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Constitutional Law--Connecticut Statute Forbidding the Use of Any Drug, Medicinal Article or Instrument for the Purpose of Preventing Conception Struck Down

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and controlling question . . . is, was his employment discontinued voluntarily by [claimant] . . . or his authorized agent?" Despite this emphasis on the test of voluntariness, the court refused to hold claimant disqualified. This interjects new elements into the test of qualification. First, the court by distinguishing the *Reynolds*[9] case has made it known that before an employee's voluntary acceptance of a plan through collective acquiescence will be construed as his own acceptance, the employee must be represented by at least a truly representative employees' association. Further adjudication must be had before the bench and bar will know the full extent of this requirement. Second, the court alluded to the fact that there was no pension provided for by the retirement plan. While it is probable that the court mentioned the absence of a pension as a factor militating against a conclusion of voluntary acceptance of the plan by claimant, it might well prove that the absence of benefits under a retirement plan will become prima facie evidence of involuntary unemployment by the retired employee. It is interesting to note that a majority of the courts which have considered the issue have ruled that a retired employee receiving pension benefits is not at the same time eligible for unemployment benefits.[10]

The present law in Kentucky on the issue of a mandatorily retired employee's qualification under KRS 341.370(2)(c) is a combination of *Reynolds, Kroehler,* and *Young.* It is submitted that while the court correctly decided the issue before it in the *Young* case, the loose language concerning the claimant's representation by the committeemen and the absence of a pension plan has cast doubt upon the heretofore established test of voluntariness. Any future litigation to resolve the doubt could have been avoided by a closer compliance with the previously established test.

William R. Harris

CONSTITUTIONAL LAW—CONNECTICUT STATUTE FORBIDDING THE USE OF ANY DRUG, MEDICINAL ARTICLE OR INSTRUMENT FOR THE PURPOSE OF PREVENTING CONCEPTION STRUCK DOWN.—Appellants Griswold and Buxton, the Executive Director of the Planned Parenthood League of Connecticut and the League's Medical Director respectively, were arrested as accessories for giving information and advice to married persons and for prescribing the best contraceptive device or ma-

[9] 360 S.W.2d 746 (Ky. 1962).
[10] Annot., 32 A.L.R.2d 901 (1953).

terial. A Connecticut statute made it a crime for any person to use any drug, article or instrument for preventing conception.[1] Appellants contended that the assessory statute[2] as applied to them violated the fourteenth amendment. They were, however, subsequently found guilty as assessories, and the appellate division of the circuit court affirmed. The court of errors then affirmed that judgment. The case was brought on appeal to the United States Supreme Court. *Held*: *Reversed.* (6-2 opinion, Justice Clark not sitting). Delivering the opinion of the Court, Justice Douglas found that the right to marital privacy lay somewhere along the periphery of the Bill of Rights and that this right is made applicable to the states by the force of the first, fourth, fifth and fourteenth amendments. In attempting to ground the right to marital privacy in the Bill of Rights, Justice Douglas said: "Various guarantees create zones of privacy. . . .[3] The present case . . . concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees."[4] *Griswold v. Connecticut*, 381 U.S. 479 (1965).

On at least two major occasions litigation regarding the constitutionality of the Connecticut contraception statute had wound its way to the Supreme Court only to see the complaints dismissed either for want of justiciable controversy or standing.[5] When, however, appellants were arrested as assessories, found guilty, and fined one hundred dollars each, "that real controversy flare[d] up,"[6] and the constitutional question had to be faced. In *Griswold*, appellants were not merely representing married persons who had not been (nor were about to be) injured;[7] they had been injured and were allowed to represent married persons whom they had aided and abetted in violating a statute the constitutionality of which was challenged. Having finally surmounted the barriers of justiciable controversy and standing, the Court was prepared to take a giant stride toward the invalidation of state criminal legislation.

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[1] General Statutes of Connecticut, § 53-32 (1949).

[2] General Statutes of Connecticut, § 54-196 (1949).

[3] Three key phrases in the opinion of the Court are worthy of explanation. These phrases, "zones of privacy," "penumbra," and "peripheral rights," are often interchangeable. Technically, however, the penumbra is the partially illuminated area beneath either the shelter of an amendment or, perhaps, the shelter of the Bill of Rights as a unit. A zone of privacy is a specific area along the edge of the penumbra. And a peripheral right, for the purposes of Griswold v. Connecticut, lies on the edge of the zone of privacy and thus on the edge of the penumbra.

[4] Griswold v. Connecticut, 381 U.S. 479, 484, 485 (1965).

[5] Poe v. Ullman, 367 U.S. 497 (1961); Tileston v. Ullman; 318 U.S. 44 (1943).

[6] Poe v. Ullman, *supra* note 5, at 509.

[7] Compare Poe v. Ullman *supra* note 5, *with* Tileston v. Ullman, 318 U.S. 44 (1943).

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Reaching the merits of a case that was perhaps long overdue, Justice Douglas did little more than deliver into law a position which he had proffered in an earlier dissent.[8] It is well established that the freedom to associate and privacy in one's associations are peripheral first amendment rights.[9] Furthermore, Justice Douglas found that the Court has safeguarded the sanctity of a man's home and the privacies of life against all governmental invasions through the protection of the fourth and fifth amendments.[10] Since the concept of privacy has frequently been read into the Bill of Rights and extended to include the privacy of association, the sanctity of a man's home, and even the right to marry and bring up children,[11] Justice Douglas was clearly justified in concluding that the right to marital privacy was one of those "peripheral rights [without which] the specific rights would be less secure."[12] While the right to marital privacy, like other privacy rights, comes within the penumbra of the Bill of Rights, Douglas failed to point out the specific amendment under which the right to marital privacy falls. Does the Bill of Rights as a unit have a single penumbra, and does the right to marital privacy lie somewhere along the periphery of this penumbra? Or, more logically, do all (or some) of the first eight amendments have separate penumbras? If not all, which ones? The crucial question is ultimately this: if all (or some) of the first eight amendments have separate penumbras, under which ones—or one—does the right to marital privacy fall? These are questions that the opinion never satisfactorily answered. What force, then, has suddenly given the Douglas opinion a thrust that it never before had enjoyed?

While dredging for the right to marital privacy in the Bill of Rights, Justice Douglas quite fleetly tacked along the course of the ninth amendment. By providing that "the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people," the ninth amendment indicates that Justice Douglas' "zones of privacy" were truly anticipated. The ninth amendment, then, simply clinched the argument that the Bill of Rights (or its amendments) contained a penumbra which concealed various zones of privacy. Why did Justice Douglas not say more about the ninth amendment and thereby bring it to the fore in the Court's opinion for the first significant time in such litigation? Did he only light upon it because he knew that the Court had been

[8] Poe v. Ullman, *supra* note 5.
[9] NAACP v. Alabama, 357 U.S. 449, 462 (1958).
[10] Boyd v. United States, 116 U.S. 616, 630 (1886).
[11] Meyer v. Nebraska, 262 U.S. 390, 399 (1923).
[12] Griswold v. Connecticut, 381 U.S. 479 (1965).

steering toward the "zones of privacy" argument simply through logical extensions of the first eight amendments anyway? Or did he merely elect to recede into the judicial background and permit Justice Goldberg to carry the argument along?

To the delight of at least one legal scholar,[13] Justice Goldberg, whom the Chief Justice and Justice Brennan joined, rendered a detailed reading of the ninth amendment. Without the Goldberg opinion the application of the ninth amendment in the Court's opinion palls upon the ear of an inquisitive legal mind. In noting that the Court has found fundamental personal rights and liberties protected by the due process clause of the fourteenth amendment from impairment by the states,[14] and that these rights include even "the right . . . to marry, establish a home and bring up children,"[15] Justice Goldberg stated that a fair interpretation of the ninth amendment is really the constitutional fountain from which all such rights flow: "The Ninth Amendment simply shows the intent of the Constitution's authors that other fundamental personal rights should not be denied such protection or disparaged in any other way simply because they are not specifically listed in the first eight amendments."[16] The right to marital privacy, then, falls within a penumbra of the Bill of Rights. But does this right fall within a penumbra of the Bill of Rights as a unit, or does it fall within the penumbra of a specific amendment? In saying that "my conclusion that the concept of *liberty* is not so restricted and that it embraces the right of marital privacy though that right is not mentioned explicitly in the Constitution is supported by numerous decisions of this Court . . . and by the language and history of the Ninth Amendment,"[17] Justice Goldberg indicated that the right to marital privacy falls within the penumbra of the fifth amendment. While the fourth, and perhaps even the first, may be extended to include various privacy rights, the ninth amendment encourages the Court to read the fifth amendment more liberally and to find that the concept of liberty within that amendment contains a penumbra under which the right to marital privacy lies. The question now becomes this: Is Justice Goldberg's holding that the Connecticut statute violates the fifth amendment as it is incorporated into the fourteenth amendment in alignment with the holding of the Court?

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[13] See Redlich, *Are There "Certain Rights . . . Retained By the People,"* 37 N.Y.U.L. Rev. 787 (1962).

[14] Gitlow v. New York, 268 U.S. 652, 666 (1925).

[15] Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

[16] Griswold v. Connecticut, 381 U.S. 479, 492 (1965).

[17] *Id.* at 486-87.

If the Goldberg reading of the Court's opinion were a proper clarification of the fuzzy holding of the Court, a significant projection of *Griswold* might well be made. Contrary to dictum in the Court's opinion, invalidation of a state's regulation of the manufacture and sale of contraceptives, for example, might become possible. State legislation compelling the sterilization of recidivistic sexual offenders (especially those who are married), moreover, might never be constitutionally acceptable. And, again contrary to dictum, state statutes prohibiting miscegenation might be struck down. But Justice Goldberg's reading of the Court's opinion is clearly too narrow. Although Justice Douglas failed to locate the right to marital privacy in a specific amendment, he indicated that he dealt not with just a right to marital privacy but with a right to "privacies of life,"[18] and such privacies might well be derived from the penumbra of each and every amendment. If this is the proper reading of the Court's opinion, the results could be cataclysmic. First, the surge of the ninth amendment is forestalled because, rather than encouraging a broad reading of the liberty concept in the fifth amendment, it simply is just another sentence in the Constitution that allows the Court to see the privacy concept in the first, fourth, fifth, and perhaps other amendments—a vision that the Court had had without the aid of the ninth amendment. Instead of toughening up the liberty concept in the fifth amendment, the ninth amendment therefore becomes nothing more than one of number of guidelines in a particular case. Secondly, the holding becomes so broad and unwieldly that it will prove inapplicable when the Court is faced with finding a "privacy of life" other than a marital privacy in the Bill of Rights. If, for example, the Court were faced with the problem of invalidating a state criminal statute which invaded a first amendment privacy, Justice Brennan and Chief Justice Warren (to say nothing of Justice Stewart, who dissented in *Griswold*) might well be unwilling to invalidate such a statute under *Griswold* for two reasons. First, *Griswold* does not clearly hold that the Connecticut statute violated the first amendment. And, secondly, they "have not accepted the view that the 'due process' as used in the Fourteenth Amendment includes all of the first eight Amendments."[19] But, by joining Justice Goldberg, they have accepted the view that the due process of the fourteenth amendment totally incorporates the explicit rights of the fifth amendment and all other rights that are implicitly contained in that amendment's liberty concept. There-

[18] Boyd v. United States, 116 U.S. 616, 630 (1886).
[19] Griswold v. Connecticut, 381 U.S. 479, 486 (1965).

fore, if the opinion of the Court had been more closely aligned with the somewhat more narrow opinion of Justice Goldberg (an opinion which, incidentally, should surely be less distasteful to Justices White and Harlan), the hypothetical statute which, as mentioned above, invaded a seeming first amendment privacy might well be found to invade the liberty concept of the fifth amendment as broadened by the ninth amendment.

For its failure to locate the right to marital privacy within the penumbra of a specific amendment, the Court's holding may prove to be too unwieldly to be useful in future litigation. But, while this omission causes an incomplete utilization of the ninth amendment, the Court's holding that the right to marital privacy lies somewhere on the periphery of the Bill of Rights will perhaps prove to be quite strong in itself, for marital privacy encompasses a multitude of fundamental privacies that have heretofore gone unrecognized. Marital privacy, however, has become a unique right, one separate from a greater right—"the right to be let alone."[20] It seems that the Court's opinion may have laid the groundwork for the future interpretation that the right to be let alone was the right which was actually invaded in Connecticut.

George C. Piper

TORTS—LIMITATION OF ACTIONS—ESTOPPEL.— Appellants were involved in an automobile collision with appellee's insured. An insurance adjuster, appellee's agent, visited appellants three times within the next four months. The claims of the parties are in conflict, but according to appellants, the adjuster told them that appellee would take care of everything, that he wanted them to get well, and that they should call him when they determined the amount of their expenses. Appellee never paid appellants' expenses. More than one year after the collision, the appellants brought suit, and the appellee relied on the Kentucky one-year statute of limitations.[1] Appellants maintained that appellee should be estopped to plead the limitation, in that appellee had obstructed the prosecution of the action within the one-year period.[2] The trial court dismissed appellants' claim. *Held*: Affirmed. Appellants are presumed to know that their action will be barred after one year. They had no right to rely on the

[20] Olmstead v. United States, 277 U.S. 438, 478 (1928).

[1] Ky. Rev. Stat. 413.140 (1) [hereinafter cited as KRS].

[2] Although there is a statute covering this matter, KRS 413.190 (2), it is vaguely worded and is always construed in light of the common law.