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Fundamental Rights in the "Gray" Area: The Right of Privacy Under the Minnesota Constitution

Michael K. Steenson

Mitchell Hamline School of Law, mike.steenson@mitchellhamline.edu

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Abstract

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Keywords

Gay marriage, constitutional law, fundamental right, zone of privacy, Roe v. Wade, Planned Parenthood v. Casey, Baker v. Nelson, torts, invasion of privacy, Minnesota constitution

Disciplines

Civil Rights and Discrimination | Comparative and Foreign Law | Constitutional Law | Human Rights Law | Jurisprudence | Torts

FUNDAMENTAL RIGHTS IN THE “GRAY” AREA: THE RIGHT OF PRIVACY UNDER THE MINNESOTA CONSTITUTION

MICHAEL K. STEENSON†

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† Margaret H. and James E. Kelley Professor, William Mitchell College of Law, Saint Paul, Minnesota. B.S. 1967, University of Minnesota; J.D. 1971, University of Iowa.

I. INTRODUCTION

The Minnesota Supreme Court first recognized the right of privacy under the Minnesota Constitution in the 1987 case of *State v. Gray*.¹ Although the articulation of a constitutional right of privacy in Minnesota is relatively new, the court relied on deep common law roots and a solid constitutional foundation for privacy in shaping its formulation of the basic right of privacy in *Gray* and subsequent cases.²

This Article explores the constitutional aspects of Minnesota privacy law. Part II briefly explains federal privacy law to provide a baseline for consideration of privacy law in Minnesota. Part III examines the right of privacy as it has evolved in the Minnesota common law. Part IV evaluates the Minnesota Supreme Court's application of federal privacy standards and then examines the court's decisions that outline the right of privacy under the Minnesota Constitution. Part V concludes by raising questions concerning the potential application of the court's concept of privacy under the Minnesota Constitution as applied to two areas: same-sex marriages and abortion rights.

II. PRIVACY UNDER THE UNITED STATES CONSTITUTION

Although privacy as a fundamental right has earlier origins,³ the typical starting point for any analysis of the law of privacy is *Griswold v. Connecticut*.⁴ In *Griswold*, the Supreme Court held unconstitutional a Connecticut statute that prohibited giving "information, instruction, and medical advice to married persons as to the means of preventing conception."⁵ However, the right of privacy the Court recognized was not based on a single conceptual view of privacy rights.⁶ The primary problem challenging the *Griswold* Court was the fact that the right of privacy is not specifically enumerated in the Constitution.⁷

1. 413 N.W.2d 107, 111 (Minn. 1987).

2. See discussion *infra* parts II, III. See generally Michael K. Steenson, *The Anatomy of Emotional Distress Claims in Minnesota*, 19 WM. MITCHELL L. REV. 1 (1993).

3. See *Pierce v. Society of Sisters*, 268 N.W.2d 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

4. 381 U.S. 479 (1965).

5. *Id.* at 480, 485.

6. *Id.* at 484-85.

7. *Id.* at 485.

Justice Douglas, writing for the majority, concluded that the right of privacy emanated from “penumbras”⁸ of the specific guarantees found in the Bill of Rights and that the marital relationship involved in *Griswold* concerned “a relationship lying within the zone of privacy created by several fundamental constitutional guarantees,”⁹ including the First, Third, Fourth, and Fifth Amendments.¹⁰

Justice Goldberg, in a concurring opinion, also recognized the right of privacy, but relied on the Ninth Amendment to support his conclusion that the privacy right is protected even though not enumerated in the Constitution:

Although I have not accepted the view that ‘due process’ as used in the Fourteenth Amendment incorporates all of the first eight Amendments, I do agree that the concept of liberty protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights. 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 both by numerous decisions of this Court . . . and by the language and history of the Ninth Amendment

. . . .

. . . The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement

. . . [The Ninth Amendment] was proffered to quiet expressed fears that a bill of specifically enumerated rights could not be sufficiently broad to cover all essential rights

8. The “penumbra doctrine” is defined as the “implied powers of the federal government predicated on the Necessary and Proper Clause of the U.S. Const., Art. I, Sec. 8(18), [that] permits one implied power to be engrafted on another implied power.” BLACK’S LAW DICTIONARY 1135 (6th ed. 1990).

9. *Griswold*, 381 U.S. at 485. Justice Douglas also emphasized the importance of the institution of marriage:

We deal with a right of privacy older than the Bill of Rights. . . . Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Id. at 486.

10. *Id.* at 484.

and that the specific mention of certain rights would be interpreted as a denial that others were protected.¹¹

Justice Harlan, although concurring in the result, did not join the Court's opinion because he could not agree that "the Due Process Clause of the Fourteenth Amendment does not touch this Connecticut statute unless the enactment is found to violate some right assured by the letter or penumbra of the Bill of Rights."¹² Rather, by Harlan's view, "the proper constitutional inquiry in this case is whether this Connecticut statute infringes on the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values 'implicit in the concept of ordered liberty.'"¹³

Justice Harlan's position was clarified further in his earlier dissent in *Poe v. Ullman*,¹⁴ where he stated that "it is not the particular enumeration of rights in the first eight Amendments which spells out the reach of Fourteenth Amendment due process, but rather, [those concepts embracing] rights 'which are fundamental; which belong . . . to the citizens of all free governments.'"¹⁵ He concluded that the right to marital privacy was included in those rights.¹⁶

Six years after *Griswold*, in *Roe v. Wade*,¹⁷ the Court applied the privacy concept to a woman's decision to terminate a pregnancy. Justice Blackmun, speaking for the Court and relying on *Griswold*, held that the right to privacy includes a limited right to choose an abortion:

This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty . . . as we feel it is, or . . . in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. . . . Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated

11. *Id.* at 486-89 (Goldberg, J., concurring) (citations omitted).

12. *Id.* at 499 (Harlan, J., concurring).

13. *Id.* at 500 (citations omitted).

14. 367 U.S. 497 (1961).

15. *Id.* at 541 (Harlan, J., dissenting).

16. *Id.*

17. 410 U.S. 113 (1973).

with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.

On the basis of elements such as these, appellant and some amici argue that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses. With this we do not agree. . . . The Court's decisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate. . . . [A] State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision.¹⁸

The Court's recognition of the state's competing interests in the life and health of the mother and the potentiality of human life led to the adoption of the trimester framework that left the abortion decision to the woman and her attending physician in the first trimester of pregnancy.¹⁹ The Court permitted the state to regulate the abortion procedure in the second trimester "in ways that are reasonably related to the preservation and protection of maternal health."²⁰ In the third trimester, the state could regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.²¹

Thirteen years later, in *Bowers v. Hardwick*,²² the issue concerned the right of privacy in the context of a Georgia sodomy statute as applied to an act of homosexual sodomy. The Court, splitting five to four, held that the statute was not unconstitutional as applied, over the dissents of Justices Blackmun, Brennan, Marshall, and Stevens.²³ Justice White framed the issue as

18. *Id.* at 153-54.

19. *Id.* 162-63.

20. *Id.* at 163.

21. *Id.* at 163-64.

22. 478 U.S. 186 (1986).

23. *Id.* at 196, 199-220.

whether there is a fundamental right to engage in consensual homosexual sodomy.²⁴

In his dissent, Justice Blackmun took the position that two strands of privacy were violated, the decisional as well as spatial aspects of privacy. In summarizing the Court's privacy decisions, he noted that the right to privacy has developed along distinct but complementary lines. One is the right to privacy in making certain decisions. The other is a "privacy interest with respect to certain places without regard for the particular activities in which the individuals who occupy them are engaged."²⁵ Justice Blackmun concluded that both aspects were violated in *Bowers*. In rejecting Justice White's conclusion that the Court is only refusing to recognize a "fundamental right to engage in homosexual sodomy," he said that "what the Court really has refused to recognize is the fundamental interest all individuals have in controlling the nature of their intimate associations with others."²⁶

In discussing the spatial aspect of privacy, Justice Blackmun disputed the Court's rejection of *Stanley v. Georgia*,²⁷ as protecting the privacy of the home, concluding that "the right of an individual to conduct intimate relationships in the intimacy of his or her own home seems to me to be the heart of the Constitution's protection of privacy."²⁸

In *Michael H. v. Gerald D.*,²⁹ decided three years after *Bowers*, the issue was whether a natural father's parental rights could be terminated as to a child born into a marital relationship between the mother and her husband. Justice Scalia, writing for the majority, noted that:

[T]he legal issue in the present case reduces to whether the relationship between persons in the situation of Michael and Victoria has been treated as a protected family unit under the historic practices of our society, or whether on any other basis it has been accorded special protection. We think it impossible to find that it has. In fact, quite to the contrary, our traditions have protected the marital family . . . against the sort of claim Michael asserts.³⁰

24. *Id.* at 192.

25. *Id.* at 204.

26. *Id.* at 206.

27. 394 U.S. 557 (1969).

28. 478 U.S. at 208.

29. 491 U.S. 110 (1989).

30. *Id.* at 124.

In determining whether a right is fundamental, Justice Scalia used an analysis that focused on “the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.”³¹ Justices O’Connor and Kennedy did not join that portion of the opinion, and later repudiated it in their joint opinion in *Planned Parenthood v. Casey*,³² in which the Court reaffirmed the central holding of *Roe v. Wade*.³³

Written by Justices O’Connor, Souter, and Kennedy, *Casey* addressed the substantive due process issue in detail.³⁴ The Court first noted that it has not accepted the view that “liberty encompasses no more than those rights already guaranteed to the individual against federal interferences by the express provisions of the first eight amendments to the Constitution.”³⁵ The Court also rejected the view that “the Due Process Clause only protects those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified.”³⁶

Noting that neither the Due Process Clause nor the Bill of Rights mark the outer boundaries of the “substantive sphere of liberty” protected by the Fourteenth Amendment, the Court noted the problems involved in judicial interpretation of the meaning of liberty. Addressing claims involving that issue re-

31. *Id.* at 127 n.6.

32. 112 S. Ct. 2791 (1992).

33. The Court characterized the central holding as follows:

First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State’s interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman’s effective right to elect the procedure. Second is a confirmation of the State’s power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger a woman’s life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child. These principles do not contradict one another; and we adhere to each.

Id. at 2804.

34. *Id.* at 2804-08. Substantive due process refers to a person’s fundamental personal liberty as required under the Fourteen Amendment. *See, e.g., Loving v. Virginia*, 388 U.S. 1 (1967) (holding that substantive due process includes a fundamental right to marry).

35. *Casey*, 112 S. Ct. at 2804 (citing *Adamson v. California*, 332 U.S. 46, 68-92 (1947)).

36. *Id.*

quires the Court to apply reasoned judgment within "boundaries that are not susceptible of expression as a simple rule."³⁷

The Court quoted with approval Justice Harlan's observations in *Poe v. Ullman*:

Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.³⁸

The Court also recognized the breadth of the right of privacy as developed in previous decisions:

Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. Our cases recognize "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." Our precedents "have respected the private realm of family life which the state cannot enter." These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of

37. *Id.*

38. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2806 (1992) (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) (dissenting from dismissal on jurisdictional grounds)).

personhood were they formed under compulsion of the State.³⁹

The Court's conception of privacy as it has evolved in cases from *Griswold* to *Casey* has three strands—decisional, relational, and spatial—that may readily overlap in given cases.⁴⁰ *Casey* strengthens the privacy concept but also notes its limitations. Those limitations will necessarily prompt resort to state constitutions, where the same arguments will play out as legislative or common law restrictions on the right of privacy are challenged as violative of state constitutions. The privacy arguments will be flavored with the additional elements of differing state constitutional language, history, and traditions that litigants will assert as justification of a broader recognition of rights than under the Federal Constitution.

III. PRIVACY IN MINNESOTA—COMMON LAW RECOGNITION

The Minnesota Supreme Court has not yet adopted the common law tort of invasion of privacy.⁴¹ But the failure to adopt Prosser's nomenclature for the tort of invasion of privacy⁴² has not in any way precluded the court's recognition of privacy interests. In varying forms, the court has vindicated privacy interests ranging from the interest in bodily integrity to interests in family autonomy, and to the protection of the privacy of the home.

For example, in *Mohr v. Williams*,⁴³ the Minnesota Supreme Court upheld the plaintiff's right of choice in a battery action against a physician who performed an operation that the physician deemed necessary, but which was different from the opera-

39. *Id.* at 2807 (citations omitted).

40. See Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1443-48 (1992).

41. See *Hendry v. Conner*, 303 Minn. 317, 319, 226 N.W.2d 921, 923 (1975). The court of appeals typically follows *Hendry*, denying privacy claims because the supreme court has not yet adopted the tort. See, e.g., *Stubbs v. North Memorial Medical Ctr.*, 448 N.W.2d 78, 80 (Minn. Ct. App. 1989), *review denied*, (Minn. Jan. 12, 1990) (citing *Hendry* for the proposition that Minnesota does not recognize a cause of action for invasion of privacy); *Bohdan v. Alltool Mfg.*, 411 N.W.2d 902, 906 (Minn. Ct. App. 1987) (referring to *Hendry* for support in granting summary judgment on a claim for invasion of privacy); *House v. Sports Films & Talents*, 351 N.W.2d 684, 685 (Minn. Ct. App. 1984) (interpreting *Hendry* to indicate "there is no action for invasion of privacy in Minnesota.").

42. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 117, at 849 (5th ed. 1984).

43. 95 Minn. 261, 104 N.W. 12 (1905).

tion to which the plaintiff consented.⁴⁴ The physician was acting in good faith and in the patient's best interests, raising the issue of whether her consent was necessary.⁴⁵ In discussing the nature of the right to consent, the court stated:

The patient must be the final arbiter as to whether he will take his chances with the operation, or take his chances of living without it. Such is the natural right of the individual, which the law recognizes as a legal [one]. Consent, therefore, of an individual, must be either expressly or impliedly given before a surgeon may have the right to operate.⁴⁶

More than seventy years later, in *Cornfeldt v. Tongen*,⁴⁷ the court applied informed consent principles in the context of a claim for the negligent failure to disclose certain risks associated with an operation.⁴⁸ In discussing the issue of whether a standard of accepted medical practice should be applied, the court said that "[o]ur society is morally and legally committed to the principle of self-determination, a corollary of which is the right of every adult of sound mind to determine what shall be done with his own body."⁴⁹

44. *Id.* at 269, 104 N.W. at 15.

45. *Id.* at 267, 104 N.W. at 14.

46. *Id.* at 268, 104 N.W. at 14-15 (quoting 1 EDGAR B. KINKEAD, *THE LAW OF TORTS* § 375, 726 (1903)).

Other intentional torts provide redress when individual interests are invaded by others. For example, emotional interests are vindicated through the law of intentional infliction of emotional distress. *See, e.g.,* *Dornfeld v. Oberg*, 503 N.W.2d 115, 117-18 (Minn. 1993); *Hubbard v. United Press Int'l*, 330 N.W.2d 428, 438-39 (Minn. 1983); *Eklund v. Vincent Brass & Aluminum Co.*, 351 N.W.2d 371, 378-79 (Minn. Ct. App. 1984).

Negligently caused personal injury may be vindicated in a personal injury suit in which damages for the losses sustained may be recovered, including damages for the physical and emotional invasion caused by another's negligence. *See* *Stadler v. Cross*, 295 N.W.2d 552 (Minn. 1980).

47. 262 N.W.2d 684 (Minn. 1977).

48. *Id.* at 699.

49. *Id.* at 701. The Minnesota Supreme Court has also recognized the existence of a privacy interest, short of a constitutional claim, in *Haynes v. Anderson*, 304 Minn. 185, 232 N.W.2d 196 (1975), a case involving the issue of whether a plaintiff in civil litigation could be required to take the Minnesota Multiphasic Personality Inventory (MMPI) pursuant to the defendant's discovery request. In *Haynes*, the court concluded that the MMPI could not be required unless the trial court determined:

(1) That the answers to the questions will not be used to embarrass or intimidate the examinee;

(2) That the need for the examination and the anticipated probative value of the evaluation of the answers given outweigh any unnecessary intrusion on the examinee's privacy;

(3) That the evaluation of the results of the test will be privileged except to the extent that disclosure is made necessary by the progress of the litigation.

In *Miller v. Monsen*,⁵⁰ the Minnesota Supreme Court recognized the importance of family relationships:

As a practical proposition, the family is in large measure a self-governing unit so far as concerns its internal affairs. From a social point of view it is also a most important one. It is the foundation of civil society, sanctioned as such by both civil and ecclesiastical authority. It provides not only shelter, food, comfort, family life, happiness, and security for its members, but also instruction in, and example of, virtue, morality, and character. . . . Human Society could not endure without it. Among the rights of the members of a family as against the world are those of having the family maintained intact without interference by outsiders. In the Heck case, it was held that not only "every member" of the family has a "right" to protect family rights against outside interference (there criminal conversation with the wife), but that the state also has an interest in the protection thereof. This right is protected also under the constitution of the United States against outside interference even by government.⁵¹

In a more recent case, *State v. Casino Marketing Group*,⁵² the supreme court balanced the privacy interest against invasive automatic dialing devices in protecting the privacy of the home:

The telephone is unique in its capacity to bring those outside the home into the home for direct verbal interchange—in short, the residential telephone is uniquely intrusive. The caller, who can convey messages which very young children can understand, is able to enter the home for expressive purposes without contending with such barriers as time or distance, doors or fences. We do not take this verbal presence lightly: "The ancient concept that 'a man's home is his castle' into which 'not even the king may enter' has lost none of its vitality" Moreover, the shrill and imperious ring of the telephone demands immediate attention. Unlike the unsolicited bulk mail advertisement found in the mail collected at the resident's leisure, the ring of the telephone mandates prompt response, interrupting a meal, a restful soak in the bathtub, even intruding on the intimacy of the

(4) That answers to each of the questions submitted to the person examined are necessary to make the test useful to the examining physician; otherwise, answers to nonessential questions should not be required.

Id. at 190, 232 N.W.2d at 200.

50. 228 Minn. 400, 37 N.W.2d 543 (1949).

51. *Id.* at 402, 37 N.W.2d at 545 (citations omitted).

52. 491 N.W.2d 882 (Minn. 1992).

bedroom. Indeed, for the elderly or disabled, the note of urgency sounded by the ring of the telephone signals a journey which may subject the subscriber to the risk of injury. Unlike the radio or the television, whose delivery of speech, either commercial or noncommercial, depends on the listener's summons, the telephone summons the subscriber, depriving him or her of the ability to select the expression to which he or she will expose herself or himself.⁵³

The Minnesota Supreme Court's recognition of the importance of personal autonomy, family relationships, and the right of privacy in the home, indicates a strong common law interest in privacy rights. Recognition of a common law right of privacy empowers individuals whose rights are violated to vindicate the privacy interest through litigation against other private individuals. Or, as in *Casino Marketing*, the privacy interest may be recognized by the court as a legitimate legislative interest that will serve to sustain protective legislation against constitutional attacks predicated on other interests, even those based on the First Amendment.

The personal, relational, and spatial aspects of privacy⁵⁴ recognized by the Minnesota Supreme Court in its common law decisions provide a strong foundation for the development of a constitutional right of privacy in Minnesota. While not all common law decisions protecting privacy have a constitutional analogue, the court's concept of a core of privacy as recognized in decisions such as *Mohr*, *Cornfeldt*, *Monsen*, and *Casino Marketing* has a strong parallel in the court's constitutional privacy decisions. The common law cases buttress the court's recognition of privacy in the constitutional sense and paint a central theme that has as its baseline the protection of basic human dignity.

IV. PRIVACY IN MINNESOTA—THE CONSTITUTIONAL DIMENSION

The Minnesota Supreme Court has protected privacy rights under both the federal and state constitutions. Although there are earlier pre-*Griswold* decisions that follow both *Meyer v. Nebraska*⁵⁵ and *Pierce v. Society of Sisters*,⁵⁶ the right of privacy only

53. *Id.* at 888-89 (citations omitted).

54. *See* Thomas, *supra* note 40, at 1431.

55. 262 U.S. 390 (1923). In *Meyer*, the Court held unconstitutional, under the Due Process Clause of the Fourteenth Amendment, a Nebraska law that prohibited teaching children in public or private schools in languages other than English. *Id.* at 399-403.

emerges with greater definition in the post-*Griswold* decisions.⁵⁷ Nevertheless, broader constructions of fundamental rights under the Minnesota Constitution pre-date the 1965 federal *Griswold* decision.

A. *Minnesota and the United States Constitution*

1. *Pre-Griswold Minnesota Decisions*

Although the right may not have been clearly articulated, Minnesota has followed early federal privacy decisions in a variety of areas. In *State ex rel. Pavlik v. Johannes*,⁵⁸ the court considered the constitutionality of a Minneapolis ordinance that limited the business hours of barber shops and schools.⁵⁹ The court relied on the *Meyer* Court's discussion of due process to hold the ordinance unconstitutional under the due process clauses of both the federal and state constitutions:

Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to . . . engage in any of the common occupations of life . . . and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. . . . The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect.⁶⁰

Based on *Nebbia v. New York*,⁶¹ the Minnesota Supreme Court rejected the appellant's argument that courts no longer have a right to determine the reasonableness of a legislative enactment:

Such a contention, if upheld, would necessitate discarding the principles set forth above, exalt the police power above all constitutional restraints, relegate the judicial branch to a position entirely subordinate to the legislative will, and ulti-

56. 268 U.S. 510 (1925). In *Pierce* the Court held that substantive due process prohibited the state from requiring children to attend public schools. *Id.* at 533-35.

57. Today, *Meyer* and *Piece* would probably be litigated under the First Amendment's protection of the free exercise of religion because the statutes at issue affected private sectarian education.

58. 194 Minn. 10, 259 N.W. 537 (1935).

59. *Id.* at 12, 259 N.W. at 538.

60. *Id.* (citing *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923)).

61. 291 U.S. 502 (1934).

mately put an end to American constitutional government. A careful study of the case warrants no such conclusion.⁶²

In 1949, the court, again citing *Meyer*, noted the Supreme Court's protection of family rights under the Constitution in *Miller v. Monsen*.⁶³ Subsequently, the Minnesota Supreme Court has retreated from the *Lochner* approach to due process cases,⁶⁴ although how far is not clear, particularly in light of the court's liberal use of the equal protection clause to arrive at decisions that potentially smack of the *Lochner* Court's approach to due process issues.⁶⁵

2. *Post-Griswold Minnesota Decisions*

In *Baker v. Nelson*,⁶⁶ the Minnesota Supreme Court's first post-*Griswold* privacy case, the court considered the issues of whether same-sex marriages were authorized by Minnesota law or, if not, whether they were constitutionally compelled.⁶⁷ In *Baker*, the petitioners argued that prohibition of same-sex marriage violated the Ninth Amendment, deprived them of liberty and property without due process, and denied them equal protection of the laws.⁶⁸ The court rejected the challenges:

These constitutional challenges have in common the assertion that the right to marry without regard to the sex of the parties is a fundamental right of all persons and that restricting marriage to only couples of the opposite sex is irrational and invidiously discriminatory. We are not independently persuaded by these contentions and do not find support for them in any decisions of the United States Supreme Court.

The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis. *Skinner*,

62. *Johannes*, 194 Minn. at 13, 259 N.W. at 538.

63. 228 Minn. 400, 402, 37 N.W.2d 543, 545 (1949) (citing *Meyer v. Nebraska*, 262 U.S. 390 (1923)).

64. *Lochner v. New York*, 198 U.S. 45 (1905). *Lochner* held unconstitutional a New York law that limited the hours bakers could work. The Court reasoned that the law unreasonably interfered with the freedom of employers and employees to contract terms of employment. *Id.* at 64.

65. See *State v. Russell*, 477 N.W.2d 886, 902 (Minn. 1991) (Coyne, J., dissenting); see generally Deborah K. McKnight, *Minnesota Rational Relation Test: The Lochner Monster in the 10,000 Lakes*, 10 WM MITCHELL L. REV. 709 (1984) (noting the Minnesota Supreme Court's resurrection of independent scrutiny of economic legislation).

66. 291 Minn. 310, 191 N.W.2d 185 (1971).

67. *Id.* at 310-12, 191 N.W.2d at 185-86.

68. *Id.* at 312, 191 N.W.2d at 186.

which invalidated Oklahoma's Habitual Criminal Sterilization Act on equal protection grounds, stated in part: "Marriage and procreation are fundamental to the very existence and survival of the race." This historic institution manifestly is more deeply founded than the asserted contemporary concept of marriage and societal interests for which petitioners contend. The due process clause of the Fourteenth Amendment is not a charter for restructuring it by judicial legislation.⁶⁹

The court decided that *Griswold* did not compel an opposite conclusion: "The basic premise of [*Griswold*] . . . was that the state, having authorized marriage, was without power to intrude upon the right of privacy inherent in the marital relationship."⁷⁰

The court recognized that "[m]arriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival."⁷¹ The court declined to extend *Loving*, however:

Loving does indicate that not all state restrictions upon the right to marry are beyond reach of the Fourteenth Amendment. But in commonsense and in a constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex.⁷²

69. *Id.* at 312-13, 191 N.W.2d at 186 (citations omitted) (relying on *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942)).

70. *Id.* at 313, 191 N.W.2d at 186. The supreme court also rejected the petitioners' equal protection challenges. The petitioners' argument was based in part on *Loving v. Virginia*, 388 U.S. 1 (1967), in which the Supreme Court held Virginia's antimiscegenation statute prohibiting interracial marriage unconstitutional because of its patent racial discrimination. See *Baker*, 291 Minn. at 314, 191 N.W.2d at 187. The Minnesota Supreme Court rejected the petitioners' argument:

The equal protection clause of the Fourteenth Amendment, like the due process clause, is not offended by the state's classification of persons authorized to marry. There is no irrational or invidious discrimination. Petitioners note that the state does not impose upon heterosexual married couples a condition that they have a proved capacity or declared willingness to procreate, posing a rhetorical demand that this court must read such condition into the statute if same-sex marriages are to be prohibited. Even assuming that such a condition would be neither unrealistic nor offensive under the *Griswold* rationale, the classification is no more than theoretically imperfect. We are reminded, however, that "abstract symmetry" is not demanded by the Fourteenth Amendment.

Id. at 313-14, 191 N.W.2d at 187.

71. *Baker*, 291 Minn. at 314, 191 N.W.2d at 187 (citations omitted) (citing *Loving v. Virginia*, 388 U.S. 1, 12 (1967)).

72. *Id.* at 315, 191 N.W.2d at 187.

In *State v. Hodgson*⁷³ and *State v. Hultgren*,⁷⁴ the Minnesota Supreme Court applied *Roe v. Wade*⁷⁵ to hold Minnesota's restrictive abortion statute unconstitutional under the Federal Constitution.⁷⁶ In *Hickman v. Group Health Plan*,⁷⁷ the supreme court considered the application of *Roe* in a case involving a challenge to the constitutionality of a Minnesota statute that prohibited wrongful birth and wrongful life actions.⁷⁸ While the court held that there was no state action in the case, in dicta it indicated there was no violation of *Roe*, even assuming the existence of state action:

[T]he United States Supreme Court has clearly held to the rule that, in order to be in violation of *Roe v. Wade*, the state must directly affect or impose a significant burden on a woman's right to an abortion. Thus, in its most recent decision, the court invalidated laws that forced doctors to provide clients with information discouraging abortion and to use medical procedures that could put maternal health at risk for the benefit of a fetus. Other statutes held unconstitutional have given third parties the arbitrary right to veto the woman's choice. Unlike these statutes, section 145.424, subdivision 2 does not directly interfere with the woman's right to choose a safe abortion. The two parties, doctor and patient, are still left free to make whatever decision they feel is appropriate.⁷⁹

In *Price v. Sheppard*,⁸⁰ the court considered a privacy claim that involved the administration of electroshock therapy to a patient in a mental hospital without the consent of the patient's guardian.⁸¹ Recognizing the loose parameters of the privacy right, the court noted that the privacy right is "an extremely amorphous one."⁸² The court then assumed an indefinite position toward determination of the nature of privacy rights:

We recognize that it is far too early in the evolution of the right of privacy to offer any single definition or rule of what

73. 295 Minn. 294, 204 N.W.2d 199 (1973).

74. 295 Minn. 299, 204 N.W.2d 197 (1973).

75. 410 U.S. 113 (1973).

76. *Hodgson*, 295 Minn. at 295, 204 N.W.2d at 200; *Hultgren*, 295 Minn. at 301, 204 N.W.2d at 198.

77. 396 N.W.2d 10 (Minn. 1986).

78. *Id.* at 13 (applying MINN. STAT. § 145.424, subd. 2 (1984)).

79. *Id.* at 13-14 (citations omitted).

80. 307 Minn. 250, 239 N.W.2d 905 (1976).

81. *Id.* at 253, 239 N.W.2d at 908.

82. *Id.* at 256, 239 N.W.2d at 910 (discussing *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); and *Stanley v. Georgia*, 394 U.S. 557 (1969)).

the right entails. Only its broadest contours have been sketched. We do feel, however, because of the importance of that emerging right, it is appropriate for us, at this time, to set forth more than our bare conclusion that the right of privacy is or is not involved.

At the core of the privacy decisions, in our judgment, is the concept of personal autonomy—the notion that the Constitution reserves to the individual, free of governmental intrusion, certain fundamental decisions about how he or she will conduct his or her life. Like other constitutional rights, however, this right is not an absolute one and must give way to certain interests of the state, the balance turning on the impact of the decision on the life of the individual. As the impact increases, so must the importance of the state's interest. Some decisions, we assume, will be of little consequence to the individual and a showing of a legitimate state interest will justify its intrusion; other decisions, on the other hand, will be of such major consequence that only the most compelling state interest will justify the intrusion.

But once justified, the extent of the state's intrusion is not unlimited. It must also appear that the means utilized to serve the state's interest are necessary and reasonable, or, in other words, in light of alternative means, the least intrusive.

To summarize, our understanding of at least one aspect of the privacy decisions to date is that where the state proposes to intrude into a fundamental decision affecting the conduct of an individual's life, in order to justify that intrusion, it must first demonstrate a legitimate and important state interest. The sufficiency of the interest will be directly dependent on the impact of the decision on the individual's life. And secondly, the means it intends to utilize in serving that interest must, in light of the alternatives, be the least intrusive.⁸³

The court balanced the State's interest in supporting the well-being of its citizens who are unable to make decisions for themselves against the individual's right of physical liberty and concluded that, as the severity of the therapy increases, the degree of procedural due process required before the therapy is administered increases.⁸⁴ For more invasive forms of therapy, the court established strict procedural guidelines that must be followed before the therapy is used.⁸⁵

83. *Price*, 307 Minn. at 256-58, 239 N.W.2d at 910-11 (footnotes omitted).

84. *Id.* at 262-63, 239 N.W.2d at 913.

85. The court adopted the following procedure:

In *Minnesota Board of Health v. City of Brainerd*,⁸⁶ the court considered the privacy issue in the context of a claim that compulsory fluoridation was unconstitutional.⁸⁷ The court added to the basic concept of privacy set forth in *Price*.

Thus, in *Eisenstadt v. Baird*, the Supreme Court held that the right of privacy protects an individual's right "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child"; and, in *Roe v. Wade*, the court held that the right of privacy protects an individual's right to decide "whether or not to terminate her pregnancy."

While the United States Supreme Court has never so held, the right of personal privacy could also extend to protect an individual's decision regarding what he will or will not ingest into his body. Indeed, this concept of bodily integrity is rooted in common law.

. . . .

Whether one's right to bodily integrity is designated a right of personal privacy or not, though, does not alter our conclusion that the right, like other constitutional rights, is not absolute.⁸⁸

Applying what appears to be a rational basis standard, the supreme court held the fluoridation law constitutional.⁸⁹

(1) If the patient is incompetent to give consent or refuses consent or his guardian other than persons responsible for his commitment also refuses his consent, before more intrusive forms of treatment may be utilized, the medical director of the state hospital must petition the probate division of the county court in the county in which the hospital is located for an order authorizing the prescribed treatment;

(2) the court shall appoint a guardian ad litem to represent the interests of the patient;

(3) in an adversary proceeding, pursuant to the petition, the court shall determine the necessity and reasonableness of the prescribed treatment.

In making that determination the court should balance the patient's need for treatment against the intrusiveness of the prescribed treatment. Factors which should be considered are (1) the extent and duration of changes in behavior patterns and mental activity effected by the treatment, (2) the risks of adverse side effects, (3) the experimental nature of the treatment, (4) its acceptance by the medical community of this state, (5) the extent of intrusion into the patient's body and the pain connected with the treatment, and (6) the patient's ability to competently determine for himself whether the treatment is desirable.

Price v. Sheppard, 307 Minn. 250, 262-63, 239 N.W.2d 905, 913 (1976) (footnotes omitted).

86. 308 Minn. 24, 241 N.W.2d 624 (1976).

87. *Id.* at 36-37, 241 N.W.2d at 631.

88. *Id.* at 35-36, 241 N.W.2d at 631 (citations omitted).

89. The court worded the test as follows:

In *R.S. v. State*,⁹⁰ the Minnesota Supreme Court considered the privacy issue with respect to family relationships.⁹¹ The court noted that there are two ways in which the State may interfere with familial autonomy: by intruding “into the family structure or the definition of family” or by interfering “with an individual’s constitutional right to make certain decisions concerning the family unit.”⁹²

At issue in *R.S.*, which involved the second aspect of familial autonomy, was whether the State unconstitutionally interfered with that right by adopting a statute that authorized interviewing a reported child abuse victim without parental notification and consent when the report does not name the alleged abuser.⁹³ Although the court recognized implications of the right to privacy and concluded that the State must establish a compelling interest to justify interference with the right, it held that the State’s interest in identifying and protecting victims of child abuse justified the interview of a suspected victim of child abuse without parental notification.⁹⁴

The Minnesota Supreme Court’s application of the federal privacy right was the first step in giving meaning to the constitutional dimension of privacy in Minnesota. The second, and most important, was recognition of a privacy right under the Minnesota Constitution, an independent right, free from the potential restrictions of the privacy concept as it has been defined by the United States Supreme Court under the Federal Constitution.

B. Privacy under the Minnesota Constitution

Although the Minnesota Supreme Court did not acknowledge the existence of a right of privacy under the Minnesota Constitution until 1987, the building blocks for the privacy right were already in place. The court had established three propositions

[T]o properly determine the constitutionality of fluoridation, we must consider (1) the importance of the state’s purpose for requiring fluoridation; (2) the nature and magnitude of the effect of forced fluoridation on the individual; (3) whether the state’s purpose justifies the intrusion of forced fluoridation; and (4) whether the means adopted by the state to accomplish its purpose is proper and reasonable.

Id. at 36-37, 241 N.W.2d at 631.

90. 459 N.W.2d 680 (Minn. 1990).

91. *Id.* at 689.

92. *Id.*

93. *Id.* (applying MINN. STAT. § 626.556, subd. 10(c) (1988)).

94. *Id.* at 689-90.

critical to the recognition of a right to privacy under the Minnesota Constitution. First, that fundamental rights are not limited to rights expressly established in the Minnesota Constitution. Second, that fundamental rights under the Minnesota Constitution may be interpreted more broadly than fundamental rights under the Federal Constitution. The third, building on the first two, indicates there is an unenumerated right of privacy under the Minnesota Constitution that is not limited by the federal concept of the right of privacy.

1. *Fundamental Rights Are Not Limited to Express Rights*

In *Thiede v. Town of Scandia Valley*,⁹⁵ the court considered constitutional claims that arose out of injuries the plaintiffs allegedly sustained when Scandia Valley officials forcibly removed them from the town.⁹⁶ In sweeping language, the court put in constitutional context a freehold owner's right to be free from government interference, particularly removal, because of a legal settlement for public relief benefits:

The entire social and political structure of America rests upon the cornerstone that all men have certain rights which are inherent and inalienable. Among these are the right to be protected in life, liberty, and the pursuit of happiness; the right to acquire, possess, and enjoy property; and the right to establish a home and family relations—all under equal and impartial laws which govern the whole community and each member thereof. The rights, privileges, and immunities of citizens exist notwithstanding there is no specific enumeration thereof in State Constitutions. "These instruments measure the powers of rulers, but they do not measure the rights of the governed." . . . "The fundamental maxims of a free government seem to require, that the rights of personal liberty and private property should be held sacred." Government would not be free if they were not so held.

The Constitution of Minnesota specifically recognizes the right to "life, liberty or property", but does not attempt to

95. 217 Minn. 218, 14 N.W.2d 400 (1944).

96. *Id.* at 218, 14 N.W.2d at 402. The town removed the plaintiffs to avoid providing relief to the indigent. *Id.* The facts, which are quite detailed, prompted the court to remark in the opening paragraph of its opinion that "The story so told reads like a sequel to Steinbeck's 'The Grapes of Wrath.'" *Id.* at 219, 14 N.W.2d at 402. The plaintiffs allege that they sustained damage to their property by the removal, which took place in sub-zero weather, and that the plaintiff and her husband also suffered mental anguish as a result. *Id.* at 224, 14 N.W.2d at 405.

enumerate all "the rights or privileges secured to any citizen thereof". It, however, significantly provides: "The enumeration of rights in this constitution shall not be construed to deny or impair others retained by and inherent in the people."⁹⁷

Against this background, the court discussed the right of a freeholder against government action removing her from the freehold:

"Every man's house is his castle" is more than an epigram. It is a terse statement, in language which everyone should understand, of a legal concept older even than Magna Carta. The maxim has found expression, in various forms, in the Declaration of Independence, and in the Bills of Rights in our Federal and State Constitutions. A man's right to occupy his home is inviolable, irrespective of the meagerness or abundance of his wealth. " 'Indigence' in itself is neither a source of rights nor a basis for denying them."

. . . In recognition of these principles, both American and English courts for centuries have uniformly declared that the owner of a freehold cannot, without his consent, be removed therefrom to his legal settlement for poor relief purposes in another municipality.⁹⁸

2. *Fundamental Rights under the Minnesota Constitution May Be Interpreted More Broadly than Fundamental Rights under the Federal Constitution*

More recently, in *State v. Fuller*,⁹⁹ the court addressed the issue of whether the Minnesota Constitution's double jeopardy provision should be construed more broadly than the equivalent provision in the Constitution.¹⁰⁰ The *Fuller* court noted that state supreme courts may construe their constitutions more broadly than the Constitution:

It is axiomatic that a state supreme court may interpret its own state constitution to offer greater protection of individual rights than does the federal constitution. Indeed, as the highest court of this state, we are "independently responsible for safeguarding the rights of [our] citizens." State courts are, and should be, the first line of defense for individual liberties within the federalist system. This, of course, does not mean

97. *Id.* at 224-25, 14 N.W.2d at 405 (citations omitted).

98. *Id.* at 225-26, 14 N.W.2d at 405-06 (citations and footnote omitted).

99. 374 N.W.2d 722 (Minn. 1985).

100. *Id.* at 726-27 (interpreting MINN. CONST. art. I, § 7).

that we will or should cavalierly construe our constitution more expansively than the United States Supreme Court has construed the federal constitution.¹⁰¹

The Minnesota Supreme Court has consistently taken the position, perhaps more so in criminal cases and in cases involving freedom of conscience, that Minnesota constitutional guarantees may provide broader protection than the United States Constitution.¹⁰² However, not until 1987, in *State v. Gray*,¹⁰³ did the court acknowledge the existence of a separate right of privacy under the Minnesota Constitution. And, fully one year later, in *Jarvis v. Levine*,¹⁰⁴ the court finally gave more specific definition to the origins of that right.

3. *Privacy Rights Exclusive to the Minnesota Constitution*

This section first describes the Minnesota Supreme Court's adoption of the right of privacy in *Gray* and then briefly examines the court's post-*Gray* application of the concept. The discussion then returns to the principal decisions, *Gray* and *Jarvis v. Levine*, to determine whether specific standards or guidelines for application of the privacy right exist.

In *State v. Gray*,¹⁰⁵ the court built on the foundations laid in both *Thiede* and *Fuller* in acknowledging the existence of a fundamental right of privacy under the Minnesota Constitution:

The constitutionally protected right of privacy was first explicitly recognized by the United States Supreme Court in *Griswold v. Connecticut*. Since *Griswold*, the Supreme Court has continued to recognize the right of privacy as a constitutionally protected right, although it has never isolated the precise source of that right. A comparison of the Minnesota Bill of Rights with the federal constitutional provisions upon which the right of privacy is founded shows that the rights protected by the Federal Constitution are also protected by the Minnesota Bill of Rights. Accordingly, it is our opinion that there

101. *Id.* (citations omitted and footnote omitted).

102. *See, e.g., In re E.D.J.*, 502 N.W.2d 779, 781 (Minn. 1993); *State v. Russell*, 477 N.W.2d 886, 888 (Minn. 1991); *Friedman v. Commissioner of Pub. Safety*, 473 N.W.2d 828 (Minn. 1991); *State v. Hershberger*, 462 N.W.2d 393, 397 (Minn. 1990); *State v. Hamm*, 423 N.W.2d 379, 382 (Minn. 1988); and *State v. Gray*, 413 N.W.2d 107, 111 (Minn. 1987).

103. 413 N.W.2d 107 (Minn. 1987).

104. 418 N.W.2d 139 (Minn. 1988).

105. 413 N.W.2d at 111. *Gray* involved a sodomy charge arising out of the sale of sex. *Id.* at 108.

does exist a right of privacy guaranteed under and protected by the Minnesota Bill of Rights.¹⁰⁶

Having recognized the existence of the privacy right, the *Gray* court also concluded that the privacy right could be construed more broadly under the Minnesota Constitution.¹⁰⁷

In *Jarvis v. Levine*,¹⁰⁸ the court relied on the conclusions reached in *Gray* to analyze the right of an involuntarily committed mental patient to refuse neuroleptic drugs:

There is a right to privacy under the Constitution of Minnesota. The right begins with protecting the integrity of one's own body and includes the right not to have it altered or invaded¹⁰⁹

The court held that the procedures it had established earlier for the administration of psychosurgery or electroshock treatments also applied to the use of neuroleptic drugs.¹¹⁰ The court went on to say:

This holding is specifically made under [Minnesota Constitution, article I, sections 1, 2 and 10] and not pursuant to any law or provision of the United States Constitution. . . . Although judicial recognition of a constitutional right of privacy in Minnesota may be relatively recent, the protection of bodily integrity has been rooted firmly in our law for centuries.¹¹¹

106. *Id.* at 111 (citations omitted). The Minnesota Bill of Rights is not the only source of fundamental rights under the Minnesota Constitution. In *Skeen v. State*, 505 N.W.2d 299 (Minn. 1993), the State argued that *Gray* only recognizes fundamental rights status for the mandates found in the bill of rights, but not other parts of the Minnesota Constitution. The court rejected the State's argument:

Thus, on balance, we hold that education is a fundamental right under the state constitution, not only because of its overall importance to the state but also because of the explicit language used to describe this constitutional mandate. While a fundamental right cannot be found "[a]bsent constitutional mandate," the Education Clause is a mandate, not simply a grant of power.

Skeen, 505 N.W.2d at 313 (citation omitted).

107. *State v. Gray*, 413 N.W.2d 107, 111 (Minn. 1987).

108. 418 N.W.2d 139 (Minn. 1988).

109. *Id.* at 148 (citation omitted).

110. *Id.* at 145.

111. *Id.* at 148-49. The *Jarvis* court relied in part on its opinion in *Minnesota Bd. of Health* in which it stated that "[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Id.* at 149 (quoting *Minnesota Bd. of Health v. City of Brainerd*, 308 Minn. 24, 36, 241 N.W.2d 624, 631 (Minn. 1976), *appeal dismissed*, 429 U.S. 803 (1976)). The *Jarvis* court stated that its opinion "should erase any doubt that *Price* is based upon principles of the Minnesota Constitution, principles which remain valid today." *Jarvis v. Levine*, 418 N.W.2d 139, 149 (Minn. 1988).

Subsequent to *Gray* and *Jarvis* there has been only a handful of appellate decisions directly implicating the right of privacy under the Minnesota Constitution.

The court applied *Jarvis* in *In re Schmidt*,¹¹² yet another case involving the administration of neuroleptic drugs. This time the court concluded that a legislative amendment had established the procedural framework set forth in *Jarvis*.¹¹³ The court therefore concluded that “facially the statute violates neither the involuntarily committed patient’s right to privacy nor due process under article 1—the Bill of Rights—of the Minnesota Constitution.”¹¹⁴

In *In re Blilie*,¹¹⁵ the plaintiff argued that the *Prince-Jarvis-Schmidt* trilogy extended to protect the privacy rights of retarded persons, as well as mentally ill persons, and that her right to privacy was violated because the Minnesota Commitment Act “subjects mentally retarded or developmentally disabled persons to intrusive forms of therapy without any independent judicial review.”¹¹⁶ Blilie argued that the approval system which permitted the hospital staff to prescribe neuroleptic medication with the approval of the public guardian, did not properly protect her privacy right insofar as the “state, or its delegate, is both recommending the treatment and approving it as public guardian.”¹¹⁷

The court framed the issue as “whether the state should be enjoined from providing intrusive therapy, such as neuroleptic drugs, without the consent of a nonpublic guardian ad litem or court order.”¹¹⁸ The court held that the procedural protections for mentally ill patients in *Price*, *Jarvis*, and *Schmidt* applied to mentally ill patients, except “that a public guardian may be substituted for a court-appointed guardian for purposes of making the treatment decisions.”¹¹⁹ The court reviewed the procedures for the administration of neuroleptic drugs:

We reiterate today the continuing validity of the *Price* procedures and hold that they must be applied equally to mentally retarded and mentally ill patients who face intrusive

112. 443 N.W.2d 824 (Minn. 1989).

113. *Id.* at 827 (referring to MINN. STAT. § 253B.03(6a) (1988)).

114. *Id.*

115. 494 N.W.2d 877 (Minn. 1993).

116. *Id.* at 880.

117. *Id.*

118. *Id.* at 881.

119. *Id.* at 883.

treatment procedures. The primary concern we raised in Price and Schmidt that intrusive therapy should not be authorized by persons engaged in providing direct care to a patient, has been addressed by the requirement that neuroleptics may not be administered without the consent of a permanent guardian or guardian ad litem and a multidisciplinary treatment review panel. These procedural requirements comport with the purposes underlying these cases, and they adequately protect appellant's privacy rights. Thus, we reject appellant's constitutional challenge.¹²⁰

120. *In re Blilie*, 494 N.W.2d 877, 883-84 (Minn. 1993) (citations omitted).

In *Ascher*, the court of appeals held that a state sobriety checkpoint violated the Fourth Amendment and the Minnesota Constitutional right to privacy. *Ascher v. Commissioner of Pub. Safety*, 505 N.W.2d 362, 369 (Minn. Ct. App. 1993), *review granted*, (Minn. Oct. 28, 1993). The sobriety check that gave rise to the constitutional claim was conducted by the Burnsville Police, the Dakota County Sheriff, and the State Highway Patrol in Burnsville. *Id.* at 363. The media was invited to be present at the checkpoint and two local television stations sent camera crews to the checkpoint. *Id.* *Ascher* went through the sobriety checkpoint and was diverted to the final screening area where he failed the field sobriety tests and the initial breath test. *Id.* When he was taken to the police station he refused to take the Intoxilyzer test and his driver's license was subsequently revoked pursuant to the implied consent law. *Id.* at 364. *Ascher* challenged the sobriety checkpoint in the petition for judicial review of the license revocation. *Id.* The court applied the Supreme Court's three-prong standard to determine the reasonableness of a seizure made pursuant to a sobriety checkpoint. *Id.* at 364-65 (citing *Michigan Department of State Police v. Sitz*, 496 U.S. 444, 467 (1990)). *Sitz* requires a "weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." *Sitz*, 496 U.S. at 467 (quoting *Brown v. Texas*, 443 U.S. 47, 50-51 (1979)). The court of appeals concluded that the first two prongs were satisfied but that the checkpoint violated the third prong because it "impermissibly exacerbated the subjective intrusion to the law-abiding motorist." *Ascher*, 505 N.W.2d at 366. The authorities gave permission to the camera crews to film the checkpoint areas, the initial screening, and field sobriety tests, causing sober drivers to fear seeing their pictures on the evening news. *Id.* The court concluded by stating that:

Although we recognize that citizens who appear to have violated laws may have a lessened right to privacy, there is a degradation of public spirit and human dignity when a police force uses unrestricted media exploitation as a serious method of law enforcement, particularly when so few people are actually apprehended as violators.

Id.

Having concluded that the sobriety checkpoint violated the Fourth Amendment under *Sitz*, the court of appeals also held that the checkpoint violated article I, section 10 of the Minnesota Constitution. *Id.* The court's examination of the right to privacy under the state constitution began with *Gray* and *Jarvis*, and led the court to conclude that the checkpoint was conducted in violation of that right:

The unfettered discretion afforded police officers and officials by the checkpoint procedures used here appears to have produced an intrusion on the privacy rights of law-abiding drivers, as well as the culpable, analogous to the impermissible invasion of bodily integrity identified in *Jarvis*. Requiring drivers, under the lights and lenses of deliberately invited commercial televi-

In *State v. Davidson*,¹²¹ the supreme court considered the right to privacy under the Minnesota Constitution in a case involving a constitutional challenge to the Minnesota obscenity statute. The court relied on *Gray* and *Jarvis* in recognizing the existence of the privacy right under Minnesota law.¹²² The *Davidson* court considered the Supreme Court's holding in *Stanley v. Georgia*, that the right to privacy protected the possession of obscene material in the privacy of one's own home, but also noted the Court's holding in *United States v. 12 12,000-Ft. Reels of Super 8mm Film*, that the privacy right did not prohibit the government from controlling the commercial flow of obscene material.¹²³

The respondent argued that the court should reject the Supreme Court's interpretation of the privacy right and hold instead that the right of privacy protects the seller and distributor of the material.¹²⁴ The argument relied on a Hawaii Supreme Court decision that invalidated that state's obscenity statute based on an explicit privacy provision in the Hawaii Constitu-

sion cameras, to get out of their cars and perform sobriety tests produced, here, a serious invasion of personal autonomy. . . .

The prospect that anyone, no matter how innocent, may be stopped for a televised police inspection is inconsistent with the Minnesota conception of ordered liberty. Sobriety checkpoints, we conclude, deny the detained individual's reasonable expectations of privacy, inserting a suspicionless search into a context where none would normally occur.

Id. at 368-69.

In *Gray*, decided the same day as *Ascher*, a different panel of the court of appeals held that a sobriety checkpoint in Saint Paul was constitutional under the *Sitz* standards. 505 N.W.2d 357, 360-61 (Minn. Ct. App. 1993), *review granted*, (Minn. Oct. 28, 1993). Television stations were also present and were permitted to film the prescreening and final screening areas. *Id.* at 359. The court concluded that there were no compelling reasons for it to deviate from the *Sitz* standards in favor of a more stringent standard under the Minnesota Constitution. *Id.* at 362. See generally Cynthia R. Bartell, *Giving Sobriety Checkpoints the Cold Shoulder: A Proposed Balancing Test for Suspicionless Seizures Under the Minnesota Constitution* 20 WM. MITCHELL L. REV. 515 (1994).

In *Albright*, the Supreme Court refused to recognize a substantive due process right to be free from criminal prosecution except upon probable cause. *Albright v. Oliver*, 114 S. Ct. 807 (1994). The Court held that the Fourth Amendment, not substantive due process, is the appropriate basis for any claim that a prosecution was instituted without probable cause. *Id.* at 812. If *Albright* precludes the conversion of what is essentially a Fourth Amendment search and seizure claim into a substantive due process claim, the argument could be made that the use of the Minnesota Constitution should be similarly confined.

121. 481 N.W.2d 51 (Minn. 1992).

122. *Id.* at 58.

123. *Id.* (citing *United States v. 12 12,000-Ft. Reels of Super 8mm Film*, 413 U.S. 123, 128 (1973); and *Stanley v. Georgia*, 394 U.S. 557, 564-65 (1969)).

124. *Id.*

tion.¹²⁵ The Minnesota Supreme Court rejected this argument and concluded that the right to privacy, even if it extended to the private possession of obscene material under *Gray*, does not mean that it would apply to the "point of sale."¹²⁶

The decisions that have followed *Gray* and *Jarvis* do not seem to add in any significant way to privacy jurisprudence in Minnesota. The absence of guidelines in subsequent decisions raises the question of whether more specific guidelines can be extracted from the principal cases, *Gray* and *Jarvis*.

The constitutional right of privacy recognized by the Minnesota Supreme Court in *Gray* was anchored in the similarity between the Minnesota and federal constitutions. The court explained *Gray* in *Jarvis* by specifically anchoring the privacy right not in general comparisons between the Minnesota and federal constitutions, but in three specific Minnesota constitutional provisions.¹²⁷ The first is article I, section 1, which reads as follows:

Government is instituted for the security, benefit and protection of the people, in whom all political power is inherent, together with the right to alter, modify or reform government whenever required by the public good.¹²⁸

The second is article I, section 2:

No member of this state shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers. There shall be neither slavery nor involuntary servitude in the state otherwise than as punishment for a crime of which the party has been convicted.¹²⁹

The third is article I, section 10:

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and

125. *Id.* (citing *State v. Kam*, 748 P.2d 372 (Haw. 1988) (referencing HAW. CONST. art. I, § 6)).

126. *State v. Davidson*, 481 N.W.2d 51, 58 (Minn. 1992) (citing *Stall v. State*, 570 So. 2d 257, 260 (Fla. 1990), *cert. denied sub nom. Florida v. Long*, 111 S. Ct. 2888 (1991)).

127. *Davidson*, 481 N.W.2d at 58 (citing *Jarvis v. Levine*, 418 N.W.2d 139, 147-48 (Minn. 1988)).

128. MINN. CONST. art. I, § 1.

129. *Id.* § 2.

particularly describing the place to be searched and the person or things to be seized.¹³⁰

Only article I, section 10, which protects against unreasonable searches and seizures, has a clear equivalent in the United States Constitution—language that is almost identical to the Fourth Amendment.¹³¹ The language in the second part of Article I, section 2 has a partial equivalent in the United States Constitution, but it is found in the Thirteenth Amendment¹³² rather than the Bill of Rights. The language in the first part includes Minnesota's equal protection guarantee.¹³³ Minnesota's due process guarantee is in article I, section 7,¹³⁴ rather than article I, section 2, of the Minnesota Constitution.

130. *Id.* § 10.

131. The Fourth Amendment states:

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

U.S. CONST. amend. IV.

Albright raises questions concerning the relationship between Fourth Amendment and substantive due process claims. *Albright v. Oliver*, 114 S. Ct. 807 (1994). The Court held a claim that prosecutions are initiated without probable cause must be based on the Fourth Amendment rather than substantive due process rights. *Id.* at 811. The Court stated that “[w]here a particular amendment ‘provides an explicit textual source of constitutional protection’ against a particular sort of government behavior, ‘that Amendment, not the more generalized notion of “substantive due process,” must be the guide for analyzing these claims.’” *Id.* at 813 (citation omitted).

132. The Thirteenth Amendment states that “[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.” U.S. CONST. amend. XIII, § 1. The Thirteenth Amendment took effect Dec. 18, 1865 subsequent to the adoption of the Minnesota Constitution on October 13, 1857.

133. *See Skeen v. State*, 505 N.W.2d 299, 312 (Minn. 1993).

The point was also made in *State v. Russell*, where Justice Simonett stated:

Equal protection is confirmed in our state constitution as an “unenumerated” constitutional right. . . . Article 1, § 2 provides: “No member of this state shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers.” One of the inherent rights secured to a free people by section 2 is the inherent right to “equal and impartial laws which govern the whole community and each member thereof.” Put another way, persons similarly situated are to be treated alike unless a sufficient basis exists for distinguishing among them.

State v. Russell, 477 N.W.2d 886, 893 (Minn. 1991) (Simonett, J., concurring) (citations omitted). Simonett noted that the “rights and privileges” language in article 1, section 2 may have been taken from the New York Constitution, which has identical language. *Id.* n.1. *See also* Fred L. Morrison, *An Introduction to the Minnesota Constitution*, 20 WM. MITCHELL L. REV. 287 (1994).

134. No person shall be held to answer for a criminal offense without due process of law, and no person shall be put twice in jeopardy of punishment for the

Article I, section 1, does not have a federal constitutional parallel, but it is similar in approach to state constitutional provisions adopted prior to the adoption of the United States Constitution that were intended to make clear that the people are the ultimate repository of power.¹³⁵

The shift from *Gray's* broad interpretation of the privacy right, which relied on the Supreme Court's recognition of the privacy right in *Griswold* and *Roe* ("although it has never isolated the precise source of that right"),¹³⁶ to *Jarvis* and its reliance on specific Minnesota constitutional provisions¹³⁷ is not explained in any Minnesota Supreme Court opinions. Whether *Jarvis* makes a difference in structuring the privacy right is questionable. In one view, the origin of the right of privacy makes no difference because it is clearly an "unenumerated right"¹³⁸ and, as such, the exact origin of the right does not have to be defined. The very existence of language, such as that contained in article I, section 16 of the Minnesota Constitution¹³⁹ is strong evidence that the purpose was to "safeguard unwritten inalienable rights."¹⁴⁰ The *Jarvis* court's reliance on article I, section 1, supports this conclusion.¹⁴¹

The court's reliance on the equal protection source, and particularly, although not clearly articulated, on the involuntary servitude provision of that section, coupled with the section 10 prohibition against unreasonable searches and seizures, at the very least seems to imply that constitutional zones of privacy exist.¹⁴² Those privacy zones protect not only privacy interests with respect to places, but also the privacy interest in personal autonomy, including the interest in personal liberty and associational interests. The adoption of the privacy right is perfectly consistent with the Minnesota Supreme Court's understanding of pri-

same offense, nor be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law.

MINN. CONST. art I, § 7.

135. See generally John Choon Yoo, *Our Declaratory Ninth Amendment*, 42 EMORY L.J. 967 (1993) (discussing the Ninth Amendment as protecting unenumerated civil rights).

136. *State v. Gray*, 413 N.W.2d 107, 111 (Minn. 1987).

137. *Jarvis v. Levine*, 418 N.W.2d 139, 148 (Minn. 1988).

138. See, e.g., *State v. Russell*, 477 N.W.2d 886, 893 (Minn. 1992) (Simonett, J., concurring).

139. MINN. CONST., art. I, § 16 (stating that "[t]he enumeration of rights in this constitution shall not deny or impair others retained by and inherent in the people").

140. Suzanna Sherry, *Natural Law in the States*, 61 U. CIN. L. REV. 171, 182 (1992).

141. *Jarvis v. Levine*, 418 N.W.2d 139, 148 (Minn. 1988).

142. *Id.* at 148-49.

vacy under the United States Constitution and is also consistent with the court's understanding of the common law concept of privacy.¹⁴³ The scope of the privacy right, however, is unclear, a point that is obvious from the *Gray* court's discussion of the nature of fundamental rights:

Having recognized the existence of a right of privacy under the Minnesota Bill of Rights, we must articulate the scope of protection afforded by that right. In this respect, we agree with the United States Supreme Court that the right of privacy protects only fundamental rights. Consequently, a law must impermissibly infringe upon a fundamental right before it will be declared unconstitutional

Fundamental rights are "[t]hose which have their origin in the express terms of the Constitution or which are necessarily to be implied from those terms."

In deciding whether a right alleged to be fundamental is indeed fundamental, under our Constitution, we are not limited by United States Supreme Court decisions. Certainly, the protection we afford cannot be less than that afforded by the Federal Constitution, but it is equally certain that we can afford more protection under our constitution than is afforded under the Federal Constitution.¹⁴⁴

After establishing the analytical framework, the *Gray* court held that the right of privacy was not violated by the prosecution of Gray for criminal sodomy arising out of alleged prostitution.¹⁴⁵ The court reiterated its statement that the right of privacy protects only fundamental rights, and then noted that *Gray* characterized the fundamental right in the case as "the right of consenting adults to engage in private sexual conduct within the privacy of the home."¹⁴⁶ The supreme court disagreed, primarily because of the attempt to characterize the claim as one involving

143. See *supra* notes 38-48 and accompanying text.

144. *Gray*, 413 N.W.2d at 111 (citations omitted). The Minnesota Bill of Rights is not the only source of fundamental rights under the Minnesota Constitution. In *Skeen v. State*, 505 N.W.2d 299 (Minn. 1993), the State argued that *Gray* only recognizes fundamental rights status for the mandates found in the bill of rights, but not other parts of the Minnesota Constitution. The court rejected the State's argument:

Thus, on balance, we hold that education is a fundamental right under the state constitution, not only because of its overall importance to the state but also because of the explicit language used to describe this constitutional mandate. While a fundamental right cannot be found "[a]bsent constitutional mandate," the Education Clause is a mandate, not simply a grant of power.

Id. at 313 (citation omitted).

145. *State v. Gray*, 413 N.W.2d 107, 113-14 (Minn. 1987).

146. *Id.* at 113.

“private sexual conduct.”¹⁴⁷ The case could not be characterized as private, the court stated, because of the fact that the sexual contact was for compensation:

It is simply wrong to say that the sexual conduct in this case became private once the bedroom door was closed. Given the public nature of this case, the closing of the bedroom door did not insulate the activity from the law. Were we to draw a line at the bedroom door, we would be hard pressed, once presented with the issue, to say that statutes criminalizing prostitution do not violate the right of privacy, and this is something we are quite unwilling to do¹⁴⁸

The court held that there is not a fundamental right under the Minnesota Constitution “to engage in sodomous acts within a sex for compensation relationship.”¹⁴⁹ The court concluded its discussion of the privacy issue with the following statement:

We emphasize that nothing in the court’s opinion, either expressly or impliedly, expands the individual’s right of privacy under the Minnesota Constitution beyond the parameters established for that right by the United States Supreme Court under our Federal Constitution. Today’s decision is limited to a holding that any asserted Minnesota constitutional privacy right does not encompass the protection of those who traffic in commercial sexual conduct. Whether the scope of any privacy right asserted under the Minnesota Constitution should be expanded beyond federal holdings remains to be resolved in future cases wherein the issue is properly raised.¹⁵⁰

In summary, *Gray* ultimately limits the privacy right to the boundaries established by the United States Supreme Court in its privacy decisions under the Federal Constitution. *Jarvis* establishes that the privacy right may be interpreted more broadly, as the court in *Gray* acknowledged, but the subsequent expansion of the privacy right has been utilized primarily to establish stricter procedural guidelines in cases involving the treatment of mentally ill and retarded patients.¹⁵¹ The critical issue in subsequent cases will be whether there is any justification for taking the right of privacy beyond its federally imposed limits. The next section explores that issue.

147. *Id.*

148. *Id.* at 114.

149. *Id.*

150. *Gray*, 413 N.W.2d at 114.

151. *See In re Blilie*, 494 N.W.2d 877, 882-83 (Minn. 1993).

V. STANDARDS FOR RESOLVING THE QUESTION OF WHETHER
MINNESOTA CONSTITUTIONAL PRIVACY RIGHTS SHOULD
BE GIVEN A BROADER INTERPRETATION

There are numerous examples of cases where the Minnesota Supreme Court has, thus far, interpreted the state constitution more broadly than the United States Constitution.¹⁵² Several of those decisions will be discussed in order to identify the standards the court would likely utilize to determine whether the right of privacy under the Minnesota Constitution should be construed more broadly than under the Federal Constitution.

A. *Standards for Minnesota Constitutional Interpretation*

In *In re E.D.J.*,¹⁵³ the supreme court noted that:

It is axiomatic that a state supreme court may interpret its own state constitution to offer greater protection of individual rights than does the federal constitution. Indeed, as the highest court of this state, we are "independently responsible for safeguarding the rights of [our] citizens." State courts are, and should be, the first line of defense for individual liberties within the federalist system. This, of course, does not mean that we will or should cavalierly construe our constitution more expansively than the United States Supreme Court has construed the federal constitution. Indeed, a decision of the United States Supreme Court interpreting a comparable provision of the federal constitution that, as here, is textually identical to a provision of our constitution, is of inherently persuasive, although not necessarily compelling, force.¹⁵⁴

With that statement, the Minnesota Supreme Court justified its rejection of the United States Supreme Court's approach in *California v. Hodari*.¹⁵⁵ The court further stated:

We do not "cavalierly" reject the *Hodari* approach. Rather, we reject it because (a) we have had considerable experience in applying the standard which the Court in *Hodari* rejected, (b) we are not persuaded by the arguments favoring the

152. See cases cited *supra* note 97.

153. 502 N.W.2d 779 (Minn. 1993).

154. *Id.* at 781 (citing *State v. Fuller*, 374 N.W.2d 722, 726-27 (Minn. 1985)).

155. *Id.* In *California v. Hodari*, the Court held that under the Fourth Amendment there is no seizure until a person stops and submits to the authority of the police. *California v. Hodari*, 499 U.S. 621, 629 (1991).

Hodari approach, and (c) we are persuaded that there is no need to depart from the pre-*Hodari* approach.¹⁵⁶

Two years earlier, the court decided *Friedman v. Commissioner of Public Safety*,¹⁵⁷ which involved the right to counsel under article I, section 6 of the Minnesota Constitution as applied to stops for driving while intoxicated.¹⁵⁸ The court adopted the United States Supreme Court's "critical stage" analysis to determine whether the right to counsel applied.¹⁵⁹ The *Friedman* court listed several reasons to justify its decision to interpret the Minnesota Constitutional guarantee of counsel more broadly than the right as interpreted under the Federal Constitution.¹⁶⁰ Two reasons stand out as most determinant. The court stated that "[s]ince very early statehood, Minnesota has recognized the right to counsel as a fundamental right incorporated in the ancient statute adopted in 1877."¹⁶¹ The court also found that "because of Minnesota's lengthy and historic recognition of human rights, human dignity, and the procedural protection for the rights of the criminally accused, detention of drivers suspected of driving while under the influence is a criminal proceeding invoking the right to counsel."¹⁶²

In a third case, *State v. Hershberger*,¹⁶³ the court held that the freedom of conscience and religion provision in the Minnesota Constitution provided broader protection than the First Amendment for Amish who argued that a state law requiring brightly colored triangular signs to be placed on their wagons was unconstitutional.¹⁶⁴ The Minnesota Supreme Court held the statute unconstitutional notwithstanding the Supreme Court's decision

156. *In re E.D.J.*, 502 N.W.2d at 781.

157. 473 N.W.2d 828 (Minn. 1991).

158. *Id.* at 829.

159. *Id.* at 833. If the Minnesota Supreme Court interprets its constitution more broadly, it still may borrow federal standards in determining whether the state constitutional provision has been violated. See *State v. Hershberger*, 462 N.W.2d 393 (Minn. 1990), where, although the terms arose from federal doctrine, the court approved use of "compelling state interest" and "least restrictive alternative" as embodying concepts that provided guidance for examination of issues under the Minnesota Constitution. *Id.* at 398.

160. *Friedman*, 473 N.W.2d at 836.

161. *Id.*

162. *Friedman v. Commissioner of Pub. Safety*, 473 N.W.2d 828, 836 (Minn. 1991).

163. 444 N.W.2d 282 (Minn. 1989), *vacated*, 495 U.S. 901, *aff'd on remand*, 462 N.W.2d 393 (Minn. 1990).

164. 462 N.W.2d at 397.

in *Employment Division v. Smith*.¹⁶⁵ The Minnesota Constitution's Freedom of Conscience and Religion provision, article I, section 16, reads as follows:

The enumeration of rights in this constitution shall not deny or impair others retained by and inherent in the people. The right of every man to worship God according to the dictates of his own conscience shall never be infringed; nor shall any man be compelled to attend, erect or support any place of worship, or to maintain any religious or ecclesiastical ministry, against his consent; nor shall any control of or interference with the rights of conscience be permitted, or any preference be given by law to any religious establishment or mode of worship; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the state, nor shall any money be drawn from the treasury for the benefit of any religious societies or religious or theological seminaries.¹⁶⁶

The court first noted that the language in article I, section 16, is significantly stronger than the language of the First Amendment:

Whereas the first amendment establishes a limit on government action at the point of *prohibiting* the exercise of religion, section 16 precludes even an *infringement* on or an *interference* with religious freedom. Accordingly, government actions that may not constitute an outright prohibition on religious practices (thus not violating the first amendment) could nonetheless infringe on or interfere with those practices, violating the Minnesota Constitution.¹⁶⁷

Section 16 also imposes specific limitations on the government's authority to interfere with the freedom of religion of Minnesota citizens by limiting the State interests that outweigh religious liberty to the government's interest in "peace or safety or against acts of licentiousness."¹⁶⁸ The court concluded that the section 16 limitation on infringement of religious freedom and the limitation on the governmental interests that may justify an interference with that freedom gives Minnesotans "greater

165. *Id.* at 397-99 (applying MINN. CONST. art. I, § 16 to MINN. STAT. § 169.522 (1988)). In *Smith*, the Supreme Court held constitutional the prohibition of the sacramental use of peyote. *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990).

166. MINN. CONST. art I, § 16.

167. *Hershberger*, 462 N.W.2d at 397.

168. *Id.*

protection for religious liberties against governmental action under the state constitution than under the first amendment of the federal constitution."¹⁶⁹

The court recognized that section 16 necessitated balancing the individual's interest in freedom of conscience against the state's interest in public safety.¹⁷⁰ To analyze the importance of freedom of religion, the court noted the preamble to the Minnesota Constitution,¹⁷¹ in which the framers of the Minnesota Constitution acknowledged the importance of religious liberty.¹⁷² The preamble, which places religious liberty on an equal footing with civil liberty, the supreme court's own recognition that individual liberties may deserve greater protection under the Minnesota Constitution than the United States Constitution, and the history of religious tolerance in Minnesota¹⁷³ all support "broad protection for religious freedom in Minnesota."¹⁷⁴

In re E.D.J., Friedman, and Hershberger, as previously noted, are only three examples of supreme court decisions construing the Minnesota Constitution in the face of the United States Supreme Court's more narrow constitutional constructions of the United States Constitution. Other cases suggest relevant factors to be considered when determining whether the Minnesota Constitution should be interpreted more broadly than the United States Constitution,¹⁷⁵ but these three cases focus on history, traditions,

169. *Id.*

170. *Id.* at 398.

171. The Preamble reads as follows: "We, the people of the state of Minnesota, grateful to God for our civil and religious liberty, and desiring to perpetuate its blessings and secure the same to ourselves and our posterity, do ordain and establish this Constitution." MINN. CONST. pmb1.

172. *Hershberger*, 462 N.W.2d at 397-98.

173. *Id.* at 398 (citing *State v. French*, 460 N.W.2d 2, 9-10 (Minn. 1990) (in which a plurality of the court "recognized that the early settlers of this region were of varied sects, may have endured religious intolerance in their native countries and were thus sensitive to religious differences among them").

174. *Id.*

175. Other factors to be considered include: 1) the text of the constitutional provision; 2) significant differences in the language of parallel provisions; 3) state constitutional and common law history; 4) pre-existing state law; 5) structural differences between the state and Federal Constitution; and 6) matters of particular state interest or local concern. See generally Terrence J. Fleming & Jack Nordby, *The Minnesota Bill of Rights: "Wrapt in the Old Miasmatic Mist"*, 7 HAMLINE L. REV. 51, 67-77 (1984); Melissa Sheridan & Bradford S. Delapena, *Individual Liberties Claims: Promoting a Healthy Constitution for Minnesota*, 19 WM. MITCHELL L. REV. 683 (1993); Lisa M. Wiencke, Note, *Invoking the State Constitution to Invalidate Legislation: Who's Guarding the Guardians?*, 18 WM. MITCHELL L. REV. 1073, 1104-1108 (1992); see also Rita Coyle DeMeules, *Minnesota's Variable Approach to State Constitutional Claims*, 17 WM. MITCHELL L. REV. 163 (1991).

and specific constitutional language to make that determination. Most important for the right of privacy, the court's affirmation of the Minnesota history of protecting human rights and dignity provides strong support for a broad recognition of the right to privacy.

B. The Future of Privacy Rights Under the Minnesota Constitution

Arguing in general terms that a broad right of privacy exists under the Minnesota Constitution is a start. The problem comes in ascertaining how that general protection applies in specific cases. As a test, this section examines the potential application of the right of privacy in two areas, same-sex marriages and abortion rights.¹⁷⁶

176. The notable lack of a state constitution standard for the resolution of the issues makes the task difficult. See James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761 (1992). Professor Gardner suggests the likely approach to a state constitutional question:

When you undertake this research, here is what you are likely to find. After reading dozens of state constitutional decisions, you have absolutely no sense of the history of the state constitution. You do not know the identity of the founders, their purposes in creating the constitution, or the specific events that may have shaped their thinking. You find nothing in the decisions indicating how the various provisions of the document fit together into a coherent whole, and if you do find anything at all it is a handful of quotations from federal cases discussing the federal Constitution. You are able to form no conception of the character or fundamental values of the people of the state, and no idea how to mount an argument that certain things are more important to the people than others. If you have found state court decisions departing from the federal approach to the corresponding federal provision, you have no idea why the courts departed from federal reasoning; at best, you are left with the vague impression that the courts simply thought the dissents in analogous federal cases more persuasive. But nothing in these state opinions gives you any idea of what you, as an advocate, could say to convince the state courts once again to reject the federal approach as a matter of state constitutional law.

As a result of this uncertainty, you are unable to draft an argument in which you have the slightest confidence, and you end up throwing anything you can think of at the court and praying that something hits the mark. . . .

This story illustrates what I call the poverty of state constitutional discourse, by which I mean the lack of a language in which participants in the legal system can debate the meaning of the state constitution. Further, to the extent that such a state constitutional discourse exists, its terms and conventions are often borrowed wholesale from federal constitutional discourse, as though the language of federal constitutional law were some sort of *lingua franca* of constitutional argument generally.

Id. at 765-66.

1. Same-sex Marriages

The same-sex marriage issue¹⁷⁷ was initially resolved by the Minnesota Supreme Court in *Baker v. Nelson*,¹⁷⁸ in which the court rejected the claim that the right to privacy under the Federal Constitution supported the claim to a right to same-sex marriage.¹⁷⁹ That decision has not gone without criticism.¹⁸⁰ But a more important issue is whether the case would necessarily be decided the same way under the Minnesota Constitution. For purposes of comparison, the Hawaii Supreme Court's recent decision in *Baehr v. Lewin*¹⁸¹ is raised.

In *Baehr*, the court considered the constitutionality of Hawaii's Marriage Law,¹⁸² which was applied to refuse marriage licenses to the plaintiff couples, who were of the same sex.¹⁸³ In its opinion, the Hawaii court rejected the Minnesota Supreme Court's opinion in *Baker v. Nelson*,¹⁸⁴ which held that state authorization of same-sex marriages was not compelled by the United States Constitution.¹⁸⁵ The Hawaii Supreme Court bypassed *Baker* be-

177. For a good recent discussion of the same-sex marriage issue, see William M. Hohengarten, Note, *Same-Sex Marriage and the Right of Privacy*, 103 YALE L.J. 1495 (1994).

178. 291 Minn. 310, 191 N.W.2d 185 (1971), *appeal dismissed*, 409 U.S. 810 (1972).

179. *Id.* at 312-15, 191 N.W.2d at 186-87.

180. *E.g.*, James Trosino, *American Wedding: Same-Sex Marriage and the Miscegenation Analogy*, 73 B.U. L. REV. 93 (1993); Otis R. Damslet, Note, *Same-Sex Marriage*, 10 N.Y.L. SCH. J. HUM. RTS. 555 (1993).

181. 852 P.2d 44 (Haw. 1993).

182. HAW. REV. STAT. § 572-1 (1985).

183. The court did not characterize the claim as one for homosexual marriage and there were no allegations that the couples were homosexual. The court noted that:

"Homosexual" and "same-sex" marriages are not synonymous; by the same token, a "heterosexual" same-sex marriage is, in theory, not oxymoronic. A "homosexual" person is defined as "One sexually attracted to another of the same sex." "Homosexuality" is "sexual desire or behavior directed toward a person or persons of one's own sex." Conversely, "heterosexuality" is "Sexual attraction for one of the opposite sex," or "sexual feeling or behavior directed toward a person or persons of the opposite sex." Parties to "a union between a man and a woman" may or may not be homosexuals. Parties to a same-sex marriage could theoretically be either homosexuals or heterosexuals.

Baehr, 852 P.2d at 51 n.11 (citations omitted).

The circuit court found that "the issue of whether homosexuality constitutes an immutable trait has generated much dispute in the relevant scientific community." *Id.* at 53 (citation omitted). Notwithstanding this evidence, the Hawaii Supreme Court concluded that the finding was irrelevant to the equal protection claim, which was based on sex discrimination, not discrimination on the basis of sexual orientation. *See id.* at 53 n.14.

184. *Id.* at 61 (rejecting *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 (1971), *appeal dismissed*, 409 U.S. 810 (1972)).

185. *Baker*, 291 Minn. at 312-15, 191 N.W.2d at 186-87.

cause it neither raised nor passed on the application of the state constitution to the plaintiffs' claims.

Article I, section 6 of the Hawaii Constitution states that "[t]he right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest."¹⁸⁶ The privacy right recognized in the constitution was intended by the framers of the Hawaii Constitution to be a fundamental right,¹⁸⁷ similar to the privacy right recognized by the Supreme Court in *Griswold*.¹⁸⁸ The Hawaii Supreme Court also concluded that "at a minimum, article I, section 6 of the Hawaii Constitution encompasses all of the fundamental rights expressly recognized as being subsumed within the privacy protections of the United States Constitution."¹⁸⁹ Because the United States Supreme Court has recognized that the right of privacy includes the right to marry,¹⁹⁰ that right is included in the privacy protections of the Hawaii Constitution.¹⁹¹ The remaining issue was whether the right to marry should be extended to same-sex couples. The Hawaii Supreme Court noted the Supreme Court's link between the right to marry and the "fundamental rights of procreation, childbirth, abortion, and child rearing," to conclude that case law established "that the federal construct of the fundamental right to marry—subsumed within the right to privacy implicitly protected by the United States Constitution—presently contemplates unions between men and women."¹⁹²

The court's conclusion that the privacy right under the United States Constitution does not extend to same-sex couples left the issue of whether the Hawaii Constitution required recognition of a fundamental right to marry by same-sex couples.¹⁹³ The court refused to recognize that right and based its decision on the mandated parallel of Hawaii's constitutional provision on privacy to the Supreme Court's construction of the federal privacy right.¹⁹⁴ The standards the court used to resolve the issue were extracted in general terms from certain landmark Supreme

186. HAW. CONST. art. I, § 6.

187. *Baehr v. Lewin*, 852 P.2d 44, 55 (Haw. 1993) (quoting *State v. Kam*, 748 P.2d 372, 378 (Haw. 1988) (citation omitted)).

188. *Id.*

189. *Id.*

190. *Id.* (citing *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978)).

191. *See id.*

192. *Baehr*, 852 P.2d at 56.

193. *Id.* at 57.

194. *Id.*

Court decisions. Drawing from Justice Goldberg's concurring opinion in *Griswold v. Connecticut*,¹⁹⁵ and from *Palko v. Connecticut*,¹⁹⁶ the Hawaii Supreme Court rejected the claim that same-sex marriages are protected by the right of privacy:

[W]e do not believe that a right to same-sex marriage is so rooted in the traditions and collective conscience of our people that failure to recognize it would violate the fundamental principles of liberty and justice that lie at the base of all our civil and political institutions. Neither do we believe that a right to same-sex marriage is implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if it were sacrificed. Accordingly, we hold that the applicant couples do not have a fundamental constitutional right to same-sex marriage arising out of the right to privacy or otherwise.¹⁹⁷

The applicants also argued that the denial of a marriage license deprived them of the equal protection of the laws as guaranteed by Article I, section 5 of the Hawaii Constitution, which prohibits discrimination on the basis of "race, religion, sex or ancestry."¹⁹⁸ The court initially resolved an open question under the Hawaii Constitution by concluding that strict scrutiny applies to sex-based discrimination.¹⁹⁹ Applying that standard, the supreme court concluded that the Hawaii statute limiting marriage to heterosexual couples is presumed to be unconstitutional absent a showing by the State that "(a) the statute's sex-based classification is justified by compelling state interests and (b) the statute is narrowly drawn to avoid unnecessary abridgements of the applicant couples' constitutional rights."²⁰⁰

195. 381 U.S. 479, 486 (1965) (Goldberg, J., concurring). In *Griswold*, Justice Goldberg stated that fundamental rights determinations hinge on the traditions and conscience of the people, and not "personal and private notions," and that the appropriate question is whether a right "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.'" *Id.* at 493 (citations omitted).

196. 302 U.S. 319 (1937). In *Mueller*, the court cited *Palko* for the proposition that the only protected privacy rights are those implicit in the concept of ordered liberty or those deemed fundamental. *State v. Mueller*, 671 P.2d 1351, 1359 (Haw. 1983). Applying the *Palko* standard, the court held that a prostitute did not have a fundamental right, under the state or Federal Constitution, to conduct business in her home. *Id.* at 1359-60.

197. *Baehr*, 852 P.2d at 57.

198. *Id.* at 60 (citing the HAW. CONST. art. I, § 5) (emphasis omitted).

199. *Id.* at 67.

200. *Id.* at 67. The plaintiffs argued on appeal that the circuit court erred in concluding as a matter of law that homosexuals do not constitute a "suspect class" for pur-

Accordingly, the supreme court remanded to the circuit court to determine whether the state could overcome the presumption of unconstitutionality by showing that the challenged statute "furthers compelling state interests and is narrowly drawn to avoid unnecessary abridgements of constitutional rights."²⁰¹

The court's decision in *Baehr* identifies the problems involved in asserting that the right to privacy encompasses a right to same-sex marriage, even under a specific constitutional provision that governs privacy.²⁰² History and tradition typically present formidable hurdles for such arguments.

Not only does the Minnesota Supreme Court's historical analysis in *Baker v. Nelson*²⁰³ remain as a potential bar to a broader recognition of the privacy claim, but the argument is difficult to make in light of the way the court has been inclined to view Minnesota's history and traditions. The court's analysis in *State v. French*²⁰⁴ illustrates this point.

In *French*, the supreme court considered whether a landlord should be held liable for violating the Minnesota Human Rights Act²⁰⁵ ("MHRA") when he refused to rent a house to a tenant because she intended to live with her fiancé prior to marriage.²⁰⁶ The court's holding was twofold. First, the court held that the refusal to rent the house was not a violation of the MHRA prohibition against discrimination based on marital status.²⁰⁷ Second, the court held that article I, section 16 of the Minnesota Constitution, the freedom of conscience provision, outweighed the

poses of equal protection analysis. The supreme court deemed it irrelevant for purposes of the constitutional analysis, in this case, whether homosexuals constitute a "suspect class." *Id.* at 53 n.14, 58 n.17. The court stated that resolution of the issue was unnecessary to its ruling that Hawaii denies same-sex couples access to the marital status, with the rights and benefits that it confers. Resolution of the issue was also unnecessary to the conclusion "that it is the state's regulation of access to the marital status, on the basis of the applicants' sex, that gives rise to the question whether the applicant couples have been denied the equal protection of the laws in violation" of the constitution. *Id.* at 53 n.14.

201. *Id.* at 68.

202. Several states have specific constitutional provisions governing the right to privacy. For example, the Florida Constitution provides that: "Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein." FLA. CONST. art. I, § 23. See also ALASKA CONST. art. I, § 22; CAL. CONST. art. I, § 1; and MONT. CONST. art. II, § 10.

203. 291 Minn. 310, 191 N.W.2d 185 (1971), *appeal dismissed*, 409 U.S. 810 (1972).

204. 460 N.W.2d 2 (Minn. 1990).

205. MINN. STAT. §§ 363.01-15 (1988).

206. *French*, 460 N.W.2d at 4.

207. *Id.* at 8.

tenant's interest in cohabitating with her fiancé prior to marriage.²⁰⁸

The court noted the importance of religious liberty in Minnesota, as demonstrated by the preamble to the constitution, which states: "We, the people of the state of Minnesota, grateful to God for our civil *and religious liberty*, and desiring to perpetuate its blessings and secure the same to ourselves and our posterity, do ordain and establish this Constitution."²⁰⁹ After noting the additional protection of religion in article I, section 16 of the Minnesota Constitution, the court remarked that the broad protection for religion in the constitution was "not surprising given the background of the people who adopted this constitution."²¹⁰ Minnesota history, combined with the history we share with Wisconsin, compelled the court to hold that French had to be granted an exemption from the Minnesota Human Rights Act.²¹¹

The question then shifted to the issue of whether the State could establish a compelling interest that would override the

208. *Id.* at 9.

209. *Id.* at 8 (emphasis added) (quoting MINN. CONST. pmb.).

210. *Id.* at 9. The court characterized Minnesota's history as parallel to Wisconsin's:

The early settlers of Wisconsin came chiefly from New England and the Middle States. They represented the best religious, intellectual, and moral culture, and the business enterprise and sagacity, of the people of the states from whence they came. They found here a territory possessing all the elements essential to the development of a great state. They were intensely desirous that the future state should be settled and developed as rapidly as possible. They chose from their number wise, sagacious, Christian men, imbued with the sentiments common to all, to frame their constitution. The convention assembled at a time when immigration had become very large and was constantly increasing. The immigrants came from nearly all the countries of Europe, but most largely from Germany and Ireland. As a class, they were industrious, intelligent, honest, and thrifty—just the material for the development of a new state. Besides, they brought with them, collectively, much wealth. They were also religious and sectarian. Among them were Catholics, Jews, and adherents of many Protestant sects. These immigrants were cordially welcomed, and it is manifest the convention framed the constitution with reference to attracting them to Wisconsin. Many, perhaps most, of these immigrants came from countries in which a state religion was maintained and enforced, while some of them were non-conformists and had suffered under the disabilities resulting from their rejection of the established religion. . . . Such were the circumstances surrounding the convention which framed the constitution. In the light of them, *and with a lively appreciation by its members of the horrors of sectarian intolerance and the priceless value of perfect religious and sectarian freedom and equality, is it unreasonable to say that sectarian instruction was thus excluded . . . ?*

Id. (citing *State ex rel. Weiss v. District Bd. of Sch. Dist. No. Eight*, 44 N.W. 967, 974-75 (Wisc. 1890)).

211. *French*, 460 N.W.2d at 9.

constitutional protection due French. The State argued that its interest was in "eliminating pernicious discrimination, including marital status discrimination."²¹² The court rejected the concept:

We are not told what is so pernicious about refusing to treat unmarried, cohabiting couples as if they were legally married. The state does not even attempt to reconcile this notion with this court's express recognition of the "preferred status" of the institution of marriage in *Kraft*.²¹³

The court's reference to the history of the constitutional convention in Minnesota, extrapolated from the Wisconsin experience, and fortified by its recognition of the importance of the institution of marriage, serves to expand French's religious liberty. However, this expansion is done at the expense of persons who live in what might be termed nontraditional relationships, or perhaps more accurately, relationships that are not legally recognized by the legislature. The reference to history and traditions, seemingly a liberal contextual background when the issue is freedom of conscience, also serves to severely restrict any expansive interpretation of fundamental rights under the Minnesota Constitution. Those rights that are recognized must be consistent with history and traditions. The problem is that both history and tradition may be read in a way that is highly restrictive.

Conversely, if the issue is broadened, the court must consider the privacy right as one mandating due regard for human rights and dignity,²¹⁴ including the right to association. When that formulation of the privacy concept is coupled with judicial recognition of enhanced legislative protection for groups that have been discriminated against, a plausible claim may be made that the core concept of privacy as the Minnesota Supreme Court has recognized it should include a nonjudgmental acceptance of the implications of the right of personal autonomy,²¹⁵ a right that necessarily includes acceptance of the implications of the right of intimate association. It is a privacy right that could readily

212. *Id.* at 10 (citation omitted).

213. *Id.* (referring to *Kraft, Inc. v. State ex rel. Wilson*, 284 N.W.2d 386 (Minn. 1979)).

214. *See Friedman v. Commissioner of Pub. Safety*, 473 N.W.2d 828, 836 (Minn. 1991). *See also supra* note 22-27 and accompanying text.

215. *See Bowers v. Hardwick*, 478 U.S. 186, 206 (1986) (Blackmun, J., dissenting).

include the acceptance of the legitimacy of a claim for the right of same-sex marriage.²¹⁶

216. Of course, an argument for tolerance grounded on the fact that discrimination on the basis of sexual orientation is a violation of the MHRA, or that enhanced penalties are imposed for crimes that are motivated by the sexual orientation of the victim, does not mean that the legislature necessarily condones any particular lifestyle. The Minnesota legislature added language to that effect when it amended the MHRA to prohibit discrimination on the basis of sexual orientation. Section 363.021 reads as follows:

Nothing in this chapter shall be construed to:

(1) mean the state of Minnesota condones homosexuality or bisexuality or any equivalent lifestyle;

(2) authorize or permit the promotion of homosexuality or bisexuality in education institutions or require the teaching in education institutions of homosexuality or bisexuality as an acceptable lifestyle;

(3) authorize or permit the use of numerical goals or quotas, or other types of affirmative action programs, with respect to homosexuality or bisexuality in the administration or enforcement of the provisions of this chapter; or

(4) authorize the recognition of or the right of marriage between persons of the same sex.

MINN. STAT. § 363.021 (Supp. 1993). This legislative prohibition may seem to make judicial reliance on a tradition of legislatively established tolerance curious in light of the specific legislative statement that the anti-discrimination policy goes to a certain point and no further.

Of course, the legislative statement that same-sex marriages are not authorized by the enactment of the MHRA amendments relating to discrimination based on sexual orientation may simply prevent an argument that those amendments do not mean that the marriage laws are implicitly modified by the additions. The legislature is simply reinforcing *its* view that marriage is limited to heterosexual couples. That does not mandate judicial capitulation when the issue concerns constitutional interpretation.

If the privacy argument is rejected, an alternative equal protection claim might be made, based upon the Hawaii Supreme Court's decision in *Baehr*, 852 P.2d 44 (Haw. 1993). The court, while rejecting the privacy claim, held the Hawaii Marriage Act unconstitutional as violative of the Hawaii Constitution's equal protection provision, which prohibits discrimination on the basis of "race, religion, sex or ancestry," unless the state can show a compelling state interest. *Id.* at 65, 67.

If the Minnesota Supreme Court were to determine that the Minnesota Constitution prohibits discrimination on the basis of sex, under article I, section 2 of the Minnesota Constitution, the same claim could be made, arguably without running afoul of the problems involved in attempting to establish that history and tradition support same-sex marriages.

Of course, even assuming that the supreme court treated the issue as an equal protection problem, and even assuming that it applied intermediate scrutiny to the classification, there is no guarantee that the court would reach the same conclusion as the *Baehr* court. The same value laden analysis that permeates decisions such as *State v. French*, 460 N.W.2d 2 (Minn. 1990), may provide a basis for a determination that the state's interest in limiting the sanctioning of marriage to different-sex couples is an important interest and that the state's classification is substantially related to that goal.

The problem of line-drawing may also give the court pause. Determining that Minnesota's refusal to allow same-sex marriage is unconstitutional would then require a determination that other laws limiting spousal entitlement and adoption would be potentially unconstitutional. Opening the door would create potential problems that the court would perhaps prefer to avoid.

Moreover, there may be problems inherent in making an equal protection argument under the Minnesota Constitution. The problems are pointed out in the supreme court's opinion in *State v. Russell*, 477 N.W.2d 886 (Minn. 1991), in which the court held a statute that applied disproportionate penalties for the possession of the same amounts of crack and cocaine unconstitutional under the Minnesota Constitution. *Id.* at 889. Under MINN. STAT. § 152.023, subd. 2(1) (1989), persons possessing three or more grams of cocaine base ("crack cocaine") are guilty of a third degree offense. But under the same statute, a person had to possess ten or more grams of cocaine powder to be guilty of the same offense. *Id.* § 152.023, subd. 2(2). Possession of less than 10 grams of cocaine powder is a fifth degree offense. *Id.* § 152.025, subd. 2(1) (1989).

Under these statutes, there are disproportionate penalties. A person who possesses three grams of crack cocaine may be sentenced to 20 years in prison, but possession of an equal amount of cocaine powder carries a penalty of up to five years in prison. Because more African Americans are arrested for the possession of crack, the disproportionately higher penalties fell more heavily on African Americans. The Minnesota Supreme Court held the statute unconstitutional, but not under an application of strict scrutiny. The court was unwilling to apply strict scrutiny because of the discriminatory impact of the statute, and there was no indication of intentional discrimination to justify the application of strict scrutiny. *Russell*, 477 N.W.2d at 888 n.2. Rather, the court applied its own version of rational basis review to justify a more invasive review than under a federal rational basis standard. *Id.* at 888-89.

Since the early eighties, the supreme court noted that it has articulated a rational basis test that differs from the federal standard. The court's test requires:

- (1) The distinctions which separate those included within the classification from those excluded must not be manifestly arbitrary or fanciful but must be genuine and substantial, thereby providing a natural and reasonable basis to justify legislation adapted to peculiar conditions and needs; (2) the classification must be genuine or relevant to the purpose of the law; that is there must be an evident connection between the distinctive needs peculiar to the class and the prescribed remedy; and (3) the purpose of the statute must be one that the state can legitimately attempt to achieve.

Id. at 888 (citations omitted).

Where the court has applied its own version of the rational basis analysis, it is not been willing to simply hypothesize a rational basis for the classification. *Id.* at 889. Rather, the court has required a reasonable, rather than just theoretical connection, between the statutory goals and the actual effect of the legislation. *Id.*

The purpose of this brief examination of *Russell* is not to re-examine the court's application of heightened rational basis review, but, rather, to determine what implications the *Russell* analysis might have in examining privacy cases that may arise under the Minnesota Constitution. The *Russell* analysis is perplexing because of the court's reasons, or lack thereof, for application of a higher standard of review in cases involving discriminatory effects. While it is clear that state supreme courts are free to formulate more stringent standards of review than the United States Supreme Court, there should be reasoned justifications for those formulations.

In *Russell*, the issue is what standards constitute the justification for a higher standard of review. The majority opinion rests on the perception of injustice that the classification creates, permitting focus on a single class of persons—African Americans, and on the lack of a justification for distinguishing between cases involving discriminatory intent and discriminatory effects:

There comes a time when we cannot and must not close our eyes when presented with evidence that certain laws, regardless of the purpose for which they were enacted, discriminate unfairly on the basis of race, e.g., that for the murder of a white person in Georgia, a black person is more than twice as likely as a white person to be sentenced to death; that, in Minnesota, the

predominantly black possessors of three grams of crack cocaine face a long term of imprisonment with presumptive execution of sentence while the predominantly white possessors of three grams of powder cocaine face a lesser term of imprisonment with presumptive probation and stay of sentence.

State v. Russell, 477 N.W.2d 886, 888 n.2 (citation omitted).

Justice Simonett would have limited the court's holding to cases involving facially neutral criminal statutes that have "a substantial discriminatory racial impact." *Id.* at 894 (Simonett, J., concurring specially); see generally Ann Iijima, *Minnesota Equal Protection in the Third Millennium: "Old Formulations" or "New Articulations"?*, 20 WM. MITCHELL L. REV. 337 (1994).

The lack of clear standards in the majority opinion opens it to the claim that it has engaged in "substantive review" of legislation of the kind engaged in by the Supreme Court in *Lochner v. New York*, 198 U.S. 45 (1905), a decision that was subject to immense criticism because of the standardless review it engendered. Justice Coyne criticized the majority opinion on that basis. *Russell*, 477 N.W.2d at 902 (Coyne, J., dissenting).

The problem is heightened in Justice Yetka's concurring opinion, part of which is set out at length because of the problems it appears to raise as a standard for deciding future cases involving fundamental rights and equal protection issues:

We must understand that the United States has been and still remains a largely homogeneous society and that the problems of minority groups, particularly blacks, often are misunderstood. The judicial branch is charged with protecting the individual rights and liberties of all citizens, and in a case like this, where we lack the actual experience necessary to place ourselves in the respondents' position, we must rely on our imagination, understanding and analytical judgment to reach the just result.

To me, the obvious solution to the drug problem is to return to basic human values, namely, strong families, solid religious communities, and economic and educational opportunities for all citizens. In the 1930's, we had federal programs such as the Civilian Conservation Corps. The Corps took youths out of poverty-stricken environments and put them to work in our nation's forests and parks and taught them social skills as well as job skills so that they could function and prosper in society. It is beyond the court's capabilities to provide similar opportunities today. However, it is our duty to see that the laws are enforced so as to provide equality before the bench to all citizens, regardless of their race or economic status.

The dissenting opinion suggests that the legislature has unfettered discretion to define criminal acts and set punishments. The legislature's power is admittedly broad in this area, but it is not so broad as to allow distinctions that have a harsher impact on minority groups, particularly when those distinctions are based on minimal information.

I agree with the majority's conclusion that strict scrutiny could be applied to this statute since there is enough evidence from which to infer discriminatory purpose.

I also agree with the majority's finding that the statute is invalid under rational basis as applied under our state constitution. Where the discrimination is so obvious in the application of our Minnesota drug laws, I agree that we ought to apply state constitutional principles to find the law invalid. When the federal Constitution does not go far enough to protect basic rights and liberties, state courts may look to their own constitutions to determine whether broader protections are warranted. As the majority rightly concludes, this is a case where our constitution can and should be used to establish a stricter standard than the federal rational-basis test.

Id. at 892-93 (Yetka, J., concurring) (citations omitted). There is no question about the good faith basis for the opinion, but the strong statement of personal values and the lack of standards leaves the opinion open to criticism.

2. *Abortion*

The abortion problem produces similar difficulties in discerning whether meaningful standards exist for the resolution of issues involving abortion rights that implicate the right to privacy under the Minnesota Constitution. The Minnesota Supreme Court's only decisions involving the abortion issue, thus far, are cases involving claims of privacy under the United States Constitution. The question is whether, post-*Planned Parenthood v. Casey*,²¹⁷ the Minnesota Supreme Court would prefer to strike new ground in the abortion debate, or simply accept *Casey* and its reaffirmation of *Roe*, but stripped of the trimester framework that gave the decision substance. The reality of post-*Casey* decisions is that most state-imposed limitations on a woman's decision whether or not to have an abortion will be sustained under the Court's "undue burden" standard.²¹⁸ The Court's holdings in *Casey* sustaining the Pennsylvania Abortion Control Act, save for the spousal notification provision,²¹⁹ make it likely that other state abortion legislation of a similar nature will be sustained under the Court's undue burden standard for pre-viability abortion regulations.

The only realistic recourse for litigants who seek to successfully challenge state abortion control legislation is through the application of state constitutions, pursuant to state supreme court constructions that construe privacy protection under the state constitutions more broadly. The construction can come from explicit privacy provisions in those constitutions or through state supreme court decisions holding that the right of privacy exists even though it is not a specifically enumerated right. However, if state privacy law is held to be parallel to federal law, the results are predictable.

In Minnesota, the issue is whether the Minnesota Supreme Court's definition of the right to privacy, as set forth in *State v.*

A value-laden analysis of constitutional issues creates problems, insofar as the statement of values that justifies what many would agree to be a positive result may actually apply in other cases to stifle personal liberty. That arguably has been the result in cases such as *State v. French* where the court's interpretation of the religious tradition in Wisconsin, actually results in a permissible invasion of the personal rights of others who do not fit that tradition or who violate one person's interpretation of the tradition. *State v. French*, 460 N.W.2d 2, 8-10 (Minn. 1990).

217. 112 S. Ct. 2791 (1992).

218. *Id.* at 2820.

219. *Id.* at 2821-33.

*Gray*²²⁰ and *Jarvis v. Levine*,²²¹ would support a privacy based challenge to restrictive state legislation that would impose limitations on the right to obtain an abortion. The Minnesota Supreme Court's reliance on *Roe v. Wade*²²² to resolve cases such as *State v. Hodgson*²²³ and *State v. Hultgren*,²²⁴ and the *Gray* court's reference to *Roe* as authority for a parallel right of privacy under the Minnesota Constitution means that, at a minimum, privacy in Minnesota includes the privacy right as recognized in *Roe*. The issue is whether the Minnesota Supreme Court, faced with *Casey*, would deviate from the federal course and maintain the privacy right as it was formulated in *Roe*, along with the trimester framework that was abolished in *Casey*, whether the court would accept *Casey* and refuse to acknowledge the existence of a privacy right different from the right as it was limited by *Casey*, or whether the court would recast the privacy to provide broader protection than under *Roe*.

Once again, the arguments from history and traditions provide little support or rationale for the development of restrictive abortion laws in Minnesota.²²⁵ There is a paucity of information

220. 413 N.W.2d 107 (Minn. 1987).

221. 418 N.W.2d 139 (Minn. 1988).

222. 410 U.S. 113 (1973).

223. 295 Minn. 294, 204 N.W.2d 199 (1973).

224. 295 Minn. 299, 204 N.W.2d 197 (1973).

225. One of the keys to arguing that either privacy or equal protection claims should yield a different result under state constitutions is to understand that laws that regulate abortion are determined to a substantial degree based on "social forces." The following passage from Reva Siegel's *Stanford Law Review* article highlights the problem:

Social forces play a powerful part in shaping the process of reproduction. Social forces define the circumstances under which a woman conceives a child, including how voluntary her participation in intercourse may be. Social forces determine whether a woman has access to methods of preventing and terminating a pregnancy, and whether it is acceptable for her to use them. Social forces determine the quality of health care available to a woman during pregnancy, and they determine whether a pregnant woman will be able to support herself throughout the term of gestation, or instead will be forced to depend on others for support. Social relations determine who cares for a child once it is born, and what resources, rewards, and penalties attend the work of gestating and nurturing human life.

Thus, human reproduction is not simply a physiological process; like eating and dying, it is a social process, occurring in and governed by culture. In each culture, norms and practices of the community, including those of family, market, medicine, church, and state, combine to shape the social relations of reproduction. If physiological forces seem to define the process of reproduction, it is because most cultures reason about the social relations of reproduction as part of the physical relations of reproduction, that is, as unalterable aspects of nature; ideologies of gender sustain these habits of thought. Ideological norms and institutional practices pertaining to reproduction play a central part in defining women's status, the dignity they are accorded, the

concerning the history of abortion law in Minnesota. The initial criminalization of abortion elicited little response at the time and little subsequent commentary in Minnesota.²²⁶

The same-sex marriage and abortion issues illustrate the problems and alternatives the court will likely face in deciding privacy cases under the Minnesota Constitution. If the Minnesota court accepts the broader claims of privacy under the Minnesota Constitution, it is arguable that it will be entering uncharted territory. But while the territory may be uncharted, the court's decision illustrates a sustained tradition of judicial recognition for personal autonomy and associational rights. It is a tradition that lights the way to a broader acceptance of the right of autonomy and dignity in these difficult cases.

degradations to which they are subjected, and the degree of autonomy they are allowed or dependency they must suffer. These norms and practices affect women who are mothers most intensely, but in one way or another they affect all women.

These observations, tenets of anthropological and feminist critical thought, do not inform the reasoning of those charged with interpreting the Constitution. In crafting equal protection and due process doctrine concerning reproductive regulation, the Court has typically reasoned from the premise that women's reproductive role is dictated by nature, and that regulation of women's reproductive conduct can be evaluated by consulting facts of nature. The result is that social relations enforced by the body politic often find constitutional justification in the organization of the female body itself. The interpretive assumptions of physiological naturalism inform both equal protection and due process doctrine, inhibiting judicial scrutiny of the social norms and practices that shape reproduction and its regulation. Consequently, both privacy and equal protection precedents governing regulation of women's reproductive lives are inordinately preoccupied with the physiological character of women's reproductive role and correspondingly inattentive to the social logic of its regulation.

Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 267-68 (1992) (footnote omitted).

A recognition of the nature of abortion control legislation is central to advancing equal protection or due process claims under state constitutions. The arguments, if made, would require the Minnesota Supreme Court to accept the basic viewpoint, as a predicate to acceptance of a privacy formulation, that a woman seeking an abortion is provided greater protection than currently required by the Supreme Court's *Casey* formulation. In the equal protection context, it would require an acknowledgement that abortion restrictions are gender-based discriminations that require the application of heightened scrutiny. Cf. *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753, 760 (1993).

226. Act of Mar. 10, 1873, ch. 9, 1873 MINN. LAWS 117 (repealed 1974). Extensive research last year on the history of abortion regulation in Minnesota yielded little. The State Historical Society was able to locate only a few documents relevant to the question, but nothing that is of use on the issue.

VI. CONCLUSION

The deep common law roots of the right to privacy in Minnesota and the court's application of the federal constitutional right to privacy provide a solid foundation for the court's recognition of the right to privacy under the Minnesota Constitution.

Minnesota's recognition of the right of privacy under the Minnesota Constitution was triggered by the need to determine whether the privacy right transcended the federal privacy right as applied by the United States Supreme Court. The Minnesota Supreme Court recognized the right of privacy, but decided that the right, although based specifically on the Minnesota Constitution, would not automatically be construed to provide broader protection than permitted under the Federal Constitution. In subsequent decisions, the court interpreted the privacy right more expansively than under the Federal Constitution, but only in limited circumstances and only for the purpose of providing broader procedural rights.

In Minnesota, the privacy right has an uncertain future. The right will be tested in specific areas and, in light of these challenges, the court will have to decide whether to interpret the important right of privacy under the Minnesota Constitution more expansively than the Federal Constitution. For the court to deviate from the Supreme Court's path, its decisions will have to be principled and the standards for the decisions will have to be clear.

This Article illustrates the difficulties that lie ahead, but offers only an abbreviated consideration of the right of privacy under the Minnesota Constitution as it might be applied to abortion rights issues or gay and lesbian rights. The greater danger is that privacy rights, which naturally include a broad recognition of personal autonomy, may be overridden by a judicially imposed federal morality that both fails to consider the basis for an expansive recognition of personal rights and advocates a constriction of existing rights. The court's decisions for the past century have established a path that the court can readily follow in establishing a right of personal autonomy free and different from federal privacy law.

