[5]

Computerized databases of reported decisions make it possible to trace the history of judicial word usage, at least to the limits in time and accuracy of the databases. Those databases include all reported federal cases and most twentieth century reported state cases.[6] The databases show that penumbra was not in common judicial use before *Griswold*. In federal courts, from its first use in 1871 until the *Griswold* decision in June 1965, penumbra appeared in thirty-six district court opinions, thirty-eight circuit court opinions, and twenty-three opinions from the United States Supreme Court. Forty-six of those ninety-seven uses were in quotations from other sources. Of the fifty-one original uses, twenty-six were made by just four judges: Oliver Wendell Holmes, Jr., Learned Hand, Benjamin Cardozo, and William O. Douglas. Examining some of the opinions that have used penumbra may provide some insight into Justice Douglas's use of the word in *Griswold*.

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4. After writing this article, I learned of an earlier article covering the same topic: Henly, *"Penumbra": The Roots of a Legal Metaphor*, 15 HASTINGS CON. L.Q. 81 (1987). That article covers some of the history discussed in this article and also concludes that penumbra was poorly used in *Griswold*. Our conclusions about the history and our criticisms of penumbra are different.

5. Maria Edgeworth, *Angelina* iv (1801), *quoted in* 7 THE OXFORD ENGLISH DICTIONARY at 660 (1933).

6. I used both Lexis and Westlaw in searching for uses of penumbra. Both services purported to contain the texts of federal cases from 1789. Neither service followed a consistent pattern with state cases. State cases generally were in the databases for earlier periods from the state's highest court than from other courts, but, for most states, neither service contained any cases decided before 1899. The Massachusetts Supreme Judicial Court, the most relevant state court for this inquiry, was available in Westlaw only from 1899.

In light of its later role in *Roe v. Wade*,[7] it is ironic that the first use of penumbra in a federal case dealt with the legal status of someone between life and death. In *Montgomery v. Bevans*,[8] Justice Field, sitting on circuit, had to decide who owned certain property in San Francisco. The grantee had disappeared several days before delivery of the deed, never to be seen again. After seven years, his father claimed the property as his heir, but the claim could only be good if the son had been alive at the time the deed was delivered. Field used penumbra in summarizing one of the other side's arguments: "[C]ounsel argue that there is no presumption in favor of the continuance of life during the penumbra, or death period, of seven years . . . ."[9]

After *Montgomery*, the word penumbra does not appear again in reported cases until the turn of the century and the opinions of Oliver Wendell Holmes, Jr.[10] Holmes liked the word, using it in four Supreme Court opinions and at least three opinions of the Massachusetts Supreme Judicial Court between 1899 and 1902. He usually used it in discussing one problem, the need to draw partly arbitrary lines.

This issue had occupied Holmes long before he became a judge. In 1873 the thirty-two year old Holmes featured it in a theory of the evolution of law.

> The growth of law is very apt to take place in this way: Two widely different cases suggest a general distinction, which is a clear one when stated broadly. But as new cases cluster around the opposite poles, and begin to approach each other, the distinction becomes more difficult to trace; the determinations are made one way or the other on a very slight preponderance of feeling, rather than articulate reason; and at last a mathematical line is arrived at by the contact of contrary decisions, which is so far arbitrary that it might equally well have been drawn a little further to the one side or to the other. The distinction between the groups, however, is philosophical, and it is better to have a line drawn somewhere in the penumbra between darkness and light, than to remain in uncertainty.[11]

Between 1899 and 1902, Holmes used penumbra in three deci-

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7. 410 U.S. 113, 152 (1973).

8. 17 F. Cas. 628 (9th C.C.D.Cal. 1871) (No. 9,735).

9. *Id.* at 632.

10. "Penumbra" did appear in one other federal opinion in the nineteenth century, but only in a suit involving the expenses of the wonderfully named United States Marshal for the District of Oregon, Penumbra Kelly. United States v. Kelly, 89 F. 946 (9th C.C.A. 1898). *See also* Kelly v. Matlock, 85 Cal. 122, 24 P. 642 (1890) (mortgage dispute involving the same person).

11. Holmes, *The Theory of Torts*, 7 AM. L. REV. 652, 654 (July 1873), *reprinted in* F. KELLOGG, THE FORMATIVE ESSAYS OF JUSTICE HOLMES, 117, 119 (1984). This quotation was the source of a grudge Holmes long held against Judge Charles Doe, Chief Justice of New Hampshire. Holmes had sent Doe proofs of the article and was surprised to find a later Doe opinion using the idea behind this quotation without attribution. Thirty-seven years later, Holmes complained of this injustice in a letter to Wigmore. *See* Reid, *Brandy in His*

sions of the Massachusetts Supreme Judicial Court, most significantly in *Danforth v. Groton Water Co.*[12] In *Danforth*, the plaintiff's eminent domain case against a water company had become entangled in shifting procedural statutes that first barred, then allowed, the plaintiff's recovery. Holmes referred to penumbra in discussing the nature of constitutional rules.

> Perhaps the reasoning of the cases has not always been as sound as the instinct which directed the decisions. It may be that sometimes it would have been as well not to attempt to make out that the judgment of the court was consistent with constitutional rules, if such rules were to be taken to have the exactness of mathematics. It may be that it would have been better to say definitely that constitutional rules, like those of the common law, end in a penumbra where the Legislature has a certain freedom in fixing the line, as has been recognized with regard to the police power.[13]

After his 1902 appointment to the United States Supreme Court, Holmes used penumbra four times during his thirty years on the Court: *Hanover Star Milling Co. v. Metcalf*,[14] *Schlesinger v. Wisconsin*,[15] *Springer v. Government of the Philippine Islands*,[16] and

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Water: Correspondence Between Doe, Holmes, and Wigmore, 57 NW. U.L. REV. 522, 529 (1962).

Holmes returned to the idea of partly arbitrary lines many times in writing. In the first chapter on torts in THE COMMON LAW, he used the term in describing the jury's authority.

> Legal, like natural divisions, however clear in their general outline, will be found on exact scrutiny to end in a penumbra or debatable land. This is the region of the jury, and only cases falling on this doubtful border are likely to be carried far in court.

O. HOLMES, THE COMMON LAW 127 (1881).

Eighteen years later, he revisited the term in a similar context in the Harvard Law Review:

> In our approach towards exactness we constantly tend to work out definite lines or equators to mark distinctions which we first notice as a difference of poles. It is evident in the beginning that there must be differences in the legal position of infants and adults. In the end we establish twenty-one as the dividing point. There is a difference manifest at the outset between night and day. The statutes of Massachusetts fix the dividing points at one hour after sunset and one hour before sunrise, ascertained according to mean time. When he has discovered that a difference is a difference of degree, that distinguished extremes have between them a penumbra in which one gradually shades into the other, a tyro thinks to puzzle you by asking where you are going to draw the line, and an advocate of more experience will show the arbitrariness of the line proposed by putting cases very near to it on one side or the other. But the theory of the law is that such lines exist, because the theory of the law as to any possible conduct is that it is either lawful or unlawful. As that difference has no gradation about it, when applied to shades of conduct that are very near each other it has an arbitrary look.

Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 456-57 (1899).

12. 178 Mass. 472, 477, 59 N.E. 1033, 1034 (1901). *See also* Kerslake v. Cummings, 180 Mass. 65, 68, 61 N.E. 760, 761 (1901); Driscoll v. Towle, 181 Mass. 416, 419, 63 N.E. 922, 923 (1902).

13. 178 Mass. at 476-77, 59 N.E. at 1034.

14. 240 U.S. 403, 426 (1916) (Holmes, J., concurring).

15. 270 U.S. 230, 241 (1926) (Holmes, J., dissenting).

16. 277 U.S. 189, 209 (1928) (Holmes, J., dissenting).

Olmstead v. United States.[17] Three of those uses occurred in discussions of line-drawing.

Holmes first used penumbra in the Supreme Court in *Hanover Star Milling Co.*, a trademark case. At issue was the geographical reach of one firm's common law mark, "Tea Rose" flour. Holmes concurred, but suggested that state borders would provide a useful limit to the trademark. "If this view be adopted we get rid of all questions of penumbra, of shadowy marches where it is difficult to decide whether the business extends to them. We have sharp lines drawn upon the fundamental consideration of the jurisdiction originating the right."[18]

In *Schlesinger*, the Court invalidated a Wisconsin estate tax that conclusively presumed any gift within six years of death to be "in contemplation of" death and therefore taxed it. Holmes argued in dissent that the presumption should be upheld as a reasonable although necessarily arbitrary line.

> I think that our discussion should end if we admit, what I certainly believe, that reasonable men might regard six years as not too remote. Of course many gifts will be hit by the tax that were made with no contemplation of death. But the law allows a penumbra to be embraced that goes beyond the outline of its object in order that the object may be secured. A typical instance is the prohibition of the sale of unintoxicating malt liquors in order to make effective a prohibition of the sale of beer.[19]

In *Springer*, Holmes dissented from a decision invalidating certain Philippine government corporations as violating the separation of powers. The Holmes dissent began: "The great ordinances of the Constitution do not establish and divide fields of black and white. Even the more specific of them are found to terminate in a penumbra shading gradually from one extreme to the other."[20]

Holmes's last judicial use of penumbra broke from his usual pattern. In *Olmstead*, the Court held that a federal court could use evidence obtained through wiretapping. Brandeis wrote the major dissent, which Holmes joined, but Holmes wrote his own very short dissenting opinion. Holmes maintained that federal courts should not admit wiretap evidence whether or not its use would violate the Constitution, a question on which he reserved judgment:

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17. 277 U.S. 438, 469 (1928) (Holmes, J., dissenting).

18. 240 U.S. at 426.

19. 270 U.S. at 241. Although in dissent, Holmes's statement in *Schlesinger*, and particularly his use of prohibition as an illustration, was enough to prompt an angry law review article, advertised as "one of a series of articles to be published in book form under the general caption 'Judicial Mileposts on the Road to Absolutism.'" Black, *The "Penumbra Doctrine" in Prohibition Enforcement*, 27 ILL. L. REV. 511, 511 (1933).

20. 277 U.S. at 209.

> While I do not deny it, I am not prepared to say that the penumbra of the Fourth and Fifth Amendments covers the defendant, although I fully agree that Courts are apt to err by sticking too closely to the words of a law where those words import a policy that goes beyond them.[21]

Penumbra appeared in only two other Supreme Court opinions during Holmes's tenure: in a Brandeis dissent quoting Holmes's dissent in *Schlesinger*[22] and in a majority opinion quoting a district court's conclusion that the region within twenty-five miles of a town's limits is a penumbra.[23] But while it was being used infrequently in the Supreme Court, Judge Learned Hand was expanding the word's use in the lower federal courts.

Hand used penumbra in eleven opinions from 1915 to 1950.[24] Although the contexts in which he used penumbra varied, he generally used it to denote the indistinct borders of words or concepts. Holmes had usually used penumbra when he was trying to stress the need to draw an appropriate line even if the line itself would inevitably be arbitrary—a line between juvenile and adult, between day and night, between constitutional and unconstitutional asser-

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21. 277 U.S. at 469.

22. Untermyer v. Anderson, 276 U.S. 440, 451 (1928).

23. Continental Baking Co. v. Woodring, 286 U.S. 352, 370 (1932). *Continental Baking Co.* involved Kansas legislation taxing and regulating trucking. The legislation exempted trucks of firms doing business in a city when operating within twenty-five miles of that city. The lower court used penumbra in a passage comparing the Kansas legislation to Oregon legislation upheld by the Oregon Supreme Court, which had provided a five mile exempt radius. Interestingly, immediately after using the word penumbra to describe the twenty-five mile exempt zone, the judge quoted a Holmes dissent on the need to draw arbitrary lines—but not a dissent that used penumbra.

> Of course, 25 miles is further than 5 miles; and it does seem that a 25-mile exemption, even for facility of administration, is pretty far. But, if the state has the power to create this penumbra about the city, the question of the distance must be left to the Legislature, unless it is clearly arbitrary. The language of Justice Holmes, while in a dissenting opinion, is an apt statement of a familiar principle of law: "When a legal distinction is determined, as no one doubts that it may be, between night and day, childhood and maturity, or any other extremes, a point has to be fixed or a line has to be drawn, or gradually picked out by successive decisions, to mark where the change takes place."

Continental Baking Co. v. Woodring, 55 F.2d 347, 355 (D. Kan. 1931) (*quoting* Louisville Gas & Electric Co. v. Coleman, 277 U.S. 32, 41 (1928)).

24. Hand used "penumbra" in the following cases:

Lambert Pharmacal Co. v. Bolton Chem. Corp., 219 F. 325, 327 (S.D.N.Y. 1915); The Poznan, 276 F. 418, 428 (S.D.N.Y. 1921); Van Vlaanderen v. Peyet Silk Dyeing Corp., 278 F. 933, 994 (S.D.N.Y. 1921); Wachs v. Balsam, 38 F.2d 50, 51 (2d Cir. 1930); Landers, Frary & Clark v. Universal Cooler Corp., 85 F.2d 46, 48 (2d Cir. 1936); Commissioner v. Ickelheimer, 132 F.2d 660, 662 (2d Cir. 1943); Andrews v. Commissioner, 135 F.2d 314, 319 (2d Cir. 1943); United States v. Heine, 151 F.2d 813, 817 (2d Cir. 1945); United States v. Rabinowitz, 176 F.2d 732, 735 (2d Cir. 1949), *rev'd* 339 U.S. 56 (1950); International Bhd. of Elec. Workers, Local 501 v. NLRB, 181 F.2d 34, 40 (2d Cir. 1950); and United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951).

Lambert Pharmacal Co. and *The Poznan* were the first two uses of penumbra in lower federal courts since Montgomery v. Bevans, 17 F. Cas. 628 (C.C.D. Cal. 1871) (No. 9,735).

tions of power. Hand used it when he wanted to stress the difficulty of defining words or concepts—as used in statutes, contracts, trademarks, or ideas.

Hand first used penumbra in *Lambert Pharmacal Co. v. Bolton Chem. Corp.*,[25] a trademark case decided one year before Holmes's concurrence in *Hanover Star Milling Co.* The makers of Listerine sought an injunction against the manufacturer of a similar disinfectant, named "Listogen." The defendant claimed that it was not aping Listerine, which had been distributed under that name for thirty-four years, but was referring back directly to Lord Lister, the promoter of antiseptic principles. It cited the words "Listerism," "Listerian," and "Listerize," which it claimed had been used in English before the distribution of Listerine. Hand rejected the defendant's argument: "But the defendant does not use these words; at best 'Listogen' is a coined word with a penumbra of suggestion."

In *The Poznan*,[26] Hand was construing a clause in a shipping contract concerning " 'other circumstances . . . which . . . are likely to give rise to delay or difficulty in . . . discharging' " and concluded that the clause "merely added a penumbra of meaning to each of the specified terms, so as to include similar things not literally covered by the terms themselves." In *Van Vlaanderen v. Peyet Silk Dyeing Corp.*,[27] he considered whether a manager was a "mechanic, workingman or laborer" for purposes of a statute giving the wages of "employees" a preference in receiverships.

> And the word "employee" is defined in section 2 as "mechanic, workingman or laborer." But these three words are plain enough, and there remains no penumbra of uncertainty, such as over-*shadowed* the use of "employee" in the act of 1885. [emphasis added]

These early cases illustrate Hand's general use of penumbra throughout his career.[28] In 1943, dissenting in *Commissioner v.*

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25. 219 F. 325, 327 (S.D.N.Y. 1915).

26. 276 F. 418, 427-28 (S.D.N.Y. 1921).

27. 278 F. 993, 994 (S.D.N.Y. 1921).

28. *See also* Landers, Frary & Clark v. Universal Cooler Corp., 85 F.2d 46, 48 (2d Cir. 1936). In this case, another trademark case, the plaintiff had used "Universal" for many years as the name of its electric household appliances. The defendant had recently named its electric refrigerators, an item never sold by the plaintiff, "Universal." Hand distinguished between the commercial use of coined and noncoined names: "The proprietary connotation,—'secondary meaning,'—of a word of common speech is harder to create and easier to lose, and its fringe or penumbra does not usually extend so far as that of a coined word."

Only twice did Hand use penumbra in reference to anything other than the definition of words or ideas. In Andrews v. Commissioner, 135 F.2d 314, 319 (2d Cir. 1943), Hand, in dissent, would have upheld the Tax Court, saying "[t]he case lies within that penumbra between light and darkness where the first tribunal should be final." Later in International Bhd. of Elec. Workers, Local 501 v. NLRB, 181 F.2d 34, 40 (2d Cir. 1950), he dealt with the first amendment implications of federal labor law's limitations on secondary picketing and

Ickelheimer,[29] Hand argued, on a point of statutory construction, that

> the colloquial words of a statute have not the fixed and artificial content of scientific symbols; they have a penumbra, a dim fringe, a connotation, for they express an attitude of will, into which it is our duty to penetrate and which we must enforce ungrudgingly when we can ascertain it, regardless of imprecision in its expression.

And in 1950, in *United States v. Dennis*, Hand made his last judicial use of penumbra in trying to define the phrase "clear and present danger," stating that "[i]t is a way to describe a penumbra of occasions, even the outskirts of which are indefinable, but within which, as is often the case, the courts must find their way as they can."[30]

While Hand was developing his usage of penumbra in the lower courts, the word saw only limited use at the Supreme Court. From Holmes's retirement to Justice Douglas's appointment, penumbra was used in five opinions, three of them by Justice Benjamin Cardozo.[31] Cardozo used penumbra in the same context as Holmes did, in discussing the problems of legislative line drawing.

In *Dayton Power & Light Co. v. Public Utilities Comm.*,[32] he upheld the Commission's decision not to treat "good will" as an asset for rate base purposes, saying "[f]or the legislative process, at least equally with the judicial, there is an indeterminate penumbra within which choice is uncontrolled." Concurring in *Schechter Poultry*, Cardozo urged that the National Industrial Recovery Act was unconstitutional not only as too broad a delegation of legislative power, but as beyond the constitutional powers of Congress under the Commerce Clause. He recognized that "[w]hat is near and what is distant may at times be uncertain" but found "no penumbra of uncertainty obscuring judgment here. To find immediacy or directness here is to find it almost everywhere."[33] Finally, Cardozo, writing for the Court in *Helvering v. Davis*, upheld congressional authority under the spending power to enact the old age benefits of the Social Security Act, but noted again the problems of drawing lines:

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the distinction between speech and action. "No doubt it is difficult to know when an equivocal utterance has plainly emerged out of its penumbra into the full light of unalloyed incitement . . . ."

29. 132 F.2d 660, 662 (2d Cir. 1943).

30. 183 F.2d 201, 212 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951).

31. The two opinions not discussed in text are Arrow-Hart & Hegeman Elec. Co. v. FTC, 291 U.S. 587, 607 (1934) (Stone, J., dissenting), and Coleman v. Miller, 307 U.S. 433, 465 (1939) (Frankfurter, J., concurring).

32. Dayton Power & Light Co. v. Public Utils. Comm'n, 292 U.S. 290, 309 (1934).

33. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 554 (1935).

> The conception of the spending power advocated by Hamilton and strongly reinforced by Story has prevailed over that of Madison, which has not been lacking in adherents. Yet difficulties are left when the power is conceded. The line must still be drawn between one welfare and another, between particular and general. Where this shall be placed cannot be known through a formula in advance of the event. There is a middle ground or certainly a penumbra in which discretion is at large. The discretion, however, is not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment.[34]

The addition of William O. Douglas to the Supreme Court assured penumbra's judicial future. Douglas was responsible for eight of the next eleven original uses of penumbra in the Supreme Court,[35] but he used it slightly differently than his predecessors.

His most-quoted use of penumbra before *Griswold* appeared in his opinion for the Court in *Textile Workers Union v. Lincoln Mills*.[36] *Lincoln Mills* first held that federal courts had jurisdiction to decide disputes about collective bargaining agreements, but then confronted the issue of what substantive law those courts should apply.

> We conclude that the substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor laws. The Labor Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra of express statutory mandates.[37]

This quotation is typical of Douglas's use of the word. In his first judicial use of penumbra, in dissent in *United States v. Classic*, he complained about criminalizing conduct "in the vague penumbra of a statute."[38] In *General Comm. of Adjustment v. Missouri-K-T R.R. Co.* he located an issue of union jurisdiction under the Railway

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34. 301 U.S. 619, 640 (1937).

35. Douglas used "penumbra" in the following cases before *Griswold*: United States v. Classic, 313 U.S. 299, 331-32 (1941) (dissent); General Comm. of Adjustment v. Missouri-K-T R.R., 320 U.S. 323, 336 (1943) (majority opinion); General Box Co. v. United States, 351 U.S. 159, 169 (1956) (dissent); Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 457 (1957) (majority opinion); Smith v. Sperling, 354 U.S. 91, 97 (1957) (majority opinion); Panama Canal Co. v. Grace Line, 356 U.S. 309, 317 (1958) (majority opinion); Wilson v. Schnettler, 365 U.S. 381, 392, n.5 (1961) (dissent); and Federal Power Comm'n v. Texaco, Inc., 377 U.S. 33, 39 (1964) (majority opinion).

The other three original uses during this period are found in Screws v. United States, 325 U.S. 91, 130 (1945) (Rutledge, J., concurring); Fernandez v. Wiener, 326 U.S. 340, 360 (1945) (Stone, J., majority opinion); and Uphaus v. Wyman, 360 U.S. 72, 99 (1959) (Brennan, J., dissenting). Also, in Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 315 (1945), Justice Jackson's majority opinion returned to the Holmes/Cardozo use of penumbra quite directly, by quoting Holmes' opinion for the Massachusetts Supreme Judicial Court in Danforth v. Groton Water Co., 178 Mass. 472, 476-77, 59 N.E. 1033, 1033-34 (1901).

36. 353 U.S. 448 (1957).

37. *Id.* at 456-57 (citation omitted).

38. 313 U.S. 299, 331 (1941).

Labor Act "far back in the penumbra of those few principles which [Congress] codified";[39] in *General Box Co. v. United States*, he placed a problem "in the penumbra of Louisiana law";[40] and in *Panama Canal Co. v. Grace Line*, he described a canal toll-setting issue as "a problem in the penumbra of the law."[41] Dissenting in *Wilson v. Schnettler*, a search and seizure case, he attacked the argument that a declaratory judgment could be denied for discretionary grounds, urging that "[t]he judicial discretion to deny declaratory relief is in the penumbra of the constitutional requirement of 'case or controversy.' There is no such issue here."[42]

Justice Douglas did not restrict penumbras to laws. In *Smith v. Sperling*, a case involving the extent of diversity jurisdiction in stockholder derivative actions, he used the term to describe the action the shareholders were challenging, saying that perhaps it "lies within the penumbra of business judgment, unaffected by fraud."[43] In *Federal Power Comm'n v. Texaco, Inc.* he used penumbra to describe the difficulties of fixing venue for a company like Texaco, contrasting it with the cases imagined by Congress, where a firm had a distinct location "with no penumbra of other places of business, as here."[44]

Holmes, Cardozo, and Hand had used penumbra where they wanted to highlight the difficulties of drawing distinctions or meaning. Their uses often contained references back to the primary meaning of their metaphor as a partial shadow. Douglas, on the other hand, used penumbra whenever he wanted to refer to a peripheral area or region, whether or not he wanted to point out the difficulty of line drawing or definition. And, unlike his predecessors, Douglas never used the word in a way that harked back to its primary meaning. For Justice Douglas, penumbra had become a dead metaphor, a way to refer to an idea through an abbreviation that had been shorn of its own meaning. Douglas could have replaced penumbra with periphery or fringe with no loss of meaning or force.

While Justice Douglas was using penumbra in the Supreme Court, it also saw limited use in the lower courts. Most of those uses were in quotations.[45] Apart from the eleven uses by Judge

39. 320 U.S. 323, 336 (1943).
40. 351 U.S. 159, 169 (1956).
41. 356 U.S. 309, 317 (1958).
42. 365 U.S. 381, 392 n.5 (1961).
43. 354 U.S. 91, 97 (1957).
44. 377 U.S. 33, 39 (1964).
45. The quotations were most often from the Douglas opinion in *Lincoln Mills* (thirteen uses), but also from Cardozo's opinion in Helvering v. Davis (five uses), Hand's opinion in *Landers, Frary & Clark* (four uses), and other judicial opinions (twelve uses). Two lower

Hand, there were only twenty-seven original uses of penumbra in the lower federal courts between *Montgomery v. Bevans* and *Griswold*. Most of those uses referred either to a "penumbra of uncertainty," the penumbra of a statute, or penumbra in Douglas's use, as an indistinct region surrounding something else. None was used in a case concerning privacy, contraception, or any other issue relevant to *Griswold v. Connecticut*.

It is interesting that penumbra was rarely used in federal courts, but was a favorite of such noted jurists as Holmes, Hand, Cardozo, and Douglas.[46] It is also fascinating to watch the differences in how they used the word, not so much in the meaning they gave it as in the contexts in which they used it. But the question remains: Why did Douglas use penumbra to describe the source of the right to privacy in *Griswold*?

There is almost nothing in the history of the use of penumbra before *Griswold* to suggest such use. Of all its many uses, only one, in Justice Holmes's dissent in *Olmstead*, referred to the penumbra of any of the Bill of Rights. No published opinion used penumbra in connection with contraceptives, with marriage, or except arguably for Holmes's dissent in *Olmstead*, with privacy. Before *Griswold*, no published opinion held that rights of *any* sort lurked in a penumbra.

Griswold itself provides little help. Penumbra is not used in the perfunctory lower court opinion,[47] nor does it appear in the briefs for the parties or the four amicus briefs. Although, according to Bernard Schwartz, Douglas drastically revised his initial draft of the opinion as a result of suggestions from Justice Brennan, the initial draft as published by Schwartz uses penumbra in its concluding sentence:

> The prospects of police with warrants searching the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives is repulsive to the idea of privacy and of association that make up a goodly part of the penumbra of the Constitution and Bill of Rights. Cf. *Rochin v. California*, 342 U.S. 165.[48]

As eventually published, the Douglas opinion uses penumbra

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court judges used penumbra in quotations from law review articles, one quoting Holmes and the other Landis.

46. It was also a favored word of a federal judge from Oregon, James Alger Fee, who used it in at least three opinions: Jackson v. Flohr, 227 F.2d 607, 610 (9th Cir. 1955), *cert. den.*, 350 U.S. 947 (1956); Kane v. SESAC, Inc., 54 F. Supp. 853, 859 (S.D.N.Y. 1943), and Montgomery Ward & Co. v. Northern Pac. Terminal Co., 128 F. Supp. 475, 515 (D. Or. 1953).

47. State v. Griswold, 151 Conn. 544, 200 A.2d 479 (1964).

48. B. SCHWARTZ, THE UNPUBLISHED OPINIONS OF THE WARREN COURT 236 (1985).

twice and penumbral once. Early in the opinion, he asserts that "[i]n other words, the First Amendment has a penumbra where privacy is protected from governmental intrusion."[49] He follows that with the sentence quoted above invoking the penumbra of other parts of the Bill of Rights. Later he claims the Court has "had many controversies over these penumbral rights of 'privacy and repose.' "[50] None of the uses provides a clue to its origin. Douglas does not cite a single case in which penumbra was used. And, although Douglas cites two law review articles on privacy, neither uses the word penumbra.[51]

Penumbra also appears in the concurring opinions of Justices Goldberg and Harlan, but neither Justice expands upon Justice Douglas's use of the term. Unlike Justice Douglas, Justice Goldberg does quote from a dissenting opinion from *Olmstead v. United States*, but he quotes the famous passage of Brandeis's dissent invoking "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."[52] He neither quotes nor cites the Holmes dissent.[53]

So why *did* Douglas use penumbra? We know he liked the word, having used it more often than any other Supreme Court Justice. He used it loosely, to mean something within the indistinct boundaries of something else. He was not, based on his past uses of the word, accustomed to thinking about a penumbra as a shadow or

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49. 381 U.S. 479, 483 (1965).

50. *Id.* at 485.

51. *Id., citing* Griswold, *The Right to be Let Alone*, 55 NW. U.L. REV. 216 (1960) and Beaney, *The Constitutional Right to Privacy in the Supreme Court*, 1962 SUP. CT. REV. 212. Griswold uses neither the word penumbra nor the idea of building an expansive right to privacy out of emanations of the Bill of Rights. Beaney discusses the idea that a right to privacy could be built by expanding the fourth and fifth amendments, as Brandeis had sought to do in his dissent in *Olmstead*, but he rejects that as unlikely. *Id.* at 250-51. Instead, he urged that privacy be viewed as part of the "liberty" protected by the fifth and fourteenth amendments. *Id.* at 246-51.

In 1958, penumbra featured in a debate on legal positivism carried on between H.L.A. Hart and Lon Fuller in the pages of the Harvard Law Review. Hart discussed the important distinction between meanings of the law that were at the core and those at the penumbra. He argued that the existence of penumbral questions where social policy was called into play should not be allowed to obscure the existence of the core questions, where there is a clear "law." Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607-615 (1958). Fuller argued that Hart's conception of the core and penumbra contained a new and incorrect theory of judicial interpretation. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 661-69 (1958). Those articles had no apparent effect on *Griswold* and made no obvious impression on Douglas, who never cited them in any of his opinions.

52. 381 U.S. at 494, (*quoting* Olmstead v. United States, 277 U.S. 438, 478 (Brandeis, J., dissenting)).

53. Beaney, writing about the right to privacy, examined *Olmstead* carefully and dismissed the Holmes dissent as "of little significance for the purpose of this paper." Beaney, *The Constitutional Right to Privacy*, 1962 SUP. CT. REV. 212, 223-24.

shading; he used it only as a dead metaphor without reference to its primary meaning.

Douglas had earlier referred to things in the penumbra of "express statutory mandates," "a statute," "those few principles which [Congress] codified," "Louisiana law," "the constitutional requirement of 'case or controversy,'" and simply "the law." It was a short step to penumbras of the "specific guarantees in the Bill of Rights . . . formed by emanations from those guarantees that help give them life and substance." For Douglas, penumbra appears to have meant fringe and nothing more. He seems not to have cared that penumbra might not carry that meaning, or any meaning, for his readers. Neither did he show any indication of remembering the word's primary meaning, which allowed him to write of shadows cast by the very rights that are giving off emanations. Unless those rights are oddly shaped or come equipped with lamp shades, they will not cast shadows in the light they themselves give out.

So Douglas used penumbra because he was a poor writer and he had used it before. Does it matter? I believe it does. Judicial opinions are persuasive documents that derive their power as much by their rhetoric as by their content. Judge Posner, for example, has shown how the Holmes dissent in *Lochner v. New York* draws its power from Holmes's language.[54] *Griswold* on the other hand, is weakened by Douglas's. I cannot argue that *Griswold v. Connecticut* or the subsequent cases involving the constitutional right to privacy would have been decided differently if Douglas had used a different word, but I do think the word mattered, in at least two ways.

First, he chose a poor word to express his concept. The theme of the Douglas opinion seems to be that privacy is on the border of several established constitutional rights. Penumbra was little known, poorly understood, and subject to misunderstanding. To the extent its meaning is known, it has a dark coloration. It is, after all, a word about shadow and shades. One scarcely wants to think about important affirmative rights as patterns of different degrees of darkness.[55]

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54. R. POSNER, LAW AND LITERATURE 281-89 (1988). Posner explicitly cites six judges as having "extremely interesting styles": Marshall, Cardozo, Brandeis, Learned Hand, Robert Jackson, and Holmes. As discussed above, three of those six were frequent users of "penumbra."

55. It is possible to think of the Bill of Rights as providing shelter or protection from the harsh rays of the sun/state. In that case, having more protecting rights blocking the source of the light would lead to a deeper shadow and more protection. This is a plausible interpretation of penumbra, particularly in a case involving privacy, where shelter from public scrutiny is crucial. This interpretation still conjures up the unhappy image of the constitutional liberty as involving hiding from the light, like scurrying cockroaches. In the context of

If Douglas wanted to find the right to privacy in the outskirts of the more specific rights granted by the Bill of Rights, he might have used two different kinds of words. He could have talked about rights on the fringe or periphery of the specific rights granted by the Bill of Rights. Douglas faced some problems there in choosing good words, as most of the words for border have belittling connotations—he would not have wanted to talk of peripheral rights, fringe rights, or borderline rights. On the other hand, rather than neighboring shadow, he could have associated the right to privacy with neighboring light: "The specific guarantees in the Bill of Rights" could have an aura, a radiance, a glow, a halo, or (a term used in the opinion) emanations that provide a right to privacy. The subconscious coloring would have been more affirmative.

More fundamentally, the metaphor of penumbra provides poor support for Douglas's position.[56] Constitutional rights do not cast shadows. They do not encompass things close to them merely because they are close, nor should they.[57] And, to the extent that rights have indistinct edges, there is no necessary reason to think that the borders of other rights will be overlapping.

Instead, Douglas should have argued that a unitary logic connects the varied provisions of the first, third, fourth, and fifth amendments. They are, at least in relevant part, expressions of an underlying idea or theme that should be given effect independent of their specific words. The metaphor of a penumbra—or an aura or emanation—is based on proximity and is mechanical, not logical. The proximity of additional rights does not add force to the argument for privacy, but the existence of a common idea in express rights does. The concept of a common theme, or the metaphor of weaving with a common thread, illustrates a better argument for privacy.[58]

Words matter. Justice Holmes is remembered, respected, quoted, and *alive* in part because of his ideas, in part because he

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Griswold, it is completely inconsistent with Douglas's conclusion that the Bill of Rights gave off affirmative emanations.

56. In fairness to Justice Douglas, it should be noted that, at least according to Bernard Schwartz, he had originally wanted to base his opinion and the right to privacy solely on the first amendment. B. SCHWARTZ, THE UNPUBLISHED OPINIONS OF THE WARREN COURT 230 (1985). It does make more sense to find a right along the borders of one other right, rather than on the periphery of several. In shifting at Justice Brennan's suggestion to a reliance on more of the Bill of Rights, however, Douglas did not make an appropriate shift in his metaphor.

57. That reasoning was criticized by Justice Black, dissenting in *Griswold*, as replacing specific rights with general rights, to the eventual evisceration of both. 381 U.S. at 509-10.

58. That the right to privacy is better supported by finding a common theme in the Bill of Rights is not, of course, an original idea. *See, e.g.*, Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 928 (1973).

looked like the perfect Supreme Court Justice, but in part because of his mastery of English. The same is true, to a lesser extent, of Justice Cardozo and Judge Hand. Consciously and unconsciously, words affect beliefs. Well-considered words can persuade; lazily adopted words can fail. *Griswold*'s right to privacy continues to be controversial and its borders are indeed hazy and indistinct. Its ultimate reach may well be decided more by presidential elections and senatorial battles than by mere words. Nonetheless, I believe its future would be brighter if Justice Douglas had not located its source in "the partially shaded region around the shadow of an opaque body."