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## The *Griswold* Penumbra: Constitutional Charter for an Expanded Law of Privacy?

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THE *GRISWOLD* PENUMBRA: CONSTITUTIONAL  
CHARTER FOR AN EXPANDED LAW  
OF PRIVACY?

Robert G. Dixon, Jr.\*

WHEN an "uncommonly silly law"<sup>1</sup> produces the "most significant decision"<sup>2</sup> of the Supreme Court term, and the seven-man majority has to be held together with four opinions, some inquiry is in order. Either there is some hyperbole in the terms "silly" and "significant," or we are witnessing the birth of a new facet of constitutional meaning as an offshoot of a rather special case concerning Connecticut's attempted prohibition of birth control *clinics* through the utilization of its statute prohibiting the *use* of contraceptives.

*Griswold v. Connecticut*<sup>3</sup> contains the clearest articulation to date (although it is none too clear at that) of the constitutional foundations of a yearning for "privacy," which constitutes a major component of "the American dream." More subjective even than "liberty" and "justice," the "privacy" idea overlaps both, and even turns back on itself to create internal contradictions. For example, privacy is an activist concept supporting freedom of expression in the associational privacy cases. But it is a passivist concept—the right to be let alone—in the school prayer and Bible-reading area, where it has been argued, without explicit judicial recognition as yet,<sup>4</sup> that even an excusal system does not save the regulation, because the necessary requirement of self-identification (in order to obtain permission to absent oneself) itself constitutes an invasion of privacy. Nevertheless, there is a common feature of the two concepts—an interest in nondisclosure of one's identity.

If what follows is as long on privacy in general as on *Griswold*, it is because the case is longer on yearning than on substantive content.

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1. *Griswold v. Connecticut*, 381 U.S. 479, 527 (1965) (Stewart, J., dissenting).

2. Keefe, *Practicing Lawyers' Guide to the Current Law Magazines*, 51 A.B.A.J. 885 (1965).

3. 381 U.S. 479 (1965).

4. See *School Dist. v. Schempp*, 374 U.S. 203, 319 (1963) (Stewart, J., dissenting); *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 227 (1948) (Frankfurter, J., concurring).

The editors' invitation to discuss the case has prompted a rethinking of a temporarily postponed project on a synthesis on privacy—a task easier to outline than to execute.

All that *Griswold* actually decided was that a statutory system which operated to make it a crime for married couples to use contraceptives (although there was not even a hint of direct enforcement), and for clinics to conduct examinations and prescribe contraceptives (which was the actual enforcement issue), was unconstitutional. The substantive statute merely prohibited contraceptive use; a general aiding and abetting statute furnished the grounds for suppression of the clinic. In order to reach (or create) a privacy issue, the Court allowed the sole defendants—Mrs. Griswold, the clinic director, and Dr. Buxton, the clinic medical director—to assert the rights of married clients of the clinic. The case was discussed judicially, therefore, as though the key issue was state scrutiny of the marital couch; questions concerning the validity of regulations on the manufacture, distribution, and sale of contraceptives, and concerning the validity of the regulation of birth control clinics absent an anti-contraceptive use statute were left unresolved.

To reach the conclusion that the Connecticut laws were unconstitutional, Mr. Justice Douglas, writing the opinion of the Court, first took a broad view of “standing” to assert the rights of third parties, and then, on the merits, ranged broadly through the Bill of Rights, talking loosely about “zones of privacy”<sup>5</sup> directly or peripherally protected by the first, third, fourth, fifth, and ninth amendments. In even broader fashion, Mr. Justice Goldberg took great pains to revive the “forgotten” ninth amendment,<sup>6</sup> so that it emerges especially suited to support whatever “other rights” can be articulated.

The comments that follow are divided into a brief review, for purposes of perspective, of the elusive nature of “privacy” as developed in American law to date, and an attempted rigorous analysis of the privacy aspects of *Griswold*. A final section suggests that effectuation of the new constitutional right of marital privacy necessarily or derivatively implies a corollary right of access to birth control information and devices—a right which should have been more clearly articulated by the Court.

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5. 381 U.S. at 484.

6. *Id.* at 490 n.6, referring to PATTERSON, THE FORGOTTEN NINTH AMENDMENT (1955).

## I. PROLEGOMENON ON PRIVACY

One of the warmest words in the literature of political and legal philosophy is "privacy." Characterized as the "right to be let alone"<sup>7</sup> in Mr. Justice Brandeis' oft-quoted statement, it has been accorded first rank as the most valued right of civilized men. Few concepts, however, are more vague or less amenable to definition and structured treatment than privacy. Under this emotional term march a whole congeries of interests, some closely interrelated, some almost wholly unrelated and even inconsistent. Two broad, variant strands are the "public law" meaning of privacy and the "private law" meaning of privacy, but even within these two broad categories quite different species of claims and conflict arise, and loose terminology abounds.

## A. "Privacy" in Private Law

In the robust tradition of the common law, as was so well summarized in the seminal essay by Warren and Brandeis on the private-law meaning of privacy,<sup>8</sup> little redress was available for the more refined forms of intrusion by one private person on the solitude and psychic integrity of another. Unless the invasion amounted to a trespass or a nuisance, or could be characterized as a breach of confidence or of implied contract, or affected something like a letter in which the aggrieved party could assert a property interest of sorts, relief was not forthcoming. The major contribution of Warren and Brandeis was in showing through rigorous critical analysis that doctrines of trespass, nuisance, and property were inadequate for the occasion, and that a new concept of protectible privacy could and should be evolved, both as a basis for an intelligible rationale for the handful of existing cases and for future development.

In the process of evolution, what seemed like a single concept has been refined into a loose conglomeration of four torts which, as Dean Prosser has noted,<sup>9</sup> have little in common other than interference with a person's "right to be let alone." The four torts are (1) intrusion on physical solitude or seclusion; (2) publication of unpleasant, although non-defamatory, information about a person; (3) placing of a person in a false but not necessarily defamatory position in the public eye (for example, by attributing to him views that he does

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7. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

8. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

9. PROSSER, TORTS 832 (3d ed. 1964).

not hold); (4) unauthorized commercial use of a person's name or picture. From a functional standpoint it appears that two quite different interests are being protected: freedom from physical intrusion on solitude, and freedom from unwanted communication about oneself. Use of the term "right of privacy" as an index heading is confined almost exclusively to these private torts, in addition to some governmental search and seizure matters, wiretapping-eavesdropping, and self-incrimination.

Dean Prosser has appropriately observed that the courts have been so preoccupied with the question whether the tort exists at all that there has been little discussion of its juristic nature and limitations. However, his own suggestion of substituting a generic tort—intentional infliction of mental suffering—hardly seems adequate, because in few of the privacy cases is there "pure" malice. The presence of other interests, which explains such limiting doctrines as the press privilege of dissemination of "newsworthy" information, indicates that a balancing process must be going on, although it is not always clearly articulated what is being balanced, particularly on behalf of the injured party. An "intentional infliction" doctrine could render the right of privacy in tort law overly narrow, in the process of making it more absolute. For this reason there is much appeal in a recent attempt to keep attention focused on privacy as an aspect of human dignity, or, indeed, as a "spiritual interest"<sup>10</sup> rather than merely as an interest in property and reputation. Although such an approach may not make cases any easier to solve, it may help to keep attention focused on those elements of privacy which make it uniquely valued among laymen, who, after all, are the customers of the law.

### B. "Privacy" in Public Law

In regard to the relations between a government and its citizens, the use of the term "right of privacy" suggests issues and values quite different from those encountered in private law. The term nowhere appears in the Constitution, but is quite obviously a background interest underlying the specific guarantees of the third, fourth, and fifth amendments in regard to quartering of troops, search and seizure, and self-incrimination. Important as the last two categories

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10. Bloustein, *Privacy as an Aspect of Human Dignity*, 39 N.Y.U.L. REV. 962 (1964). Professor Bloustein's article was prepared under the auspices of the Special Committee on Science and Law of the Association of the Bar of the City of New York, as part of its study examining the impact of modern technology upon privacy.

are, they represent well-established categories already subjected to extensive discussion. Furthermore, although they overlap to a degree the private tort of intrusion upon solitude, neither has been deemed germane to at least two of the several major, recurring "privacy" problems of our time—wiretapping and eavesdropping,<sup>11</sup> and free-wheeling legislative investigations of persons unable or unwilling to plead self-incrimination.<sup>12</sup>

If the fourth and fifth amendments are deemed to exhaust the field of constitutional protection of privacy, then it is a rather narrow field and one unbefitting the concept of privacy as the pre-eminent right of civilized men. However, there are a number of additional outreaches of privacy in American public law, albeit of uncertain dimension, as manifestations of the continuing development of the first amendment and of the concept of due process. Examples include the various privacies associated with the field of religion and belief,<sup>13</sup> privacy in politics, including the secret ballot<sup>14</sup> and nondisclosure of political or social beliefs and associations,<sup>15</sup> the scope of employee duties of candor and disclosure,<sup>16</sup> the use of non-Communist oaths and oaths in general,<sup>17</sup> statutory protection of the solitude of householders by restrictions on canvassing,<sup>18</sup> freedom of associational choice, including self-segregation, in "private" housing, education, and other fields.<sup>19</sup>

Of course, apart from the question of specific constitutional protection of privacy, the American concept of limited government

11. *On Lee v. United States*, 343 U.S. 747 (1952); *Olmstead v. United States*, 277 U.S. 438 (1928); cf. *Silverman v. United States*, 365 U.S. 505 (1961).

12. *Wilkinson v. United States*, 365 U.S. 399 (1961); *Braden v. United States*, 365 U.S. 431 (1961); *Barenblatt v. United States*, 360 U.S. 109 (1959); cf. *Deutch v. United States*, 367 U.S. 456 (1961).

13. It is questionable whether privacy is furthered by *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), which granted a broad exemption from a flag salute requirement in the interest of a general freedom of speech and belief, but allowed the flag salute requirement to continue. See Dixon, *Religion, Schools, and the Open Society: A Socio-Constitutional Issue*, 13 J. PUB. L. 267, 281-88 (1965).

14. Nutting, *Freedom of Silence—Constitutional Protection Against Governmental Intrusions in Political Affairs*, 47 MICH. L. REV. 181 (1948).

15. *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539 (1963); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

16. *Beilan v. Board of Pub. Educ.*, 357 U.S. 399 (1958); *Lerner v. Casey*, 357 U.S. 468 (1958); *Slochower v. Board of Higher Educ.*, 350 U.S. 551 (1956).

17. *Baggett v. Bullitt*, 377 U.S. 360 (1964); *Cramp v. Board of Pub. Instruction*, 368 U.S. 278 (1961); *Totcaso v. Watkins*, 367 U.S. 488 (1961); *Wieman v. Updegraff*, 344 U.S. 183 (1952).

18. *Breard v. Alexandria*, 341 U.S. 622 (1951).

19. Avins, *The Right Not To Listen*, 51 A.B.A.J. 656 (1965); Avins, *Freedom of Choice in Personal Service Occupations—Thirteenth Amendment Limitations on Anti-discrimination Legislation*, 49 CORNELL L.Q. 228 (1964); Avins, *Prima Facie Tort and Injunction—New Remedies Against Sitdowns*, 24 GA. B.J. 20 (1961).

formerly helped to maximize privacy by affording a protection of sorts to economic, social, and racial *laissez-faire*. This domain of privacy inherent in a system of limited government has now been considerably eroded by the freeing of federal legislative power through broad construction of the commerce and expenditure clauses, and by the demise of substantive due process as a check on economic and social legislation.<sup>20</sup> Both the purpose and the effect of the new legislative norms and extensive administrative regulation are to diminish the area of "free" contract, a supposed freedom resting at times on imbalances in knowledge and bargaining power between investor and dealer, worker and employer, and supplier and manufacturer. But the impact of much of the regulation may not be so much to diminish the right to be let alone as to diminish a power to act as one pleases without regard to external impacts, which is not quite the same thing.

### C. *The Idea of Privacy*

A lengthy essay could be written on the historical evolution of privacy concepts<sup>21</sup> from the early Greek "politics of participation," in which personal virtue was equated with civic virtue and privacy had no place, to the robust individualism of the American frontier, where the mores of society forbade inquiry into a man's past. Suffice it to say that the exploration would entail inquiry into the Judeo-Christian concept of the "soul," that recessive, untouchable essence of man, the Germanic concept of the "folk," in which the individual found his true identity and expression, and the Reformation theory of direct and personal relation to God. In a study of the modern era, particular stress would have to be placed on the natural-rights movement, which postulates the intrinsic value of pre-social personal status and absolute birthrights; on the abstrusities of Rousseau, where the absorption of the individual will into the socialized "general will" implies total abnegation of privacy; and on the recent pragmatic evolution of democratic socialism and the security state, in which the forces of organization threaten to crowd out privacy and, indeed, all of the passive virtues.<sup>22</sup>

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20. McCloskey, *Economic Due Process and the Supreme Court*, 1962 SUP. CT. REV. 34.

21. See generally SABINE, *A HISTORY OF POLITICAL THEORY* (rev. ed. 1950).

22. The growing corporate and government practice of psychiatric evaluation and psychological testing of employees poses interesting questions about the range and depth of probing, about the limits of required disclosure to employers, and about means of safeguarding against arbitrariness in the use of such data by employers.

The extent to which one finds privacy interests and threatened invasions of privacy interests depends largely on how the term is defined, or, if definition is impossible, how the term is conceived. Many commentators<sup>23</sup> have begun with the broad and warm Brandeisian invocation of a "right to be let alone." But only a hermit living outside society has such a right; unqualified, the "right" flies in the face of all social control. For what purpose is a person let alone? Are social purposes served by the right so that, in according recognition to the right, society is actually serving its long-term interest while restraining its immediate impulse to assert control? Does society, by recognizing the right, preserve and encourage personal well-springs of creativity and differentiation—needed by society if it is to avoid stagnation—which would be stifled by compelled conformity to majoritarian values and practices? Or is a "social" justification of privacy a self-defeating thing, undercutting the essence of the privacy interest? Is being let alone an end in itself as part of the dignity of man, akin to a natural right, needing no utilitarian justification in terms of social product? In short, is privacy *intrinsic* or *derivative*?

Obviously, radically different approaches originate in these different premises. Even though it be granted that a balancing of competing claims, values, and "goods" is always present as part of the never-ending process of reasoned choice, it still may make a world of difference whether one postulates social control and demands that privacy prove its social utility, or postulates privacy and counsels official restraint even where the privacy "good" is uncertain and the official action is aimed toward a "good" end. The latter approach is not quite the same thing as the "preferred position" approach in regard to freedom of expression, because in evaluating freedoms of expression we are weighing an identifiable, outward-looking course of conduct against competing social standards and interests. Speech, publication, and parades involve overt measurable *conduct* rather than privacy. It is only when we turn to a freedom of non-expression or inaction that privacy as a distinctive concept enters the calculus.

Freedoms of expression can exist without enjoying a "preferred" position, although their exact content may be affected. But to deny to privacy the character of a self-justifying end is, perforce, to socialize it; and to socialize it is to foredoom it to unequal competition with easily perceived, immediate, and pressing needs of society.<sup>24</sup>

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23. *E.g.*, Griswold, *The Right To Be Let Alone*, 55 NW. U.L. REV. 216 (1960).

24. "Once privacy is invaded, privacy is gone." *Public Util. Comm'n v. Pollak*, 343 U.S. 451, 469 (1952) (Douglas, J., dissenting).



The free-speech claimant asserts deviant views and values; the privacy claimant doesn't want to play ball at all. The former is still part of the open society and fights his battle in the marketplace of ideas; the latter is part of the closed society and fights to withhold his allegiance and perhaps even his identity and associations.

The premise of intrinsic privacy as an end in itself is clearly perceived in the fourth amendment, where we start with the nearly absolute premise that a man's home is his castle, and the fifth amendment, where we accord silence and secrecy to the known or putative criminal.<sup>25</sup> Outside these areas, life situations may blur the distinctions between *intrinsic* privacy and socially *derivative* privacy, and the quite continuous blurring in judicial usage has made a reasoned evolution of a distinctive privacy concept quite difficult, if not impossible. For example, is associational privacy, which the NAACP has recently achieved but the Communist Party has not,<sup>26</sup> an independent right, protecting a basic secrecy-solitude interest? Or is it a derivative benefit, supporting freedom of political action and having no independent significance? If it is the latter, should not some term other than "associational privacy" be used, such as "freedom of secret association for public action"?

A further problem in the prevalent loose characterizations of privacy as the "right to be let alone" is that the right tends to become indistinguishable from a policy of *laissez-faire*, promoting general freedom of action. One possibility for separating "privacy" from "freedom" as juristic concepts would be to focus on the idea of limits upon society's power either to *make exposure* or *force disclosure* of matters which the individual would prefer to keep secret. Thus narrowed, the term would be removed from the area of general *laissez-faire* interest, but the privacy concept might then be too narrow, because it would be revealed as centering really on an interest in "secrecy," which is not a "warm" idea at all. Even though we have achieved the secret ballot in order to ensure an exact translation of private views into public choice, the "stand up and be counted" slogan still has wide appeal as indicative of a robust and

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25. Barrett, *Personal Rights, Property Rights, and the Fourth Amendment*, 1960 SUP. CT. REV. 46.

26. Compare *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539 (1963), with *Barenblatt v. United States*, 360 U.S. 109 (1959). While this article was in galley the Supreme Court, on grounds of self-incrimination, set aside orders under the Subversive Activities Control Act of 1950 compelling registration of Communist Party members. *Albertson v. Subversive Activities Control Bd.*, 86 Sup. Ct. 194 (1965).

fearless honesty. Secrecy commonly conveys a connotation of forbidden conspiracies, and conspiracies find few defenders.<sup>27</sup>

Secrecy nevertheless may be an important component of the core idea of privacy as a public-law concept, and to this probably should be added the factor of "solitude"—freedom from certain social impositions and pressures. The meaning of privacy, as thus refined and separated from a generalized concept of freedom, may be fairly well encompassed by the twin ideas of *secrecy*, which protects the nondisclosure interest, and *solitude*, which protects against coercions of belief or, derivatively, against actions designed to make the holding of belief uncomfortable, or against any undue social intrusions on the intimacies and dignities of life. As already noted, however, these twin ideas are Janus-faced, because secrecy in the context of associational privacy is an *activist* concept supporting political action, whereas solitude in the context of nondisclosure of nonconformity is a *passivist*, right-to-be-let-alone concept.

When marital privacy is recognized, and then used to defend birth control clinics, an added dimension, which is neither secrecy nor solitude, seems to appear—a right of access to information relevant to the specific condition of privacy at issue. To this we now turn.

## II. *Griswold* AND THE RIGHT TO PRIVACY

What does *Griswold* add to the judicial literature on the dimensions of privacy in its constitutional or public-law aspects? It does little, certainly, to clarify the conceptual dimensions of the privacy concept. But it does much to provide varied and flexible constitutional underpinnings for those situations which do not fit established categories neatly but still seem to rest on values thought to be vital and which, for lack of a better term, are called privacy. In *Griswold* the Court avoided defining privacy narrowly and particularly, and also avoided tying it to one or two supporting (but also necessarily limiting) clauses in the Constitution. By the very breadth and uncertainty of the opinions, especially the opinion of Mr. Justice Douglas for the Court—an opinion which roams through the Bill of Rights picking up a letter here and another there to spell out the new

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27. See, e.g., *Dennis v. United States*, 341 U.S. 494, 577 (1951) (Jackson, J., concurring): "The law of conspiracy has been the chief means at the Government's disposal to deal with the growing problems created by such organizations. I happen to think it is an awkward and inept remedy, but I find no constitutional authority for taking this weapon from the Government. There is no constitutional right to 'gang up' on the Government."

right—the door was left open for continued probing and refinement of the privacy principle.

#### A. *The Penumbra Approach*

There is already a rich terrain to be investigated and a great need for closer analysis, as indicated by the varied content of the “zones of privacy,”<sup>28</sup> and by the range of controversy over “penumbral rights of ‘privacy and repose,’ ”<sup>29</sup> suggested by the cases cited by Mr. Justice Douglas, who mentioned more than a half dozen “privacy” situations. For example, the new derivative first amendment right of associational privacy was articulated in *NAACP v. Alabama ex rel. Patterson*<sup>30</sup> as the “freedom to associate and privacy in one’s associations.” The right of religious belief was supported by *West Virginia State Board of Educ. v. Barnette*.<sup>31</sup> The right to be undisturbed by the doorbell ringing of commercial solicitors was supported in *Breard v. Alexandria*.<sup>32</sup> The right to be undisturbed by music and spoken advertisements while riding in public conveyances was denied by a sharply divided Court in *Public Utilities Comm’n v. Pollak*.<sup>33</sup> The right to be free from unreasonable search and seizure received added protection through the extension to the state courts of the exclusionary rule regarding illegally seized evidence in *Mapp v. Ohio*,<sup>34</sup> and was further strengthened in *Monroe v. Pape*,<sup>35</sup> which dealt with the liability under the federal constitution of municipal police officers for illegal invasion and search of a home. The privacy of the jail cell was viewed dimly, but apparently not completely eradicated, in the recent dispute in *Lanza v. New York*<sup>36</sup> over the use of evidence obtained by eavesdropping. The sanctity of the household, at least a household graced by a half-ton pile of trash and rodent feces, had to give way to permit rat-control inspection without a warrant—but only by a 5-4 vote.<sup>37</sup> Mr. Justice Douglas also alluded in *Griswold to Skinner v. Oklahoma ex rel. Williamson*,<sup>38</sup> which invalidated Oklahoma’s provision for compulsory sterilization of certain categories of habitual criminals, although his own opinion

28. 381 U.S. at 484.

29. *Id.* at 485.

30. 357 U.S. 449, 462 (1958).

31. 319 U.S. 624 (1943).

32. 341 U.S. 622 (1951).

33. 343 U.S. 451 (1952).

34. 367 U.S. 643 (1961).

35. 365 U.S. 167 (1961).

36. 370 U.S. 139 (1962).

37. *Frank v. Maryland*, 359 U.S. 360 (1959).

38. 316 U.S. 535 (1942).

for the Court in *Skinner* had stood not on the ground of intrinsic privacies in procreation, but rather on the denial of equal protection involved in the classification scheme used in the statute.

The foregoing cases were simply listed by Mr. Justice Douglas and were not subjected to a fresh conceptual discussion; there was no attempt either to interrelate them or to use their particularity as a way of getting at a possible general central value of privacy. The list certainly reveals, however, a rich potpourri of privacy matters, and more certainly could be added; Mr. Justice Douglas was only using illustrative examples with no intention of being exhaustive.

### B. *The "Forgotten" Ninth Amendment*

The concurring opinion of Mr. Justice Goldberg, joined by the Chief Justice and Mr. Justice Brennan, rests on the ninth amendment, and, indeed, constitutes the first major judicial treatment of the ninth amendment, which states: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Mr. Justice Goldberg's focus on the ninth amendment does not narrow the breadth and multiplicity of the zones of privacy suggested by Mr. Justice Douglas. His special stress on the almost unfathomable ninth amendment strongly reaffirms the preëxisting constitutional tradition of using substantive due process as a broad vehicle for judicial articulation and protection of "fundamental liberties," whether or not they are specified elsewhere in the Constitution. And the ultimate effect may be to heighten the prospects for judicial support, case by case, for a broader range of "privacy" situations and of other hard-to-classify interests which, despite their vagueness, should be "retained by the people" in a democratic public order strongly committed to preserving individuality.

There may very well be some past denials of privacy claims, such as those involved with the music and advertising programs in public conveyances that were at issue in *Pollak*, which might strike the Court differently if passed in review again under the ninth amendment. Tactically, of course, use of the ninth amendment could be a basis for reaching a contrary result without the necessity of reversing the earlier decisions. Mr. Justice Goldberg's approach, in short, does not offer assistance in defining privacy, but is at least congenial to further probing and experimentation.

### C. *Substantive Due Process and Privacy*

The separate concurrences of Mr. Justice Harlan and of Mr. Justice White, although related more to general principles of constitutional interpretation and statutory analysis than to privacy *per se*, are not uncongenial to continued attempts to develop privacy as a more general constitutional principle than heretofore. Earlier, in the unsuccessful *Poe v. Ullman*<sup>39</sup> challenge to the same Connecticut statute, Mr. Justice Harlan had made an exceptionally apt statement, which Mr. Justice Goldberg quoted approvingly in *Griswold*:

Certainly the safeguarding of the home does not follow merely from the sanctity of property rights. The home derives its pre-eminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right. . . . Of this whole "private realm of family life" it is difficult to imagine what is more private or more intimate than a husband and wife's marital relations.<sup>40</sup>

The main thrust of Mr. Justice Harlan's concurring opinion in *Griswold* was to oppose Mr. Justice Black's view that the fourteenth amendment is grounded in the Bill of Rights and impliedly limited thereby.<sup>41</sup> Mr. Justice Harlan would preserve the fourteenth amendment as a perpetually fresh basis for safeguarding basic values "implicit in the concept of ordered liberty."<sup>42</sup>

Mr. Justice White's opinion begins with an acceptance of the Harlan view of the fourteenth amendment and perhaps even enlarges on it. He suggested that a statute with effects like that of the Connecticut statute "bears a substantial burden of justification when attacked under the Fourteenth Amendment,"<sup>43</sup> and then proceeded to an analysis demonstrating that the Connecticut statute was not reasonably related, in its terms and operation, to the legitimate objective of barring extramarital affairs.

### D. *Negative View: Privacy and "Clear Meaning"*

Both Mr. Justice Black and Mr. Justice Stewart emerged as dissenters in *Griswold*, but not necessarily as "anti-privatarians." Mr.

39. 367 U.S. 497 (1961).

40. 381 U.S. at 495 (concurring opinion) (quoting from *Poe v. Ullman*, 367 U.S. 497, 551-52 (1961) (Harlan, J., dissenting)).

41. Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights?—The Judicial Interpretation*, 2 STAN. L. REV. 140 (1949).

42. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

43. 381 U.S. at 503 (concurring opinion).

Justice Black was the only Justice to stress sufficiently the fact that "‘privacy’ is a broad, abstract and ambiguous concept."<sup>44</sup> Privacy is broader than any one amendment because several of the specific guarantees are designed in part to protect something that might be called privacy, but each guarantee is also broader than privacy.

For example, Mr. Justice Black correctly criticized the tendency to talk about the fourth amendment "as though it protects nothing but ‘privacy.’"<sup>45</sup> As he pointed out, a person may be more annoyed by an unceremonious public arrest and consequent search by a policeman than by a seizure in the privacy of his home. Similarly, there may be something instructive in the common over-use of the "privacy" label by persons writing about the fourth and fifth amendments.<sup>46</sup> Although conceptual clarity is not advanced by the practice, the writer obtains a title which attracts more interest than would a "search and seizure" label, and which evokes an instinctively sympathetic emotional response. This observation applies equally to the over-use of the privacy label by writers in the field of libel and slander, or on tort-law protections of other aspects of personality.<sup>47</sup>

The main thrust of Mr. Justice Black's dissent, however, lies elsewhere. While he likes his privacy "as well as the next one,"<sup>48</sup> he recognizes a right of the government to invade it, not when there is a counterbalancing governmental interest (heresy!), but whenever government is not "prohibited by some specific constitutional provision."<sup>49</sup> The remainder of the dissent develops further his theories of constitutional interpretation. It may come as a surprise to some to find that all Mr. Justice Black has been doing in his constitutional adjudication, at least in his own self-analysis, is to apply the "clear meaning" of the constitutional text.<sup>50</sup> Be that as it may, his "clear

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44. *Id.* at 509 (dissenting opinion).

45. *Ibid.*

46. See, e.g., Beaney, *The Constitutional Right to Privacy in the Supreme Court*, 1962 SUP. CT. REV. 212. Compare King, *Electronic Surveillance and Constitutional Rights*, 33 GEO. WASH. L. REV. 240 (1964), an essay with a modest title but with a sensitive perception of larger privacy issues and the need for a penumbral approach in constitutional interpretation in this field.

47. ERNST & SCHWARTZ, *PRIVACY—THE RIGHT TO BE LET ALONE* (1962); HOFSTADTER & HOROWITZ, *THE RIGHT OF PRIVACY* (1964); Bloustein, *supra* note 10.

48. 381 U.S. at 510 (dissenting opinion).

49. *Ibid.*

50. See MENDELSON, *JUSTICES BLACK AND FRANKFURTER—CONFLICT IN THE COURT* 51-60 (1961); Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962); Mendelson, *On the Meaning of the First Amendment—Absolutes in the Balance*, 50 CALIF. L. REV. 821 (1962); Frantz, *Is the First Amendment Law?—A Reply to Professor Mendelson*, 51 CALIF. L. REV. 729 (1963); Mendelson, *The First Amendment and the Judicial Process—A Reply to Mr. Frantz*, 17 VAND. L. REV. 479 (1964). See also Black

meaning" yielded no protection for privacy in this instance. It may not be too clear to some students of constitutional law why, under Mr. Justice Black's "clear meaning" analysis, obscenity,<sup>51</sup> group libel,<sup>52</sup> and associational privacy<sup>53</sup> are constitutional absolutes along with simple free speech, while marital privacy, in the *Griswold* context of access to birth control information, is no part of the due-process liberty which the fourteenth amendment applies to the states. And is it just the "clear meaning" of the fourteenth amendment which requires a nationally uniform practice in regard to exclusion of illegally seized evidence,<sup>54</sup> standards of self-incrimination and immunity statutes,<sup>55</sup> and the right to counsel?<sup>56</sup> To pursue these questions, which are essentially questions of methods of constitutional interpretation, would take us away from the subject of privacy and should be handled in a separate paper.

Although Mr. Justice Black's "clear meaning" did not in this instance yield a privacy shield for Mrs. Griswold or contraceptives for her clients, there is always the possibility that the "clear meaning" of the Constitution may yield privacy protection in other fact situations. One aspect of "clear meaning" jurisprudence is its unpredictability, in the guise of being best articulated.<sup>57</sup> It can be

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& Cahn, *Justice Black and First Amendment "Absolutes"—A Public Interview*, 37 N.Y.U.L. REV. 549 (1962).

51. *Roth v. United States*, 354 U.S. 476, 514 (1957) (Black & Douglas, JJ., dissenting).

52. *Beauharnais v. Illinois*, 343 U.S. 250, 275 (1952) (Black, J., dissenting).

53. *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 559 (1963) (Black, J., concurring).

54. *Mapp v. Ohio*, 367 U.S. 643, 661 (1961) (Black, J., concurring).

55. *Malloy v. Hogan*, 378 U.S. 1 (1964), Mr. Justice Black voted with the majority.

56. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

57. That "clear meaning" may not leave clear tracks and ensure predictability is indicated by the surprise some liberals felt in regard to Mr. Justice Black's recent support of state power in the 1964 sit-in decisions (see especially his dissenting opinions in *Bell v. Maryland*, 378 U.S. 226, 318 (1964), and *Bouie v. City of Columbia*, 378 U.S. 347, 363 (1964)), his dissent in *Cox v. Louisiana*, 379 U.S. 559, 575 (1965), from the Court's reversal of convictions for picketing near the courthouse, and his dissent in *Griswold* itself. In *Cox* he said: "Those who encourage minority groups to believe that the United States Constitution and federal laws give them a right to patrol and picket in the streets whenever they choose, in order to advance what they think to be a just and noble end, do no service to those minority groups, their cause, or their country." 379 U.S. at 584. If picketing is a form of free speech, *Thornhill v. Alabama*, 310 U.S. 88 (1940), this language, whether sound or unsound, is something less than first amendment absolutism.

See also *Hannah v. Larche*, 363 U.S. 420 (1960), where, with civil rights and civil liberties interests in conflict, Justices Douglas and Black in dissent would have barred the Civil Rights Commission from using confidential informants and from forbidding cross-examination in its hearings on alleged violations by the state of Louisiana of Negro rights. Was it only the "clear meaning" theory that kept Justices Douglas and Black in dissent, while the other half of the liberal block, the Chief Justice and Mr. Justice Brennan, split off and supported the Commission?

viewed as really a *code* jurisprudence rather than a *common-law* jurisprudence, although this may involve re-assessing Mr. Justice Black as a frustrated Napoleonic jurist. Perhaps its prime virtue is that it can lead to a quick "up-dating" of constitutional meaning without the need to worry much about the baggage of precedent. And its lack of "balancing" makes a "Brandeis brief" approach irrelevant. It lies, in short, at the opposite pole from that much-maligned and usually totally misunderstood term, "neutral principles."<sup>58</sup>

*E. Negative View: Is the Issue Privacy, or Access to Information?*

Although Justices Black and Stewart joined in each others' dissents, the opinion written by Mr. Justice Stewart was quite unlike that written by Mr. Justice Black. It was Stewart who coined the phrase "uncommonly silly law,"<sup>59</sup> a characterization of the statute which caught the fancy of the press and appeared in numerous editorials. By "silly," he seems to have meant that the law was "obviously unenforceable, except in the oblique context of the present case."<sup>60</sup>

Although he did not pursue the point, this thought may have been an oblique attack by Mr. Justice Stewart on the issue of standing. Mr. Justice Douglas' opinion for the Court was the only opinion to discuss the problem of standing, which had defeated earlier attacks on the statute in the *Tileston*<sup>61</sup> and *Poe* cases. In *Griswold*, of course, there had been an actual arrest of birth control clinic operators, whereas *Tileston* and *Poe* were only declaratory-judgment actions by physicians and patients in a setting of recent nonenforcement of the statute. Despite these distinctions, the Court's very brief treatment of standing in *Griswold* is mystifying unless one realizes that the matter had been carefully canvassed in *Poe* just four years earlier, that the vote then was 5-4, and that Mr. Justice Frankfurter, who had written the opinion for the Court in *Poe*, was no longer on the bench.

Nevertheless, there is still the question (and this also may have troubled Mr. Justice Stewart) of how the *Griswold* case became a

58. See Stone, "Result-Oriented" and Appellate Judgment, in PERSPECTIVES OF LAW: ESSAYS FOR AUSTIN WAKEMAN SCOTT 347 (1964), and the list of "neutral principles" articles therein; Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

59. 381 U.S. at 527 (dissenting opinion).

60. *Ibid.*

61. *Tileston v. Ullman*, 318 U.S. 44 (1943).



right-of-marital-privacy case instead of a birth control clinic-regulatory policy case. It is instructive to remember Mr. Justice Brennan's statement in *Poe* that the true controversy was over the opening of birth control clinics on a large scale. Because he felt that the issue was not presented properly, he concurred in the dismissal of the *Poe* case. Starting with this premise, it would seem that when the birth control clinic issue was raised squarely in *Griswold* by the actual arrest of clinic operators, the Court's discussion should have focused to some extent on the question of the means and ends of state power to regulate birth control clinics. Instead, the dispensers of birth control advice were granted shelter under the marital privacy of users of contraceptives.

To appreciate this aspect of the case it is important to recognize that "standing" in this sequence of birth control cases is at least a two-faceted issue. One facet is the actual threat of harm—the question of the prospect of enforcement on which Mr. Justice Frankfurter's opinion in *Poe* turned. An actual arrest solved this difficulty in *Griswold*. The other facet is the *jus tertii* issue—the standing of the defendant clinic operators to defend themselves by raising the rights of their clients to obtain birth control advice and to act on that advice by using the prescribed contraceptives. In according the defendants standing to raise the constitutional rights of their married clients, Mr. Justice Douglas said simply: "The rights of husband and wife, pressed here, are likely to be diluted or adversely affected unless those rights are considered in a suit involving those who have this kind of confidential relation to them."<sup>62</sup>

Clearly, the "rights of husband and wife" which Mr. Justice Douglas had in mind did not consist merely of an interest in having the statute nullified so that the couple could use contraceptives without fear of police invasion of their bedroom. The interest would have to be the broader one of an *affirmative right of access* to birth control information so that they could regulate, more safely and satisfactorily, the intimacies of their marital relationship.

It was this broad approach toward standing, allowing the defendant clinic to raise the rights of married couples not before the Court, which brought the marital-privacy issue to the fore. This approach also submerged both the more general question of state power to regulate birth control clinics, and Mr. Justice White's concern whether the means chosen were reasonably related to an assumed

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62. 381 U.S. at 481.

purpose of discouraging sexual promiscuity. The privacy issue thus raised is seen on close analysis not to be simply a right to be let alone; rather, it takes on the aspect of an affirmative right of access to information concerning a very private sphere of life.

It may well be that Mr. Justice Stewart had an additional difficulty with the majority's approach. His robust realism<sup>63</sup> led him to reject the broad language in the majority opinions about preserving the inviolability of the marital chamber, because there was never any real prospect of statutory enforcement in that direction. Granting the clinic defendants standing to raise the issue of a right of marital privacy in the *use* of contraceptives, and handling the case primarily on this basis, does not help their cause from the Stewart perspective; it hurts their cause because it directs attention to an unreal situation and blunts the real issue, which is access to information—and freedom to dispense information—about marital privacies.

Since information relevant to marital privacies is what *Griswold*, functionally viewed, comes down to, it is a pity that the majority and the dissents did not join issue on what might be characterized as a dissemination-of-information and making-privacy-effective type of issue, supported by the first amendment. Both Justices Black and Stewart noted this approach, but brushed it aside, albeit not very convincingly. The approach involves an analysis of the standing and substantive rights of dispensers of birth control information, as well as the standing and substantive rights of recipients of birth control information.

### III. EFFECTUATING MARITAL PRIVACY: THE RIGHT OF ACCESS TO BIRTH CONTROL INFORMATION

Merely to phrase the above caption may be to suggest the kind of conceptual confusion which seems to be inherent in the privacy

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63. See, e.g., his opinions in the reapportionment decisions, *Reynolds v. Sims*, 377 U.S. 533, 588 (1964), and companion cases in 377 U.S. at 676, 693, 712, and especially 744. Although in the opinion of the present writer (*Reapportionment in the Supreme Court and Congress—Constitutional Struggle for Fair Representation*, 63 MICH. L. REV. 209 (1964)), no Justice covered himself with glory in the *opinions* written in the reapportionment decisions, as distinguished from the *results*, Mr. Justice Stewart came closer than any other to hitting the mark and realizing that the battle concerned representation and not mathematical abstractions about equal masses of census statistics. Also indicative of his realistic approach was his desire for more facts on the actual impact on the child of prayer and Bible-reading practices in public schools before reaching and resolving the constitutional issues. *School Dist. v. Schempp*, 374 U.S. 203, 319-20 (1963) (dissenting opinion).

field. If privacy is essentially a state of peace and repose which we seek to protect from invasion, does it not take some mental gymnastics to say that *derived* from this premise of privacy, or *associated* with it as part of the core concept, there is a right of access to information relevant to rational use and enjoyment of the state of privacy? But are not both elements unavoidably present in the *Griswold* case, and does not the approach of the Court gloss over the conceptual difficulties? Without the birth control clinic operation, there would have been no case. The only interest of a married couple vis-à-vis the clinic is an interest in obtaining information relevant to a very private part of their lives. By invoking the married couples' fictional fear of prosecution for *use* of contraceptives to give the clinic defendants standing to defend themselves from actual prosecution for giving *advice*, the Court tied marital privacy and access to information together into a single bundle of rights. The Court's approach to standing also in effect reconstituted the facts and issues at the appellate level. Had the reconstituted facts been the actual facts, the decision probably would have been unanimous. To talk of allowing "the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives"<sup>64</sup> is obviously "repulsive to the notions of privacy surrounding the marriage relationship."<sup>65</sup>

But what about the actual case of clinic operation, and the actual question of the allowable range of that operation? What about the Black-Stewart distinction between mere *advice* and the actual *dissemination* of contraceptives as part of a "planned course of conduct"? If only advice had been involved, Justices Black and Stewart apparently would have joined the majority on free-speech grounds, but with no conscious overlay of marital privacy.

In effect, therefore, the Court used standing as a ploy to avoid discussing these questions, which shape the real issue in the case, and which the caption at the beginning of this section seeks to articulate. The result reached by the Court is clear. The clinic can continue to operate, and married couples, at least, have access to birth control information by resort to the clinic. If this decision rests on the peculiar wording of the Connecticut statute, which proscribed "use," then the decision is very narrow. Repeal of the "use" statute and substitution of a statute regulating or proscribing clinic operation

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64. 381 U.S. at 485.

65. *Id.* at 486.

per se would present a fresh situation.<sup>66</sup> But if the Court's stress on "marital privacy" in the use of contraceptives extends to a right of access to birth control information, then the case yields a broad precedent indeed. In rationalizing it, scholars might dispute whether the precedent can be derived from the first amendment alone, or whether the "penumbral" right of privacy is a necessary adjunct.

A perusal of the briefs<sup>67</sup> filed in the Supreme Court in *Griswold* indicates that the attorneys conceived the essence of the appeal to be either a due-process test of whether the Connecticut law was a reasonable means to achieve a proper legislative purpose, or a first amendment test of whether the statute violated any free-speech rights of the acting director of the clinic, Mrs. Griswold, and the medical director, Dr. Buxton. Privacy was handled only in the fictional context of bedroom invasion, with citations to *Rochin v. California*.<sup>68</sup> There was no clear attempt either to extend the assertion of freedom of speech to include the right of clinic patients to obtain birth control information, or to extend the assertion of the right of marital privacy to include a right of access to information intimately related to, and supportive of, conjugal privacy.

Free speech, discussed alone and unrelated to privacy, was phrased variously in the briefs as a right to intellectual freedom,<sup>69</sup> freedom of expression,<sup>70</sup> a right to disseminate information,<sup>71</sup> a right to practice medicine in accord with accepted scientific principles<sup>72</sup> (better phrased perhaps as a right to speak the truth), a right of physicians to advise patients,<sup>73</sup> and a physician's freedom of professional conscience.<sup>74</sup> For Justices Black and Stewart, all of this con-

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66. It is doubtful, however, that the outcome would be different. The following comment of Mr. Justice White, the only Justice to discuss the actual question of clinic operation, is directly in point: "[T]he clear effect of these statutes, as enforced, is to deny disadvantaged citizens of Connecticut, those without either adequate knowledge or resources to obtain private counseling, access to medical assistance and up-to-date information in respect to proper methods of birth control. . . . In my view, a statute with these effects bears a substantial burden of justification when attacked under the Fourteenth Amendment." 381 U.S. at 503 (concurring opinion).

67. Jurisdictional Statement for Appellants; Motion To Dismiss Appeal for Appellee; Brief for Appellants; Brief for Appellee; Brief for Catholic Council on Civil Liberties as Amicus Curiae; Brief for the American Civil Liberties Union and the Connecticut Civil Liberties Union as Amici Curiae; Brief for Physicians as Amici Curiae.

68. 342 U.S. 165 (1952).

69. Brief for Appellant, p. 17.

70. *Id.* at 20.

71. *Id.* at 23.

72. *Id.* at 67.

73. Jurisdictional Statement for Appellants, p. 6.

74. Brief for Physicians as Amici Curiae.

certed effort focused on a basic free speech-first amendment claim went down the drain because, as the state had asserted, the "speech" was too intermixed with a sequence of "action," consisting of physical examinations, prescriptions, and in some cases the dispensing of birth control devices, with a graduated scale of fees for those who could pay.<sup>75</sup> Regarding the merits of the free speech issue per se, one may note that the "speech"- "action" dichotomy is easier to state than to apply neatly and consistently, and may contrast Mr. Justice Black in *Griswold* with Mr. Justice Black in *Dennis v. United States*.<sup>76</sup> Although Mr. Justice Black objected to the "planned course of conduct" in *Griswold*, it was just this concept that led the majority in *Dennis* to affirm the convictions over Mr. Justice Black's dissent.

More relevant to the present discussion, however, is this question: What would have been the effect of an attempted link-up between a claim of marital privacy, defined to include a need for information of the birth control type, and a first amendment claim defined to include a right against state denial of access to information which is available and needed for intelligent decision? Such a combination would not only have closed a logical gap in the case, but would also have made it more difficult for Justices Black and Stewart to brush aside the free-speech claim simply on the ground that "action" was involved. With such a combination, the "action" at issue, which for Justices Black and Stewart qualified out of existence the first amendment claim of the clinic staff, would appear in a new light as something supportive of the first amendment-information claim of those who turned to the clinic for help. There would still be a planned course of conduct, but it would be responsive to a first amendment-privacy claim of married couples, and the fact the aid went beyond advice to include the objects described in the advice would seem to be incidental. When it is sometimes said that speech is an end in itself, what is really denoted is a feeling of the primacy of free speech as a constitutional value, not that it is a passive entity in an actionless vacuum.

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75. After noting that the clinic activity included supplying contraceptive devices, Mr. Justice Black said: "Thus these defendants admittedly engaged with others in a planned course of conduct to help people violate the Connecticut law. . . . What would be the constitutional fate of the law if hereafter applied to punish nothing but speech is, as I have said, quite another matter." 381 U.S. at 508 (dissenting opinion). Similarly, Mr. Justice Stewart said: "If all the appellants had done was to advise people that they thought the use of contraceptives was desirable, or even to counsel their use, the appellants would, of course, have a substantial First Amendment claim. But their activities went far beyond mere advocacy." *Id.* at 529 n.2 (dissenting opinion).

76. 341 U.S. 494, 579 (1951) (dissenting opinion).

In other words, is not the first amendment claim weak when looked at only from the viewpoint of the dispensing of information, because of the additional "action" factors on the part of the clinic, and far stronger when looked at from the viewpoint of the recipient, especially when it is intermixed with a "making privacy effective" argument? Viewed thus, a finding of "action" should not end the first amendment discussion, but should instead invite further inquiry as to purposes and effects.

#### IV. CONCLUSION

Elaboration of this suggested theory of an affirmative right of access to birth control information must await further litigation. It might be founded jointly on the first amendment and on the new constitutionally recognized "penumbral" right of marital privacy. Additional support might be forthcoming from the once forgotten but now remembered ninth amendment. If birth control information is available but for the intervening hand of the state, can that hand perhaps be brushed aside by articulating a constitutionally protected ninth amendment "other right" of private self-help and self-control regarding an intimate sphere of private life? Could the formula be generalized beyond birth control to other areas, or is birth control *sui generis*?

Approached from a slightly different standpoint, is not the ninth amendment concept of rights retained by the people well adapted to support a constitutional policy of confining the privacy invasions authorized by other constitutional processes to the bare minimum necessary to accomplish valid social ends?<sup>77</sup>

Suffice it to say for the present that unless some kind of information-access theory is recognized as implicit in *Griswold*, then it stands as a decision without a satisfying rationale. At least it will stand thus except for those who can join the Court in using the ploy of

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77. There may be some unarticulated privacy aspects in *Estes v. Texas*, 381 U.S. 532 (1965), decided the same day as *Griswold*, in which a conviction was reversed because the trial had been televised. Except for a passing mention in the Brief of the Petitioner, pp. 16-18, and Mr. Justice Clark's statement in his opinion for the Court that televised trial coverage "is a form of mental—if not physical—harassment" of the defendant (381 U.S. at 549), the primary focus in the briefs and opinions was on denial of a fair trial because of the impact of television. See also Brief of American Civil Liberties Union and the Texas Civil Liberties Union as Amici Curiae; Brief of the American Bar Association as Amicus Curiae. And yet could it not be argued, consistently with the result in *Estes*, that even though a trial is not a secret place, there is a ninth amendment "other right" of a defendant not to have his public courtroom trial transformed into a public television spectacle?

“standing” to re-make the actual birth-control-clinic situation into a marital-use-of-contraceptives situation. With the issue thus re-made, we have a modern morality play, with much judicial finger-shaking at fictional police invading a fictional bedchamber of a fictional couple in search of evidence of the use of contraceptives. The actual result of *Griswold* may be applauded, but to reach this result was it necessary to play charades with the Constitution?