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Privacy Revisited: The Downfall of Griswald

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PRIVACY REVISTED: THE DOWNFALL OF GRISWOLD

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I. *Introduction*

This article presents a review of the Supreme Court's privacy decisions since *Griswold v. Connecticut,*[1] and concentrates on *Doe v. Commonwealth's Attorney for City of Richmond*[2] as a vehicle to review the Burger Court's trends in the privacy area. *Doe* is a good vehicle because, though decided without opinion, the summary affirmance of a lower court decision denying homosexuals constitutional protection resolved the tension developing between Douglas' penumbra theory of privacy, which was the opinion of the Court in *Griswold,* and the more modern substantive due process analysis. The authors conclude that the opinions in *Griswold* are dead as far as precedential value is concerned; that the privacy right is found in the first, third, fourth, fifth, and fourteenth amendments according to the Burger Court, and that the test for the privacy right varies from amendment to amendment, finding its basis in the history of the amendment to which it attaches. As far as state action is concerned, all of the rights enumerated in the first, third, fourth, and fifth amendments are applicable to the states through the fourteenth amendment.

II. The Significance of *Doe* to the Privacy Doctrine

In *Doe v. Commonwealth's Attorney for the City of Richmond,*[3] the Supreme Court, on March 29, 1976, summarily affirmed[4] the decision of a three-judge federal district court[5] which upheld the constitutionality of Virginia's sodomy statute.[6]

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1. 381 U.S. 479 (1965).
2. 425 U.S. 985 (1976).
3. *Id.*
4. Mr. Justice Brennan, Mr. Justice Marshall, and Mr. Justice Stevens would have noted probable jurisdiction and set the case for oral argument.
5. Doe v. Commonwealth's Attorney for the City of Richmond, 403 F. Supp. 1199 (E.D. Va. 1975).
6. Va. Code Ann. § 18.1-212 (1950), as amended provided that:

The plaintiffs in *Doe* sought a declaratory judgment regarding the constitutionality of the sodomy statute, since it affected their sexual relations with consenting adult homosexuals. They claimed that enforcement of the statute would violate their fifth and fourteenth amendment assurances of due process, their first amendment assurance of freedom of expression, their first and ninth amendment guarantee of privacy, and the eighth amendment prohibition of cruel and unusual punishment.

The majority decision of the three-judge district court upheld the state statute. The lower court held that homosexuality does not lie within the realm of privacy protected by the recent Supreme Court decisions which condemn state legislation "that trespasses upon the privacy of the incidents of marriage, upon the sanctity of the home, or upon the nurture of family life."[7] The court added, "[t]his and only this concern has been the justification for nullification of State regulation in this area."[8] To buttress this interpretation of Supreme Court action, the lower court quoted dicta from Mr. Justice Goldberg's concurrence in *Griswold v. Connecticut*[9] which, in turn, quoted Mr. Justice Harlan's dissent in *Poe v. Ullman:*

> Adultery, *homosexuality* and the like are sexual intimacies *which the State forbids . . . . It is one thing when the State exerts its power to forbid extramarital sexuality* . . . but it is quite another when . . . it undertakes to regulate by means of the criminal law the details of that [marital] intimacy.[10]

Noting that many states have long criminalized, and continue to prohibit, the type of conduct described in Virginia's sodomy statute,

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> If any person shall carnally know in any manner any brute animal, or carnally know any male or female person by the anus, or by or with the mouth, or voluntarily submit to such carnal knowledge, he or she shall be guilty of a felony and shall be confined in the penitentiary not less than one year nor more than three years.

The second portion of the statute dealt with forcible sodomy and was not relevant to the proceedings. The relevant portion of this section has now been amended in VA. CODE ANN. § 18.2-361 (Repl. Vol. 1975). It changed the penalty provision to a class 6 felony, punishable by imprisonment for not less than one nor more than five years; or, in the discretion of the trier of fact, confinement in jail for not more than twelve months and a fine of not more than one thousand dollars, either or both.

7. 403 F. Supp. at 1200.

8. *Id.*

9. 381 U.S. 479 (1965).

10. 403 F. Supp. at 1201, *citing* Griswold v. Connecticut, 381 U.S. 479, 499 (1965).

the district court further quoted Mr. Justice Harlan in *Poe* by noting, "the intrusion of the whole machinery of the criminal law into the very heart of marital privacy . . . is surely a very different thing indeed from punishing those who establish intimacies which the law has always forbidden . . . ."[11]

The promotion of morality and decency was considered by the Court to be a matter of state legislative discretion. The burden of proving a legitimate state interest in, or rational basis for, the statute was considered met by establishment of the mere likelihood that the prohibited conduct was likely to contribute to moral delinquency. The fact that the Virginia statute had ancestry in Judaic and Christian law and had existed to the present time supported the state's interest and the statute's legitimacy.[12] Additionally, the lower court cited the 1973 Supreme Court case, *Wainwright v. Stone,*[13] in which a state statute similar to Virginia's sodomy statute was upheld.

The *Doe* dissent by Judge Merhige offered an alternative result based on the due process clause of the fourteenth amendment. He noted that the Supreme Court had been consistent in protecting the individual right of personal choice in matters as private as marriage and procreation, citing *Roe v. Wade,*[14] *Doe v. Bolton*[15] and Harlan's concurrence in *Griswold.* He viewed "those cases as standing for the principle that every individual has a right to be free from unwarranted governmental intrusion into one's decisions on private matters of intimate concern,"[16] including a mature individual's choice of an adult sexual partner in the privacy of his or her home. Without evidence of resultant harm, that freedom of choice is one in which the state has no legitimate interest.

Judge Merhige criticized the majority for its unwillingness to extend the marital right of privacy recognized in *Griswold* to homosexual conduct. *Griswold* was a 1965 decision which invalidated a state statute[17] prohibiting the use of contraceptives by married couples.

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11. 367 U.S. at 553.
12. 403 F. Supp. at 1202.
13. 414 U.S. 21 (1973).
14. 410 U.S. 113 (1973).
15. 410 U.S. 179 (1973).
16. 403 F. Supp. at 1203 (Merhige, J., dissenting).
17. CONN. GEN. STAT. REV. § 53-32 provided that:

At least three members of the Court in *Griswold* relied on Mr. Justice Harlan's dissent in the 1961 decision *Poe v. Ullman,* in which Harlan objected to the majority's dismissal of an appeal for declaratory judgment on the constitutionality of the contraceptive prohibition statute that was later held unconstitutional in *Griswold.* As applied to a married couple in their home, Harlan felt the statute was "an intolerable and unjustifiable invasion of privacy in the conduct of the most intimate concerns of an individual's personal life."[18] Although in 1961, Mr. Justice Harlan would have been unwilling to attach the right of privacy to homosexual relationships, language in *Eisenstadt v. Baird,*[19] a 1972 decision, could be interpreted as a decision removing the impediment of the marital-nonmarital distinctions in private sexual acts. As the court stated in *Eisenstadt,*

> the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to beget a child.[20]

Both *Roe,* a decision holding that the state's interest is not sufficiently compelling during the first trimester of pregnancy to outweigh a woman's fundamental right to choose not to bear a conceived child, and *Eisenstadt,* which held that unmarried persons cannot be prohibited access to contraception methods if the state allows access to married persons, indicated that individual personal decisions in substantially private matters cannot be infringed upon without a showing of the state's compelling interest.

> Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned.

Section 54-196 provided that:

> Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender.

18. 367 U.S. at 539 (Harlan, J., dissenting).

19. 405 U.S. 438 (1972).

20. *Id.* at 453 (emphasis added).

Judge Merhige argued that no evidence had been offered by the state which substantiated state interference in this scope of individual privacy. By process of elimination, the only justification upon which the majority could have relied was a state interest in morality and decency, and *Stanley v. Georgia*[21] had, in his view, clearly demonstrated that this interest does not authorize state intrusion into the privacy of the home. In *Stanley,* the Supreme Court upheld the individual right to read obscene literature in the privacy of one's home without state interference. Judge Merhige would have included the right to choose one's sexual partner and to practice sexual acts with a consenting adult in the privacy of one's home within that constitutionally protected zone of privacy.

The majority of the district court therefore gave a very narrow reading to the scope of the privacy right as delineated in *Griswold* and its progeny. The majority of the lower court in effect limited privacy by adopting Justice Harlan's dissent in *Poe* condemning homosexuality. The court found authority for adopting the dissent as precedent in Goldberg's adoption of the same in his concurrence in *Griswold* quoting Justice Harlan's dissent in *Poe.*

> It is one thing when the state exerts its power to forbid extramarital sexuality . . . or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy.[22]

However, as Judge Merhige noted in his *Doe* dissent:

> To say, as the majority does, that the right of privacy, which every citizen has, is limited to matters of marital, home or family life is unwarranted under the law. Such a contention places a distinction in marital-nonmarital matters which is inconsistent with current Supreme Court opinions and is unsupportable.[23]

The majority opinion ignored *Eisenstadt* and *Stanley,* and chose rather to take the more myopic view of privacy characterized by Justice Harlan.

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21. 394 U.S. 557 (1969).
22. 381 U.S. at 499 (Goldberg, J., concurring).
23. 403 F. Supp. at 1203 (Merhige, J., dissenting).

The fact that the Supreme Court affirmed the majority opinion which Judge Merhige found to be "unsupportable" under the Supreme Court's decisions indicates that the Burger Court has rejected the rationale of *Griswold* as enunciated by Justice Douglas, in that there is now apparently no independent privacy right the existence of which is a necessary consequence of other enumerated rights. The sexual privacy right is found, in part, in the fourteenth amendment's due process clause, and as such must be "so rooted in the tradition and conscience of our people as to be ranked as fundamental."[24]

Oddly enough, Judge Merhige, although dissenting in *Doe*, also believed the right to originate in the fourteenth amendment's due process clause. Clearly then, the different conclusions reached by Judge Merhige and the majority of the Supreme Court, who affirmed, must somehow relate to their respective positions vis a vis Harlan's dissent in *Poe*. Apparently, the Supreme Court finds Harlan's pronouncements more acceptable than Douglas' penumbra theory.

On appeal, plaintiffs framed the issue to the Supreme Court as:

> whether the Commonwealth of Virginia has the power to proscribe what consenting males may do with their bodies in the privacy of the home absent a showing by the State that the enactment has a rational basis, or since the right here involved is "fundamental" serves a compelling state interest?[25]

The questions to be presented were:

(a) Were plaintiffs denied their constitutional right to privacy previously outlined in *Griswold* (marital privacy based on penumbras from the bill of rights), *Stanley* (reading obscenity in one's own home), *Loving v. Virginia*[26] (the sanctity of the family), *NAACP v. Alabama*[27] (privacy in one's associations), *Eisenstadt* (sexual privacy in non-marital situations), and *Roe* (privacy in choosing to abort) and logically extendible to privacy in sexual acts among con-

24. Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

25. Brief for Appellants at 10, Doe v. Commonwealth's Attorney for the City of Richmond, 425 U.S. 901 (1976).

26. 388 U.S. 1 (1967).

27. 357 U.S. 449 (1958).

senting adults in the privacy of the home? These rights are fundamental, and as such, the state must meet the compelling interest test. Plaintiffs argued that Virginia had not met its burden of proof in this case, and neither the district court's reference to longevity of the statute nor its biblical ancestry relieves the state's burden.

(b) Were plaintiffs denied due process and equal protection of the laws? The substantive due process argument was that the statute did not distinguish between public and private acts, and thus the state had not chosen the least intrusive manner while invading a fundamental right.

(c) Since the Supreme Court had recognized the right of privacy in the relationships of married couples and unmarried heterosexual couples, were not homosexual couples denied equal protection of the laws without a state showing of compelling interest in denying their relationship the same right? Plaintiffs argued they were.

(d) Was plaintiffs' first amendment guarantee of freedom of expression also infringed? By enforcement of the statute, plaintiffs argued, the right to satisfy their intellectual and emotional needs in the privacy of their own home as guaranteed by *Stanley* was denied.

The Commonwealth of Virginia asked for dismissal for want of a substantial federal question. The appellants' arguments were met as follows:

(a) The right of privacy inherent in the marital relationship recognized in *Griswold* cannot justifiably be extended to include homosexual relationships and the sodomic acts privately committed within those relationships.

(b) Since no right of privacy in homosexual relationships exists, and as *Stanley* was merely a first amendment case and enforcement of the Georgia statute in one's home would have limited specific first amendment rights, there is no compulsion for the state to seek the least detrimental alternative to proscribing private consensual homosexual acts in order to afford plaintiffs due process of law.

(c) The statute does not discriminate between married and unmarried couples, nor has the Supreme Court decreed that married persons have a right to commit sodomy by reason of their marital relationship, thus there is no equal protection problem.

(d) The intent of the framers of the first amendment was to protect expression of ideas, not conduct.

Additionally, the State relied on previous Supreme Court rejection of appeals in *Pruett v. Texas*[28] and *Canfield v. Oklahoma*.[29] The lower court in *Pruett* upheld the state sodomy statute, rejecting the claim that private consensual acts of sodomy are encompassed in the right of privacy. *Canfield* also upheld a sodomy statute, rejecting the argument that consenting adults have a fifth and fourteenth amendment right to engage in sexual activity.

Although summary affirmance of the lower court's decision by the Supreme Court indicates an adoption of the conclusions, but not necessarily the rationale of the district court, as aforementioned, the affirmance in conjunction with the cases noted hereinafter, would appear to support the proposition that presently the privacy right is not a *unitary* right derived from the penumbras of the Bill of Rights (Justice Douglas' *Griswold* opinion). Rather, the right is either attendant upon the protection of certain fundamental, enumerated rights in the Bill of Rights, or is to be found in the due process clause of the fourteenth amendment. It seems that Justice Goldberg's concurrence most accurately reflects the reasoning, but not the holdings, of the state of privacy law today. He accepted Justice Harlan's pronouncements in *Poe* as to the ambit of the right, but found the origin of the right, in part, in the ninth amendment, rather than the due process clause of the fourteenth amendment. Even that difference is minimized, though, since the test applied to the ninth amendment by Goldberg is substantially the same test applied to the due process clause, i.e., whether the particular right is so rooted in the traditions and conscience of the people as to be fundamental.

Following is a review of the post-*Griswold* cases relating to the expansion of the right of privacy. Admittedly some are ostensibly "equal protection" cases (*Eisenstadt*) or first amendment cases (*Stanley*).

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28. 402 U.S. 902 (1971).
29. 414 U.S. 991 (1973).

III. The Import of Eisenstadt

If *Eisenstadt v. Baird* established a right of sexual privacy for the individual, how can the state constitutionally criminalize homosexual conduct in private? Apparently *Eisenstadt* established no such right of "sexual privacy," just as *Griswold* established no broad ranging right of privacy. This narrow reading of *Griswold* compels the narrow reading of *Eisenstadt*.

In *Eisenstadt v. Baird,* Baird had been arrested following an address at Boston University, at the conclusion of which he had given a package of Emko foam, a contraceptive, to a young woman. Baird was convicted under a Massachusetts law[30] prohibiting the dispensing of contraceptives, except by doctors or pharmacists, pursuant to a doctor's prescription, and then only to *married* women.

Baird's petition for habeas corpus was granted by the First Circuit[31] Court of Appeals on the grounds that the state had interfered with "fundamental" human rights under *Griswold.* The Supreme Court affirmed.[32]

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30. Mass. Gen. Laws Ann. ch. 272, § 21 (West) provided that:

> Except as provided in section twenty-one A, whoever sells, lends, gives away, exhibits or offers to sell, lend or give away an instrument or other article intended to be used for self-abuse, or any drug, medicine, instrument or article whatever for the prevention of conception or for causing unlawful abortion, or advertises the same, or writes, prints, or causes to be written or printed a card, circular, book, pamphlet, advertisement or notice of any kind stating when, where, how, of whom or by what means such article can be purchased or obtained, or manufactures or makes any such article shall be punished by imprisonment in the state prison for not more than five years or in jail or the house of correction for not more than two and one half years or by a fine of not less than one hundred nor more than one thousand dollars.

Section 21A provided that:

> A registered physician may administer to or prescribe for any married person drugs or articles intended for the prevention of pregnancy or conception. A registered pharmacist actually engaged in the business of pharmacy may furnish such drugs or articles to any married person presenting a prescription from a registered physician. A public health agency, a registered nurse, or a maternity health clinic operated by or in an accredited hospital may furnish information to any married person as to where professional advice regarding such drugs or articles may be lawfully obtained. This section shall not be construed as affecting the provisions of sections twenty and twenty-one relative to prohibition of advertising of drugs or articles intended for the prevention of pregnancy or conception; nor shall this section be construed so as to permit the sale or dispensing of such drugs or articles by means of any vending machine or similar device.

31. 429 F.2d 1398 (1st Cir. 1970).

32. 405 U.S. 438 (1972).

Two interests were involved in invalidating the statute: first, the right of privacy under *Griswold,* and second, the equal protection of the laws. The Court took the view that "[i]f there is need to have a physician prescribe (and a pharmacist dispense) contraceptives, that need is as great for unmarried persons as for married persons."[33]

If, on the other hand, the statute merely regulated morals by deterring illegal intercourse, it was underinclusive in that married women, to whom contraceptives were available, would not be deterred from extra-marital intercourse.[34] Nor would the court accept deterrence of *pre*marital intercourse as the purpose of the law,[35] finding that the birth of an unwanted child was unreasonable punishment for fornication. Whether a health measure or a morals measure, then, the statute fell on equal protection grounds.

The court held only that the state could not discriminate in the prohibition of availability of contraceptives. It did *not* hold that a state was constitutionally precluded from a prohibition on the distribution of contraceptives. While *Griswold* held that a state may not criminally prohibit the *use* of contraceptives due to the intrusion on the fundamental right of privacy, the holding did not establish a constitutional right of access.

The court could have simply decided *Eisenstadt* on equal protection grounds. The court did note in *Eisenstadt,* however, that *if Griswold* did stand for the proposition that a state could not ban distribution to married couples due to the right of privacy, then neither could it ban distribution to the unmarried, for "[i]f the right to privacy means anything, it is the right of the *individual* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[36]

Most commentators recognize that *Eisenstadt* was not a privacy decision. A fairly typical example is one comment noting that *Eisenstadt* was decided on equal protection grounds,[37] and that the

33. *Id.* at 450.
34. *Id.* at 449.
35. *Id.* at 448.
36. *Id.* at 453.
37. Comment, *Eisenstadt v. Baird,* 3 N.Y.U. REV. L. AND SOC. CHANGE 65 [hereinafter cited as Comment].

court's use of the "rational basis" test on the statute implied that there was no "fundamental right" of privacy involved. The author did note, however, that while not rising to a *fundamental* right, the right of privacy was accorded more attention and thus deserving of more protection than other "non-fundamental" rights. The author based this assumption on the following reasoning: first, the court, in the majority opinion, expressed it's disbelief in the stated purpose of the law, when ordinarily it would not look beyond the stated purpose of the statute under the mere "rationality" test; second, the Supreme Court does not ordinarily strike down *under*-inclusive statutes; third, normally under the "rationality" test, *any* conceivable purpose will support the validity of the act; finally, invalidating a statute under the reasonableness standard is distinctive in itself (prior to *Eisenstadt*, only *two* other statutes were struck down under the test[38]).

Was the court adopting a more stringent standard of review, by actively testing the reasonableness of the legislation? Or, was the court using a "sliding scale" approach, balancing the state interest according to the importance of a protected, though "non-fundamental," right?

No matter what approach was ultimately used by the Court, it was recognized that the success of attempts to use *Eisenstadt* to effect change in laws impinging on individual privacy "remains uncertain, for the Court's treatment of the privacy issue established only a shaky foundation for future litigation in this area."[39] *Doe* clearly tells us that *Eisenstadt* did not give use to a promise of sexual freedom but rather was a narrow decision limited to the individuals right to determine procreation similar to *Roe v. Wade.*

In *Roe* the Supreme Court "recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution . . . . [O]nly personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered lib-

38. In Reed v. Reed, 404 U.S. 71 (1971), the Supreme Court struck down an Idaho statute which gave males preference over females as administrators of estates. In Morey v. Doud, 354 U.S. 457 (1957), the Court affirmed a lower court holding which had struck down a state law that excepted the American Express Company from a state law requiring firms that issued money orders in the state to secure a license.

39. Comment, *supra* note 37, at 69.

erty',"[40] are included in this privacy guarantee. Decisions have demonstrated that the right extends to activities involving marriage, procreation, contraception, family relationships and child rearing and education. The source of the guarantee is the fourteenth amendment's protection of individual liberty, from state intrusion, contained in the due process clause.[41] However, the right of privacy does not give one a license to use his body as he pleases; if the state can show a compelling interest, intrusion into that privacy may be justified.[42]

The Supreme Court held that the Texas statute[43] unconstitutionally violated a pregnant woman's fundamental right to choose to abort her child during the first trimester of pregnancy, when the state could not substantiate a compelling interest, either in the health of the mother or in the potential life of the fetus.

If *Roe* is to be read as a personal autonomy decision, should not the choice to commit a homosexual act be deemed as fundamental as the choice to bear a child? It seems the state interest in *Roe* was substantially more compelling than any conceivable state interest in *Doe,* since in *Roe* the state had the duty to represent the interests of an unborn child. No such compelling interest is present in a homosexual relationship between consenting adults. Could not the Court in *Doe* have applied a balancing approach, finding that the state interest, if it be for preservation of moral decency, does not become sufficiently compelling until the prohibited acts are committed in areas where the participants have no reasonable expectation of privacy?

The formula for determining rights protected by the due process of law defines protected liberties as those "so rooted in the traditions and conscience of our people as to be ranked fundamental."[44] It seems apparent that the Supreme Court has determined that the ancient and common law, and the customs and attitude of modern society will not condone the envelopment of homosexual relationships in the sphere of "family relationships." Until the conscious-

40. 410 U.S. at 152.
41. *Id.* at 153.
42. *Id.* at 154.
43. Articles 1191-1194 and 1196 of the Texas Penal Code.
44. Griswold v. Connecticut, 381 U.S. at 493.

ness of the people is willing to attach that status to homosexuality, no right of privacy inheres in homosexual relationships.

IV. The First Amendment

The first amendment problem presented by the summary affirmance in *Doe* is, why the privacy of the home established in *Stanley v. Georgia* does not protect homosexual conduct between consenting adults conducted in the privacy of one's home. An examination of *Stanley* reveals that the privacy of *Stanley* is attendant upon the exercise of a first amendment right; no substantive right of privacy within the home was established.

The facts in *Stanley* were as follows. Pursuant to a warrant, federal and state agents conducted a search of Stanley's home for evidence of bookmaking activities. Although the search for such was fruitless, three reels of obscene film were found. Stanley was convicted for possessing obscene material under a Georgia statute.[45] On appeal, Stanley argued that the first and fourteenth amendments prohibit the punishment of mere private possession of obscene material. The Supreme Court agreed.

Was *Stanley* a privacy decision in the vein of *Griswold,* or was it merely a first amendment decision upholding the right to receive information? There were two complimentary interests favorable to Stanley, perhaps either of which could have supported his asserted right to read or look at whatever he wished.

In an attempt to frame the decision within the ambit of the first amendment, the Court noted the constitutional freedom of speech "necessarily protects the right to receive"[46] information and ideas, *regardless of their social worth.*[47] "Nor is it relevant that obscene materials . . . [are] arguably devoid of any idealogical content. The line between the transmission of ideas and mere entertainment is much too elusive for this Court to draw, if indeed such a line can be drawn at all."[48] Note, however, that commercial distribution is is not protected.[49]

45. Ga. Code Ann. § 26-6301 (Supp. 1968).
46. 394 U.S. at 564.
47. *Id.*
48. *Id.* at 566.
49. *See* United States v. Reidel, 402 U.S. 351 (1971); United States v. Thirty-Seven Photo-

The predominant factor distinguishing *Stanley* from *Roth v. United States*[50] and its progeny, then, is the element of privacy. As the Court stated in *Stanley:*

> [W]hatever may be the justification for the statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means that a State has no business telling a man *sitting alone in his own house* what books he may read or what films he may watch.[51]

This element of privacy is "fundamental;" any intrusion then should require a compelling interest. The conduct which the plaintiffs in *Doe* sought to protect had a sufficient non-speech element to enable the state to regulate that conduct without a showing of a compelling interest. The conduct involved here is not "symbolic speech" invoking the opportunity for free political discussion.

In *United States v. O'Brien,*[52] the Supreme Court discussed the applicability of first amendment protection claimed by a draft card burner. The court stated, "[w]e cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."[53] Even assuming, arguendo, that homosexual conduct, that is, sexual activity is "speech," it does not necessarily follow that the conduct is protected. When speech and nonspeech elements are combined, "[a] sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."[54]

Nor does the associational right implicit in the first amendment protect homosexual activity, for that right protects association for the purpose of speech. In *NAACP v. Alabama,*[55] the Supreme Court reversed the NAACP's contempt citation for its refusal to surrender its membership lists to the state of Alabama. In upholding the right of the NAACP to resist disclosure, the Court noted that it had more

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graphs, 402 U.S. 363 (1971).

50. 354 U.S. 476 (1957).

51. 394 U.S. 557, 565 (1969) (emphasis added).

52. 391 U.S. 367 (1968).

53. *Id.* at 376.

54. *Id.*

55. 357 U.S. 449 (1958).

than recognized the close nexus between the freedom of speech and assembly:

> It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an unseparable aspect of the "liberty" assured by the Due Process clause of the Fourteenth Amendment, which embraces freedom of speech . . . . Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious, or cultural matters, and state action which may have the effect of curtailing the freedom to associate as subject to the closest scrutiny.[56]

It follows that homosexuals' first amendment right of association for speech purposes are recognized. In *Gay Students Organization of the University of New Hampshire v. Bonner*[57] the First Circuit Court of Appeals precluded the University of New Hampshire from denying the gay students organization the use of campus facilities for certain activities. Homosexual *acts* are not, however, constitutionally protected.

V. SYNTHESIS

The Supreme Court's latest summary of constitutionally protected rights of privacy was contained in *Paul v. Davis*.[58] Davis had been charged with shoplifting. Although the charges were later dismissed, Davis' name and photograph were included in a flyer, sent throughout the community, listing "active shoplifters." He brought a Section 1983 civil rights action against the area police chiefs who had distributed the flyer. One of the plaintiff's arguments was that he had been deprived of his constitutional right to privacy. The Court dismissed this claim because the plaintiff failed to allege any governmental intrusion into a sphere of constitutionally protected privacy. Contained in the opinion was an enumeration of the Court-recognized areas of constitutional privacy.

The Court noted that no specific right to privacy is guaranteed by any provision of the Constitution. However,

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56. *Id.* at 460 (citations omitted).
57. 509 F.2d 652 (1st Cir. 1974).
58. 424 U.S. 693 (1976).

(a) certain "zones of privacy" act to limit governmental intrusion upon specific constitutional guarantees including the privacy which limits unreasonable searches and seizures,[59] and

(b) some substantive rights of privacy are "fundamental" or "implicit in the concept of ordered liberty" and guaranteed by the fourteenth amendment. Those include marriage, procreation, contraception, family relationships, child rearing and education.

Using this analysis, *Doe* was correctly decided. Homosexual acts have historically never been equated with procreation and contraception, marriage, family relationships and child rearing so as to be classified as "fundamental" or "implicit in the concept of ordered liberty." Thus homosexual acts do not qualify for protection afforded by the due process clause of the fourteenth amendment.

What then, is the right of privacy? It is the authors' view that, in addition to the fourteenth amendment privacy, specific guarantees are found in the first, third, fourth and fifth amendments, using the test set forth in Justice Goldberg's concurrence in *Griswold.* The test for each of those amendments derived from the history from which it was born.

A. *The First Amendment Test*

Stanley v. Georgia can be viewed as a first amendment privacy decision. From this language in *Stanley:*

> [W]e think that mere categorization of these films as 'obscene' is insufficient justification for such a drastic invasion of personal liberties guaranteed by the First and Fourteenth Amendments. Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.[60]

it is clear that a zone of privacy, the home, is essential to ensure the

59. *Id.* at 713.
60. 394 U.S. 557, 565 (1969).

protection of the thought processes of one's own mind inherent in the first amendment freedoms of religion, speech and association.

Paris Adult Theatre I v. Slaton[61] aligned *Stanley* with the fourteenth amendment substantive due process privacy rights, citing *Roe* as authority for this analysis. The owners and managers of Paris Theatres exhibited obscene films, described as hard core pornography, in two adult movie theaters. The Supreme Court held that *obscenity* was not protected by the first amendment; the state, therefore, could prohibit the showing of obscene material since the state has legitimate interests in regulating the morals of its citizenry. The theaters attempted to assert the constitutional privacy rights of its patrons, but the Court refused to equate a public theater with a private home. In the Court's words "[n]othing, however, in in this Court's decisions intimates that there is any 'fundamental' privacy right 'implicit in the concept of ordered liberty' to watch obscene movies in places of public accommodation."[62] This sounds like a fourteenth amendment substantive due process test. *Roe,* however, specifically attributes the privacy recognized in *Stanley* to the first amendment.

The privacy in the home recognized in *Stanley* is a limited privacy; it is the right to possess and read books of one's own choosing in the privacy of one's own home. No one would argue that when the conduct regulated by the state is conduct which is not constitutionally protected, the privacy of the home would shelter commission of state prohibited acts. Murder of a spouse in the confines of the home would add no legitimacy to the act. *Stanley* privacy must be read narrowly to emanate from a first amendment right.

B. *The Fourth Amendment Test*

The privacy right founded in the fourth amendment is popularly described as one protecting people, not places. That language is contained in *Katz v. United States*[63] a fourth amendment case which followed *Griswold* by two years, but preceded *Stanley, Roe* and *Doe.* In *Katz,* the defendant was charged with transmitting wagering data by telephone. The evidence had been gathered by an

61. 413 U.S. 49 (1973).
62. *Id.* at 66.
63. 389 U.S. 347 (1967).

FBI-planted electronic listening and recording device attached to the exterior of a public telephone booth which the defendant had used to place his calls. The Court described the privacy right afforded by the fourth amendment:

> [T]he Fourth Amendment cannot be translated into a general constitutional "right to privacy." That Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all. Other provisions of the Constitution protect personal privacy from other forms of governmental invasion. But the protection of a person's *general* right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual States.[64]

The Court listed other constitutional protections of personal privacy: the first amendment limitation on abridgement of freedom to associate and privacy in one's associations, the third amendment prohibition against unconsented peacetime quartering of soldiers, the fifth amendment interest in securing to the individual a private life. Since "[v]irtually every governmental action interferes with personal privacy to some degree, "the question in each case is whether that interference violates a command of the United States Constitution."[65] The Court concluded that government intrusion into areas where individuals have reasonable expectations of privacy violated the fourth amendment protection against unreasonable searches and seizures. So, as with the first amendment grant of privacy, the fourth amendment privacy right is limited. It can be infringed by the state acting upon a reasonable set of circumstances.

C. *The Fifth Amendment Test*

The privilege against self-incrimination offers another protection—the right of each individual to be let alone.[66] One of its purposes is to prevent state control through coercion of the mind and free will of an accused person, so that he has a choice whether to assist the state in his own conviction.[67] The privilege is fulfilled only

64. *Id.* at 350-51 (footnotes omitted).
65. *Id.* at 350, n.5.
66. Tehan v. Shott, 382 U.S. 406 (1966).
67. In Re Gault, 387 U.S. 1 (1967).

when a person is guaranteed the right to remain silent unless he chooses to speak in the unfettered exercise of his own will. [68]

D. *Goldberg's Concurrence in Griswold and the Ninth Amendment*

Justice Goldberg set out the ninth amendment test for fundamental rights in his concurring opinion in *Griswold:*

> [L]ook to the traditions and [collective] conscience of our people to determine whether a principle is so rooted [there] . . . as to be ranked as fundamental . . . . [T]he inquiry is whether a right involved "is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.'[69]

The right of privacy in the marital relationship meets this test as a fundamental personal right, a right not expressly enumerated in the first eight amendments but included in the reservoir of unenumerated, retained fundamental rights of the people.

This test is similar to the Court's test for substantive due process under the fourteenth amendment. Because this concurrence was necessary to the majority to carry *Griswold* it deserves mention; the ninth amendment privacy right, however, seems short lived after the Court's discussion of privacy in *Roe.* In *Roe,* the Court disavowed the ninth amendment test[70] and opted for substantive due process as the repository of the procreation privacy right. This is particularly surprising since the Court in *Griswold* particularly disavowed substantive due process.[71]

E. *Douglas' Penumbra Theory in Griswold*

In the majority decision in *Griswold,* Justice Douglas disavowed the substantive due process approach and held that there was a unitary right of privacy emanating as a penumbra from the bill of rights. Now that the Court has held that privacy involving procreation is found in the fourteenth amendment on a substantive due

68. Rochin v. California, 342 U.S. 165 (1952).
69. 381 U.S. at 493.
70. 410 U.S. 113, 153.
71. 381 U.S. 479, 481-82 (1965).

process theory all of the *Griswold* decision is lost as far as precedential value is concerned.

Conclusion

Recent Supreme Court decisions on the issue of privacy have eroded the precedential value of the opinion in *Griswold.* Privacy dealing with marriage and procreation are now to be argued under the fourteenth amendment on the theory of substantive due process. Nonetheless, the first, third, fourth and fifth amendments have privacy emanations which each apply a different test based on the theory under which the amendment was born.

Thus, privacy rights are to be found in the first, third, fourth, fifth, and fourteenth amendments. The advocate must be careful to distinguish the criteria for privacy under each of these amendments as they differ depending on the historical basis for the particular amendment.