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# The Right of Privacy: Emanations and Intimations

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# THE RIGHT OF PRIVACY: EMANATIONS AND INTIMATIONS

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## I. INTRODUCTION

### A. *Background: The Legacy of Brandeis*

WHEN Louis Brandeis and Samuel Warren wrote in 1890 of "The Right to Privacy,"[1] they sought a means of protecting against unwelcome newspaper attention to social activities in the Warren household.[2] Addressing their argument to the private law of torts, they presumably did not anticipate constitutional protection for other rights under the claim of privacy. Nevertheless, seventy-five years later that concept, now called the "right *of* privacy," was used by the Supreme Court of the United States in *Griswold v. Connecticut*[3] to describe a constitutional right. Some members of the Court said the new right was within the "penumbra" formed by "emanations" from specific guarantees in the Bill of Rights, while others emphasized that it was an always present, but previously undiscovered, "right of the people" preserved in the almost forgotten ninth amendment.[4]

It is ironic that the seventy-five-year-old right of privacy (against tort), although introduced under distinguished sponsorship and widely acclaimed as a forward step in the development of the law, has not yet been clearly defined or even generally acknowledged. William Prosser has described the right of privacy as a protection against "not one tort, but a complex of four."[5] There has been some dissent from that view,[6] and there is no general consensus as to the exact boundaries of the tort. The right of privacy against tort (or against four torts) moved with hesitant steps toward general recognition; in contrast, the constitutional right of privacy, arising out of rather different considerations, apparently became at once fully mature upon first articulation by the Supreme Court in *Griswold.*

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

2. See MASON, BRANDEIS—A FREE MAN'S LIFE 70 (1946).

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

4. Even the literature on the ninth amendment is not extensive. See PATTERSON, THE FORGOTTEN NINTH AMENDMENT (1955); Kelsey, *The Ninth Amendment of the Federal Constitution*, 11 IND. L.J. 309 (1936); Redlich, *Are There "Certain Rights . . . Retained by the People"?*, 37 N.Y.U.L. REV. 787 (1962); Rogge, *Unenumerated Rights*, 47 CALIF. L. REV. 787 (1959).

5. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960).

6. Bloustein, *Privacy as an Aspect of Human Dignity—An Answer to Dean Prosser*, 39 N.Y.U.L. REV. 962 (1964).

A further irony is the fact that the device that launched the constitutional right of privacy was the humble contraceptive, whose very existence was little recognized in the polite society whose privacy Brandeis and Warren sought to protect, but which by 1965 had become the subject of public hearings in Congress and in many state capitols, as well as the subject of a feature story with full-color illustrations in a widely circulated magazine.[7]

One wonders what Mr. Brandeis, as he was in 1890, or Mr. Justice Brandeis, as he was from 1916 to 1939, would have thought of these developments. Whatever may have been his original view of the matter, certainly Brandeis came ultimately to regard the right of privacy as a concept with more than one facet; one may speculate that he may have recognized that it was capable of still further growth. In 1928, long after the 1890 article, Brandeis wrote his celebrated dissent in *Olmstead v. United States*,[8] in which he objected strongly to the majority ruling that messages passed along telephone wires are not within the fourth amendment's protection against unreasonable searches and seizures. Although he surely did not then have in mind the specific problem which would be raised in 1965 in the *Griswold* case, his words had a prophetic quality. Reminding the Court that clauses in the Constitution have been broadly interpreted to cover activities and objects "of which the Fathers could not have dreamed," he warned:

> Clauses guaranteeing to the individual protection against specific abuses of power, must have a similar capacity of adaptation to a changing world. . . . The progress of science in furnishing the Government with means of espionage is not likely to stop with wire-tapping. Ways may some day be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home. . . . Can it be that the Constitution affords no protection against such invasions of individual security?[9]

Brandeis described "the right to be let alone," the expressive phrase first used by Judge Cooley,[10] as "the most comprehensive of rights and the right most valued by civilized men."[11] In emphasizing the urgent necessity of protecting against "every unjustifiable intru-

7. Life, Sept. 10, 1965, p. 59.
8. 277 U.S. 438 (1928).
9. *Id.* at 472, 474.
10. COOLEY, TORTS 29 (2d ed. 1888). See also Griswold, *The Right To Be Let Alone*, 55 NW. U.L. REV. 216 (1960).
11. Olmstead v. United States, 277 U.S. 438, 478 (1928).

sion by the Government upon the privacy of the individual,"[12] Mr. Justice Brandeis borrowed extensively from what Mr. Brandeis had written thirty-eight years earlier.[13]

### B. *Griswold v. Connecticut: An Anticlimax and a New Point of Departure*

Despite much off-Court criticism of the majority ruling in *Olmstead* and some expressions of dissatisfaction within the Court, it remains true in 1965, as in 1928, that the only restrictions on wiretapping depend on statute, not on constitutional inhibition. However, the creation of the new right of marital privacy in the home by-passed altogether the constitutional difficulties of the *Olmstead* rationale. Instead, the new right was compounded in some undefined way of the first, third, fourth, fifth, and ninth amendments.

The decision in *Griswold v. Connecticut* answered one question, but perhaps only one. The Court held that the Connecticut statute forbidding the use of contraceptives unconstitutionally invaded the right of marital privacy. By 1965 the ruling on that narrow question was almost anticlimatic. Twice before, in 1943[14] and 1961,[15] the same issue had been presented to the Court, but both cases had been dismissed for lack of standing or ripeness. When the Court finally decided the substantive issue, few remained to defend the statute. The Roman Catholic Church, for instance, which presumably had supported the retention of the Connecticut ban on the use of contraceptives, seemed reconciled to the invalidation of the statute in *Griswold*.[16]

To conclude that there was general satisfaction with the result in *Griswold* is not, however, to suggest that there was general agreement as to the soundness of the constitutional grounds on which the decision was based. Nor should it be thought that those who applauded the result were in accord as to the future significance of the holding. In order to understand why the case raised more questions than it answered, it is necessary first to summarize briefly the various opinions in the case. It will then be possible to sort out some of the possible future "emanations" from a decision that was itself said to be grounded on "emanations" from the Bill of Rights.

12. *Ibid.*

13. Edward J. Bloustein noted the nearly verbatim identity of several passages in the 1890 article and the 1928 dissent and concluded that "the underlying conceptual scheme is identical." Bloustein, *supra* note 6, at 976.

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

15. Poe v. Ullman, 367 U.S. 497 (1961).

16. See text accompanying notes 102-11 *infra*.

### C. *The Griswold Opinions*

Mr. Justice Douglas, writing the opinion of the Court, concluded that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."[17] Itemizing, he found that "the First Amendment has a penumbra where privacy is protected from governmental intrusion."[18] He also found facets of privacy in the third amendment's prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner; in the fourth amendment's guarantee against unreasonable searches and seizures; in the fifth amendment's privilege against self-incrimination; and in the ninth amendment's reservation of additional, unspecified rights "retained by the people."[19]

Mr. Justice Goldberg, writing for himself, Mr. Chief Justice Warren, and Mr. Justice Brennan, joined in Mr. Justice Douglas' opinion and conclusion that "Connecticut's birth-control law unconstitutionally intrudes upon the right of marital privacy. . . ."[20] His concurring opinion was written "to emphasize the relevance of [the ninth amendment] . . . to the Court's holding."[21]

The ninth amendment, which had almost no judicial interpretation between 1791 and 1965, is at best cryptic: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." In those words Mr. Justice Goldberg found the constitutional haven he sought for the cherished right to be let alone, at least for the limited purpose of protecting the "private realm of family life."[22] Although he recognized that the Constitution does not expressly mention the right of marital privacy, he nonetheless could not "believe that it offers these fundamental rights no protection. . . . Rather, as the Ninth Amendment expressly recognizes, there are fundamental personal rights such as this one, which are protected from abridgment by the Government though not specifically mentioned in the Constitution."[23] Finally, he contended that where, as in *Griswold*, "fundamental personal liberties are involved, they may not be abridged by the States simply on a

17. 381 U.S. at 484.
18. *Id.* at 483.
19. *Id.* at 484.
20. *Id.* at 486.
21. *Id.* at 487.
22. *Id.* at 495, quoting from Prince v. Massachusetts, 321 U.S. 158, 166 (1944). See also Meyer v. Nebraska, 262 U.S. 390, 399 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1925).
23. 381 U.S. at 495-96.

showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose."[24]

Justices Harlan and White concurred in the result, but argued that the statute should be held invalid as a violation of the due process clause of the fourteenth amendment, apart from any meaning derived from the Bill of Rights.[25] Their views are more fully discussed in part II below.

In dissent, Mr. Justice Black (joined by Mr. Justice Stewart) objected principally to the Goldberg opinion. Finding no protection for the right of privacy in any provision of the Constitution, Mr. Justice Black bluntly expressed his fear that the Court was claiming for the federal judiciary the "power to invalidate any legislative act which the judges find irrational, unreasonable or offensive."[26]

The issues on which the Court divided in *Griswold* raise vital questions as to the nature of the federal judicial power, and the disagreements are basic. It is therefore important to sift the issues and determine, to the extent possible, whether the constitutional frame on which the new right of privacy was erected invites further expansion into other areas, or whether the platform was a temporary edifice built for this case alone.

Of the many fascinating perspectives from which the several opinions in *Griswold* could be viewed, inquiry will here be limited to three propositions. (1) Does the due process clause of the fourteenth amendment impose any substantive limitations upon state power beyond what can reasonably be found in the "specific" provisions of the Bill of Rights? (2) What is the relationship, if any, between the right of marital privacy and other aspects of the right of privacy, such as the fourth and fifth amendments' prohibitions against unreasonable searches and seizures and against compelled self-incrimination? (3) What, if anything, does *Griswold* foretell of the permissible role of government in the study of population control and, more specifically, in the dissemination of birth control information?

## II. Fourteenth Amendment Due Process and the Bill of Rights

There is no specific textual link between any provision of the fourteenth amendment and the protections accorded certain personal liberties in other parts of the Constitution, particularly in the

24. *Id.* at 497.
25. *Id.* at 499, 502.
26. *Id.* at 511.

Bill of Rights. It has long been accepted constitutional doctrine, however, that at least "some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law."[27] Nevertheless, three vital issues centering on the due process clause have caused recurring conflict on the Court.

In the first place, there has been disagreement as to which rights should be deemed applicable to the states through the due process clause. The catalogue of rights thus carried over has expanded rapidly in recent years; by 1965 the Court had ruled applicable to the states all the provisions of the first and fourth amendments, as well as the most significant aspects of the fifth, sixth, and eighth amendments.[28]

A second division of opinion within the Court has involved the question whether those specifics of the Bill of Rights that are regarded as carried over into the due process clause should limit the states to the same extent that they limit the national government. That question has now been resolved in the affirmative,[29] although by no means unanimously.[30]

The third major issue in this area—the issue to which *Griswold* adds new dimension—is the question whether the due process clause not only draws within its prohibitions the fundamental specific provisions of the Bill of Rights but also, by "emanation" or otherwise, limits state governments in additional, largely unspecified ways. This question was raised in 1947 in *Adamson v. California.*[31] In that case the basic issue was whether the due process clause of the fourteenth amendment protects an accused against a state-imposed requirement of testimonial compulsion to the same extent as the fifth amendment privilege against self-incrimination protects an accused against the federal government. A majority of the Court answered in the negative, holding in effect that the privilege against self-incrimination was not carried over into the due process clause of the fourteenth amendment—a holding subsequently overruled

27. Twining v. New Jersey, 211 U.S. 78, 99 (1908).

28. The matter is well reviewed in Mr. Justice Brennan's opinion for the Court in Malloy v. Hogan, 378 U.S. 1 (1964). See also Pointer v. Texas, 380 U.S. 400 (1965); Frankfurter, *Memorandum on "Incorporation" of the Bill of Rights Into the Due Process Clause of the Fourteenth Amendment*, 78 HARV. L. REV. 746 (1965); Henkin, *"Selective Incorporation" in the Fourteenth Amendment*, 73 YALE L.J. 74 (1963).

29. See Ker v. California, 374 U.S. 23, 33 (1963).

30. *Id.* at 45 (Harlan, J., concurring).

31. 332 U.S. 46 (1947).

in 1964 in *Malloy v. Hogan*.[32] The dispute as to the possible inclusion of non-Bill of Rights protections within the due process clause of the fourteenth amendment took place among the *Adamson* dissenters. Mr. Justice Black, joined by Mr. Justice Douglas, contended that the due process clause should be read to make the Bill of Rights fully applicable to the states. He rejected not only the doctrine of "selective incorporation," but also the more expansive reading of due process urged by Justices Rutledge and Murphy, also in dissent.[33] While those Justices agreed with the Black-Douglas view "that the specific guarantees of the Bill of Rights should be carried over intact into the first section of the Fourteenth Amendment,"[34] they were "not prepared to say that the latter is entirely and necessarily limited by the Bill of Rights."[35]

The potential for constitutional conflict inherent in the Murphy-Rutledge view of due process became evident in 1952 when, in *Rochin v. California*,[36] all eight members of the Court who participated in the decision agreed that the due process clause forbade the use in evidence of capsules secured from the accused by means of forcible "stomach pumping." There was, however, a significant disagreement over the operative rationale. The majority, through Mr. Justice Frankfurter, thought that this was

> conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents—this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.[37]

By this time Justices Murphy and Rutledge were gone, so we cannot know how they would have reacted to this seeming acceptance of their *Adamson* position. But Justices Black and Douglas were quick to point out their fears of unconfined judicial discretion in interpretation of the due process clause. Although Mr. Justice Frankfurter asserted that "the vague contours of the Due Process Clause do not leave judges at large,"[38] Mr. Justice Black urged again his *Adamson* view that a specific constitutional text must be found for

32. 378 U.S. 1 (1964). See also Griffin v. California, 380 U.S. 609 (1965).
33. Adamson v. California, 332 U.S. 46, 68 (1947) (Black, J., dissenting).
34. *Id.* at 124.
35. *Ibid.* (Murphy and Rutledge, JJ., dissenting).
36. 342 U.S. 165 (1952).
37. *Id.* at 172.
38. *Id.* at 170.

every constitutional prohibition. For Mr. Justice Black, the fifth amendment privilege against self-incrimination supplied such a text in cases where, as in *Rochin*, "incriminating evidence is forcibly taken from [an accused] by a contrivance of modern science."[39] But, he said, there is "no express constitutional language granting judicial power to invalidate *every* state law of *every* kind deemed 'unreasonable' or contrary to the Court's notion of civilized decencies . . . ."[40] Inevitably, later cases revealed disagreements that could not be papered over with agreement as to result,[41] and the Black-Douglas view was strongly reiterated in dissent.

*Griswold*, however, presented the new phenomenon of the so-called libertarian result being upheld over the dissent of Mr. Justice Black, who is often regarded as the leader of the libertarian forces on the Court. He could find no reasonably express provision in the Constitution guaranteeing the right of marital privacy, and he could not agree with Mr. Justice Douglas' suggestion that such a right could be discovered in the emanations from other provisions. He rejected the due process argument of Justices Harlan and White and the ninth amendment rationale of Mr. Justice Goldberg "because on analysis they turn out to be the same thing—merely using different words to claim for this Court and the federal judiciary power to invalidate any legislative act which the judges find irrational, unreasonable or offensive."[42]

Although Mr. Justice Black's disagreement with the reasons given by some of the Justices was not unexpected, surely the matter calls for further analysis when it is noted that the sole ally for the Black position was Mr. Justice Stewart, while those most frequently found in agreement with Black were ranged on the other side in varying degrees of disagreement.

Mr. Justice Douglas, it will be remembered, had originally shared Mr. Justice Black's view that due process permits full incorporation of the specifics of the Bill of Rights, but does not permit protections beyond those relatively confined limits. Although Mr. Justice Douglas emphasized in his opinion for the Court in *Griswold* the penumbras and emanations from various amendments, he was no-

39. *Id.* at 175.

40. *Id.* at 176. Mr. Justice Douglas agreed in a separate concurring opinion, *id.* at 179.

41. See, *e.g.*, Breithaupt v. Abram, 352 U.S. 432 (1957) (blood sample taken from person rendered unconscious by automobile accident admissible at trial); Irvine v. California, 347 U.S. 128 (1954) (evidence secured by police through repeated illegal entries into a home admissible at trial).

42. 381 U.S. at 511.

where specific about the exact *source* of the right of marital privacy. For all of Mr. Justice Black's forgiving reference to a "narrow" disagreement with Mr. Justice Douglas, "relating to the application of the First Amendment to the facts and circumstances of this particular case,"[43] it is difficult to find in the Douglas opinion a basis for even the minimal predictability requisite for constitutional stability. Efforts to define due process in terms of "emanations" seem scarcely more likely to succeed than the somewhat circular efforts to define due process without any external standard more definite than "considerations deeply rooted in reason and in the compelling traditions of the legal profession."[44]

All members of the present Court agree, as presumably all Justices who have sat in the past have agreed, that the Supreme Court has no authority to review the *wisdom* of legislation enacted by Congress or state legislative bodies. To do so would be to infringe upon the legislative domain. Framing the issue in such terms, however, scarcely advances rational resolution of the very real issues that divide the Court. There are three, or perhaps four, views of this matter taken by various members of the Court. Understandably, each group asserts that its way of looking at the matter provides textually supportable answers, whereas other approaches produce rulings based only upon the personal predilections of the judges. The issues thus raised are at the very center of any inquiry into the nature of the judicial process; accordingly, a clear understanding of the implications of the various positions is critically important.

In 1961, in the widely criticized[45] decision in *Poe v. Ullman*,[46] the Supreme Court refused to hear an earlier challenge to the Connecticut anti-contraceptive law, for the stated reason that the case was not ripe for adjudication on the merits. Mr. Justice Harlan made clear in his dissent in *Poe* that he would vote for invalidation of the statute if there should ever be an opportunity to pass on the merits. In discussing the "liberty" protected by the due process clause of the fourteenth amendment, he said:

> This "liberty" is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational con-

43. *Ibid.*
44. Rochin v. California, 342 U.S. 165, 171 (1952).
45. See, *e.g.*, 62 COLUM. L. REV. 106 (1962). See also Poe v. Ullman, 367 U.S. 497, 524-39 (1961) (Harlan, J., dissenting).
46. 367 U.S. 497 (1961).

> tinuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints. . . .[47]

However much other members of the Court objected to the Connecticut law, it seemed likely that the constitutional rationale advanced by Mr. Justice Harlan would not be persuasive to a majority of the Court.[48] Mr. Justice Douglas dissented separately in *Poe*, suggesting a quite different view of due process from that outlined in the Harlan opinion. Perhaps forecasting his later opinion in *Griswold*, Mr. Justice Douglas described "liberty" as "a conception that sometimes gains content from the emanations of other specific guarantees . . . or from experience with the requirements of a free society."[49] Mr. Justice Black dissented from the refusal to reach and decide the merits in *Poe*, but did not join the Douglas dissent. Indeed, in view of Mr. Justice Black's repeated insistence that the due process clause must not be read to limit the states except in ways reasonably inferable from the specifics of the Bill of Rights, it would have been surprising had he joined in the somewhat unguarded talk of emanations in the Douglas opinion.

After 1961 it seemed entirely possible that a review of the Connecticut law on the merits might find a majority of the Court, under the leadership of Mr. Justice Black, unwilling to overturn the statute. With that possibility in mind, opponents of the Connecticut law re-examined the constitutional guarantees to determine whether other arguments could be advanced to persuade the Court to invalidate the Connecticut law. The most plausible rationale was advanced by my colleague Norman Redlich, who reminded the opponents of the statute that the ninth amendment offers shelter to certain rights "retained by the people" and that certain rights are "reserved . . . to the people" by the tenth amendment.[50] Anticipating the charge that these provisions would provide a textual standard no more definite than due process, he argued:

> When the question of standards is posed within the context

47. Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting).

48. No one joined in the Harlan dissent in *Poe*, although Mr. Justice Stewart, who agreed with Mr. Justice Harlan on ripeness, said that "in refraining from a discussion of the constitutional issues, I in no way imply that the ultimate result I would reach on the merits of these controversies would differ from the conclusions of my dissenting Brothers [Justices Douglas and Harlan]." *Id.* at 555. Whatever indication of sympathy for the Harlan position there was in that statement vanished when Mr. Justice Stewart dissented in *Griswold*, specifically repudiating the views of both Justices Douglas and Harlan.

49. *Id.* at 517.

50. Redlich, *Are There "Certain Rights . . . Retained by the People"?*, 37 N.Y.U.L. REV. 787 (1962).

> of the Ninth and Tenth Amendments, rather than in terms of due process, a definite pattern starts to emerge. To comply with the purposes of these Amendments, the textual standard should be the entire Constitution. The original Constitution and its amendments project through the ages the image of a free and open society. The Ninth and Tenth Amendments recognized—at the very outset of our national experience—that it was impossible to fill in every detail of this image. For that reason certain rights were reserved to the people. The language and history of the two Amendments indicate that the rights reserved were to be of a nature comparable to the rights enumerated. They were "retained . . . by the people" not because they were different from the rights specifically mentioned in the Constitution, but because words were considered inadequate to define all of the rights which man should possess in a free society and because it was believed that the enumeration might imply that other rights did not exist.[51]

On the basis of that reasoning, Professor Redlich was able to argue that the suggested application of these amendments would not resurrect the discredited freedom-of-contract theory of cases like *Lochner v. New York*,[52] which he thought

> hardly fits into the scheme of rights set forth in our Constitution. But the right of a married couple to maintain the intimacy of their marital relationship free from the criminal sanction of the state does fit into the pattern of a society which set forth in its national charter that men should be free from unreasonable searches and seizures.[53]

Professor Redlich's suggestion, which invited a detour around sharply divergent views as to the meaning of the due process clause, was adopted by three members of the *Griswold* Court, in Mr. Justice Goldberg's opinion.

> [T]he Ninth Amendment shows a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive. . . . The Ninth Amendment simply shows the intent of the Constitution's authors that other fundamental personal rights should not be denied such protection or disparaged in any other way simply because they are not specifically listed in the first eight constitutional amendments.[54]

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51. *Id.* at 810-11.
52. 198 U.S. 45 (1905).
53. Redlich, *supra* note 50, at 811.
54. 381 U.S. at 492. Mr. Justice Douglas also referred to the ninth amendment, but without explanation of its relevance. *Id.* at 484.

There seemed then little more to be done except to establish in some reasonably objective manner that the right to marital privacy was one of the retained "fundamental personal rights." But Mr. Justice Goldberg, in his anxiety to demonstrate that "judges are not left at large to decide cases in light of their personal and private notions,"[55] raised new doubts as to the objectivity of that standard when he cited two cases based on the notion of flexible due process. Quoting from *Snyder v. Massachusetts*,[56] he said that judges "must look to the 'traditions and [collective] conscience of our people' to determine whether a principle is 'so rooted [there] . . . as to be ranked as fundamental.' "[57] He relied on *Powell v. Alabama*[58] for the proposition that "the inquiry is whether a right involved 'is of such a character that it cannot be denied without violating those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions . . . ." ' "[59]

When Mr. Justice Goldberg thus failed to differentiate between the ninth amendment "retained" rights and the flexible due process concept, it was to be expected that Mr. Justice Black would repudiate the new constitutional canon for the same reasons for which he had always rejected the old. There is indeed much merit in Mr. Justice Black's complaint that the Harlan due process argument and the Goldberg ninth amendment argument "turn out to be the same thing . . . ."[60]

If there is any one proposition on which all members of the Court seem agreed, it is that there must be no return to the philosophy that allowed judicial invalidation on due process grounds of legislation intended to promote economic or social welfare. The Court has repeatedly emphasized that it is not concerned "with the wisdom, need or appropriateness" of legislation.[61] In 1963 Mr. Justice Black wrote a kind of epitaph for that constitutional period in *Ferguson v. Skrupa*: "The doctrine that prevailed in *Lochner, Coppage, Adkins, Burns*, and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely —has long since been discarded."[62] Justices Black and Stewart saw in *Griswold* a revival of that discarded doctrine. Unfortunately, the

55. *Id.* at 493.
56. 291 U.S. 97 (1934).
57. 381 U.S. at 493.
58. 287 U.S. 45 (1932).
59. 381 U.S. at 493.
60. *Id.* at 511.
61. Olsen v. Nebraska *ex rel.* Western Reference & Bond Ass'n, 313 U.S. 236, 246 (1941).
62. 372 U.S. 726, 730 (1963).

Douglas and Goldberg opinions are not altogether reassuring that the solutions they proposed are secure against expansion into another period of judicial revisionism.

It is tempting, when the Bill of Rights is not inclusive enough to protect against real or imagined governmental excesses, to search elsewhere for restraints that many believe should be found in a basic charter. Further cases may provide refinement of the ninth amendment view of the retained rights of the people so as to give the requisite certainty and protect against unconfined judicial inventiveness. In this quest for certainty, the tests suggested by Professor Redlich deserve further attention. In areas of general economic and social policy he would have the courts defer to legislative judgment so long as it appears reasonably related to a valid legislative end. But when the legislature extends its action to regulate a right that may be regarded as "an essential ingredient of the free society established by our Constitution,"[63] it is not improper to "require overwhelming proof of necessity and the absence of other and less burdensome means to achieve [the legislative] . . . objectives."[64] He argues that although here—as elsewhere—no purely objective criteria can be established, judges would not be at large; "the Ninth and Tenth Amendments should be used to define rights adjacent to, or analogous to, the pattern of rights which we find in the Constitution."[65]

Whether satisfactorily objective standards can be substituted for the purely personal reactions of judges still remains for future demonstration. Depending upon where the philosophy of *Griswold* leads, either the case will gain a respected place in constitutional jurisprudence as the progenitor of a new source of protection for "fundamental personal rights," or it will be cast aside as a judicial experiment that proved unworkable. The answer may depend in part on the future development of the right of privacy itself, the matter with which part III of this article is concerned.

## III. The Right of Privacy and the Fourth and Fifth Amendments

Even before 1965 the right of privacy was a variable concept, describing a variety of interests used by judges "in different senses and for varying purposes."[66] The use of the term implies a value judg-

63. Redlich, *supra* note 50, at 812.
64. *Ibid.*
65. *Ibid.*
66. Beaney, *The Constitutional Right to Privacy in the Supreme Court*, [1962] Sup. Ct. Rev. 212. For a reflective discussion of the contemporary potential of the privacy concept, see Ruebhausen & Brim, *Privacy and Behavioral Research*, 65 Colum. L. Rev. 1184 (1965).

ment that any invasion of that "right" is somehow wrong and should be resisted. The difficulty is that the notion of a right of privacy has been invoked as often as the proverbial cry of "wolf." Its meaning, if it was ever clear, has become diluted and uncertain through overgenerous application to a wide variety of situations. To determine the likely generative impact of the right of privacy as applied in *Griswold,* it is necessary to know more of the origins, development, and current significance of the term.

### A. *The Right of Privacy in Constitutional History*

In the United States the principal development of the constitutionally protected right of privacy has been in connection with limitations imposed on the authority of government to seize persons or property. It is familiar history that before the American Revolution the practice had been prevalent in the colonies of issuing to revenue officers "writs of assistance" that empowered them in their discretion to search suspicious places for smuggled goods.[67] In 1761 James Otis denounced the writs because they placed "the liberty of every man in the hands of every petty officer."[68] Of the debate in which that remark was made, John Adams was later to declare that "then and there the child Independence was born."[69]

By 1765 the famous ruling in *Entick v. Carrington*[70] had fixed the course of English law against the search of homes for incriminating evidence pursuant to a general writ or other discretionary exercise of official authority. Thus was constitutional protection given to a right of privacy against seizure of person or property, but ordinarily in terms of property concepts, such as protection against trespass.

This great right, translated into the fourth amendment to the Constitution of the United States as a protection against unreasonable searches and seizures, has been zealously defended; but when this privacy right has been successfully invoked, it has usually been in the context of protection against the unreasonable search and seizure of persons or tangible property. Even in *Boyd v. United States,*[71] when the fourth amendment and the fifth amendment's privilege against self-incrimination were said to "run almost into each

67. The relevant history is recapitulated in Boyd v. United States, 116 U.S. 616, 624-31 (1886). See also LASSON, HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION (1937); Barrett, *Personal Rights, Property Rights, and the Fourth Amendment,* [1960] SUP. CT. REV. 46.

68. Quoted in Boyd v. United States, *supra* note 67, at 625.

69. *Ibid.*

70. 19 Howell's State Trials 1029.

71. 116 U.S. 616 (1886).

other,"[72] the factual situation involved a statutory authorization to compel the production of private papers or to have their presumed contents taken as confessed against the person withholding them. Similarly, when the exclusionary rule under the fourth amendment was applied to the states in *Mapp v. Ohio*,[73] the problem again involved a seizure of tangible property.

These cases are linked to *Griswold* only by use of the term "right of privacy" to apply to both types of rights. If, then, the right of marital privacy is to be regarded as an emanation from the Bill of Rights, or if it is a right retained by the people pursuant to the ninth amendment, the question that naturally arises is whether there are other "rights of privacy," hitherto unprotected—perhaps not yet even discovered—that might now come within this more commodious constitutional shelter.

Candidates for constitutional protection as part of the right of privacy are not wanting. The privacy claim had earlier been unsuccessfully invoked in a number of cases. Those situations should now be re-examined to see if they meet the new standard. Perhaps, too, this inquiry may throw some light on the question whether the newly discovered right of marital privacy has a generative potential for other, heretofore untested, situations.

### B. *Privacy, Wiretapping, and Eavesdropping*

The most celebrated instance in which the Supreme Court has applied the protection-of-property rationale of the fourth amendment to deny expansion of the amendment's protection into other areas of privacy is *Olmstead v. United States*.[74] In holding that the fourth amendment does not prohibit the use of evidence secured by wiretapping, Mr. Chief Justice Taft emphasized the "property" aspects of the amendment's protective reach:

> The Amendment itself shows that the search is to be of material things—the person, the house, his papers or his effects. The description of the warrant necessary to make the proceeding lawful, is that it must specify the place to be searched and the person or *things* to be seized. . . . The language of the Amendment can not be extended and expanded to include telephone wires reaching to the whole world from the defendant's house or office.[75]

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72. *Id.* at 630.
73. 367 U.S. 643 (1961). *Cf.* Wong Sun v. United States, 371 U.S. 471 (1963); Silverman v. United States, 365 U.S. 505 (1961).
74. 277 U.S. 438 (1928).
75. *Id.* at 464-65.

The dissents of Justices Brandeis and Holmes, although neither then nor since persuasive to a majority of the Court on this specific issue, have much in common with the Douglas and Goldberg opinions in *Griswold.* In his brief dissent, Mr. Justice Holmes acknowledged the possibility "that the penumbra of the Fourth and Fifth Amendments"[76] should be applied to forbid the wiretapping and the use in evidence of its fruits. But it was the eloquent, oft-quoted dissent of Mr. Justice Brandeis that came closest to the views announced in *Griswold* in 1965. Arguing for an interpretation of the Constitution that would keep its prohibitions abreast of current developments, he pointed out that "subtler and more far-reaching means of invading privacy have become available to the Government. Discovery and invention have made it possible for the Government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet."[77]

Brandeis saw the fourth amendment as a basic charter of freedom from governmental intrusion into private affairs. In the most famous passage of his dissent he said:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. . . . They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth.[78]

Closely related to the wiretapping question involved in *Olmstead* is the right of privacy claim raised—and rejected—in the eavesdropping cases. In electronic eavesdropping, which has been described as "the ultimate invasion of privacy,"[79] the fears of Brandeis have come alive. Any telephone can be quickly transformed

76. *Id.* at 469.

77. *Id.* at 473. See Brandeis & Warren, *The Right to Privacy,* 4 HARV. L. REV. 193, 195 (1890): "[N]umerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet' shall be proclaimed from the house-tops."

78. Olmstead v. United States, 277 U.S. 438, 478-79 (1928).

79. WILLIAMS, *The Wiretapping-Eavesdropping Problem: A Defense Counsel's View,* 44 MINN. L. REV. 855, 866 (1960). See also DASH, KNOWLTON & SCHWARTZ, THE EAVESDROPPERS 339-79 (1959); PACKARD, THE NAKED SOCIETY (1964); Symposium, *Science and the Law,* 63 MICH. L. REV. 1325 (1965); King, *Electronic Surveillance and Constitutional Rights: Some Developments and Observations,* 33 GEO. WASH. L. REV. 240 (1965); Michael, *Speculations on the Relation of the Computer to Individual Freedom and the Right to Privacy, id.* at 270.

into a microphone which transmits every sound in the room, and so-called parabolic microphones can eavesdrop on a conversation in a room across a hundred-foot-wide street, but there is no constitutional protection against such intrusions.[80] Even the wiretapping prohibitions in section 605 of the Federal Communications Act offer at best limited protection to conversations thought private by their direct participants.[81]

### C. *Other Potential Right-of-Privacy Claims*

The privacy argument has been urged and rejected in other cases, but always in relation to some claimed violation of the fourth or fifth amendments—never in connection with Mr. Justice Douglas' "penumbra" concept or Mr. Justice Goldberg's ninth amendment argument. In *Public Utilities Commission v. Pollak*,[82] for example, the Court rejected a claim that radio programs on buses and streetcars of a private company regulated by the District of Columbia invaded the privacy rights of passengers in violation of the due process clause of the fifth amendment. Mr. Justice Douglas was the only dissenter:

> The case comes down to the meaning of "liberty" as used in the Fifth Amendment. Liberty in the constitutional sense must mean more than freedom from unlawful governmental restraint; it must include privacy as well, if it is to be a repository of freedom. The right to be let alone is indeed the beginning of all freedom.
>
> If we remembered this lesson taught by the First Amendment [the "sanctity of thought and belief" as "important aspects of the constitutional right to be let alone"], I do not believe we would construe "liberty" within the meaning of the Fifth Amendment as narrowly as the Court does.[83]

In *Frank v. Maryland*[84] the Court specifically acknowledged that the fourth and fifth amendments protect "the right to be secure from intrusion into personal privacy"[85] and the "intimately related" right of self-protection—"the right to resist unauthorized entry which has as its design the securing of information which may be used to effect a further deprivation of life or liberty or property."[86] But in

80. On Lee v. United States, 343 U.S. 747 (1952); Goldman v. United States, 316 U.S. 129 (1942); *cf.* Lopez v. United States, 373 U.S. 427 (1963); Lanza v. New York, 370 U.S. 139 (1962).

81. See generally Westin, *The Wire-Tapping Problem: An Analysis and a Legislative Proposal*, 52 COLUM. L. REV. 165 (1952).

82. 343 U.S. 451 (1952).

83. *Id.* at 467-68. See also DOUGLAS, THE RIGHT OF THE PEOPLE 87 (1958).

84. 359 U.S. 360 (1959).

85. *Id.* at 365.

86. *Ibid.*

that case the action complained against was the demand made by a municipal health inspector without a search warrant to enter private premises in search of health hazards. Since no evidence for criminal prosecutions was sought to be seized, a majority of the Court denied the existence of any right of privacy sufficient to preclude the search. The four dissenters, in an opinion by Mr. Justice Douglas, thought that the decision "greatly [diluted] the right of privacy."[87]

The privacy right has sometimes been discussed by individual members of the Court, usually in concurring or dissenting opinions, in connection with rights said to be protected by constitutional provisions other than the fourth and fifth amendments. Thus, it has been suggested that the first amendment-related freedoms of speech, conscience, and association are aspects of the right to privacy, because "the right of privacy implicit in the First Amendment creates an area into which the Government may not enter."[88] Accordingly, it has also been suggested that "the interest in privacy as it relates to freedom of speech and assembly"[89] is sufficiently important to carry with it a presumption of noninterference by state investigatory authorities except upon a "showing by the State sufficient to counterbalance"[90] the privacy right. Similar considerations may also be relevant for some Justices in other first amendment areas, including problems arising out of loyalty oaths,[91] admission to the bar,[92] membership disclosure requirements,[93] and freedom of travel.[94] But other members of the Court have continued to think of these matters solely in terms of the first amendment prohibitions, without considering the potential privacy aspects of the asserted rights. Since the Court has often been closely divided on these cases, with decisions wavering from one side to the other of the thin line that divides governmental power from individual liberties, it is interesting to speculate whether elevation of the privacy right to majority status in *Griswold* may also foretell a new way of looking at those aspects

87. *Id.* at 374.

88. Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539, 570 (1963) (Douglas, J., concurring). See also *id.* at 565, 569.

89. Uphaus v. Wyman, 360 U.S. 72, 107 (1959) (Brennan, J., dissenting).

90. *Ibid.*

91. *E.g.*, Baggett v. Bullitt, 377 U.S. 360 (1964).

92. *E.g.*, Schware v. Board of Bar Examiners, 353 U.S. 232 (1957); Konigsberg v. State Bar of California, 353 U.S. 252 (1957).

93. *E.g.*, Shelton v. Tucker, 364 U.S. 479 (1960); Bates v. Little Rock, 361 U.S. 516 (1960); NAACP v. Alabama, 357 U.S. 449 (1958).

94. *E.g.*, Aptheker v. Secretary of State, 378 U.S. 500 (1964); Kent v. Dulles, 357 U.S. 116 (1958).

of the right to be let alone that depend on the first amendment for their protection against governmental intrusion.

When the Court has recognized a right of privacy in some context other than the traditional fourth and fifth amendment protection against the taking of property to be used as evidence to aid in criminal prosecutions (and apart from the first amendment areas mentioned above), the privacy concept has sometimes been invoked as a makeweight to help in downgrading claimed invasions of other constitutional rights. Thus, in *Breard v. Alexandria,*[95] the Court upheld an ordinance banning door-to-door solicitation by out-of-state solicitors for magazine subscriptions. The balance was said to be "between some householder's desire for privacy and the publisher's right to distribute publications in the precise way that those soliciting for him think brings the best results."[96] The four dissenters could scarcely see this as a privacy right at all, but as an excuse to downgrade what some saw as first amendment rights[97] and others as the interest in the free flow of interstate commerce.[98]

Another item in this pre-*Griswold* catalogue of privacy rights is *Skinner v. Oklahoma,*[99] in which the Court offered protection against involuntary sterilization pursuant to a statutory authorization that was discriminatory in its application. That judgment, however, rested solely on the equal protection clause of the fourteenth amendment to protect the dignity and personality of the individual.

The short of it is that the right of privacy has been much discussed in the Supreme Court opinions, particularly in recent years, but substantively nothing much came of that discussion until *Griswold.* Except for the fourth amendment holdings, the talk about privacy rights was not supported with judgments in vindication of privacy rights until *Griswold.* Even in the fourth amendment cases, despite an increasing tendency to talk about that amendment's protection of privacy rights the *holdings* seem not to have gone beyond the 1886 decision in *Boyd v. United States.* However closely the fourth and fifth amendments may have been linked by the *Boyd* case, still the constitutional protection did no more than immunize from seizure, real or constructive. The continuing refusal to exclude evidence gained through wiretapping or electronic eavesdropping, and the refusal to apply the fourth amendment to "civil" searches, necessarily demonstrate that the right of privacy, unlike other individual

95. 341 U.S. 622 (1951).
96. *Id.* at 644.
97. *Id.* at 649 (Black and Douglas, JJ., dissenting).
98. *Id.* at 645 (Vinson, C.J., and Douglas, J., dissenting).
99. 316 U.S. 535 (1942).

liberty protections, has not significantly adapted itself to developments after 1791.

*Griswold* does not necessarily foretell evolution in the rather fixed doctrines of the fourth amendment. The fourth amendment right of privacy discussed above bears little resemblance to the right of marital privacy in *Griswold*. For purposes of comparison and contrast, it may be helpful to think of the fourth amendment right of privacy as a procedural protection—a limitation upon the means by which evidence can be obtained for the purpose of securing a criminal conviction. The right of marital privacy, on the other hand, is exclusively substantive; when applicable,[100] it nullifies positive law enacted pursuant to otherwise valid legislative power. Accordingly, there is no necessary generative force in *Griswold* in relation to the traditional fourth amendment area.

While it is thus perfectly possible for the two kinds of privacy to stand entirely apart, never quite touching, it seems more likely that the new privacy will indeed have an impact on the old. However different from each other they may be, a mutually developing relationship might be worked out. For example, even if it is conceded that wiretapping and electronic eavesdropping are not violations of the fourth or fifth amendments, the Douglas "penumbra" argument could be advanced to establish that "emanations" from the Bill of Rights forbid wiretapping and electronic eavesdropping. (If this argument seems a bit thin to overcome long-established doctrine—as well it might—the ninth amendment argument may offer greater promise.) If there is a right to marital privacy in the home, why should there not be as well a right of privacy in the home or place of business against the unwelcome intrusion of uninvited participants in conversations intended to be private? If the right of privacy is not to be limited narrowly to the facts of *Griswold*, but is

100. In describing the new right as that of marital privacy, emphasis should apparently be on the word "marital." The concurring opinions by Justices Goldberg and White state explicitly that the holding "in no way interferes with a State's proper regulation of sexual promiscuity or misconduct." 381 U.S. at 498-99 (Goldberg, J., concurring); *id.* at 505-07 (White, J., concurring). Mr. Justice Harlan had made the same point in his dissent in Poe v. Ullman, 367 U.S. 497, 553 (1961), and he adopted those views in *Griswold*, 381 U.S. at 500 (Harlan, J., concurring). These expressions of willingness to allow the states to continue to forbid adultery, homosexuality, and other disfavored sexual acts make the result in *Griswold* more acceptable to a society that has always voiced its public disapproval of sexual nonconformity; they do not, however, make easier the task of the disinterested student of the law who is required to seek distinctions between the right of marital privacy and the nonright of unwedded privacy. Perhaps better than anything else this emphasizes that *Griswold* is not a fourth amendment case. The fourth amendment, after all, protects the privacy of the home as to illicit activity to the same extent that it protects against disclosure of innocent activities.

meant to foretell broad protection for the dignity of man and the inviolability of his rights of personality, then should not its applicability be considered in connection with legislative investigations, loyalty oaths, freedom to travel, religious freedom, and other first amendment-related rights?

Far more important than the result on the narrowly special facts of *Griswold* is the question whether the principle there announced can have these important collateral consequences. It is certainly more than a bare possibility.

## IV. Government and the Dissemination of Birth Control Information

If the Constitution of the United States is to remain relevant to government in the latter half of the twentieth century, it must provide viable answers to the difficult questions of governmental structure and power. It has already been observed that the *Griswold* case has significance in relation to modern concepts of federalism. Another twentieth century problem is the growing tension between the assumed necessity for a strong state largely devoted to the achievement of social welfare ends and the equally pressing need to preserve the individual from the gathering forces of big government. Intimations from *Griswold* contribute to that continuing dialogue.

Before the Supreme Court decision in *Griswold*, the underlying social issue reflected in that case appeared to be a fairly narrow one. In a 1956 symposium, no one challenged this statement of the then-relevant question: "Should the state prohibit or otherwise regulate the sale or use of contraceptives?"[101] The new question pertinent to the immediate discussion is whether any *government*, state or federal, may disseminate birth control information through public health clinics and social welfare programs in the United States and through international aid programs abroad.

At first impression the problem might not seem very difficult. In states where the giving of birth control information has not raised serious political or religious problems, such information has been made available. Moreover, the once-substantial opposition to the traffic in birth control devices as articles of commerce has been

101. *Symposium—Morals, Medicine, and the Law*, 31 N.Y.U.L. Rev. 1157, 1158 (1956). Professor Harry Kalven, Jr., almost alone among the contributors to that symposium, noted another question, which he relegated to footnote attention: "A few states now have public birth control clinics. There is perhaps a small issue here as to whether a Catholic taxpayer has any basis for protesting this use of public funds. There is a difference between permitting contraception and sponsoring it." Kalven, *A Special Corner of Civil Liberties—A Legal View*, 31 N.Y.U.L. Rev. 1223, 1224-25 n.1 (1956).

gradually eroded.[102] If the states' power to prohibit the use of contraceptives is denied, governmental participation in the information-dispensing process might seem assured. However, a new argument against any governmental role at all in this process has been raised, principally by spokesmen for the Roman Catholic Church.

It is well known that the Catholic Church has long objected on moral grounds to the use of contraceptives. Indeed, in days past Catholic authorities in Massachusetts supported "Vote God's Way" campaigns against repeal of the state's laws prohibiting the dissemination of birth control information. Seeking statutory prohibition even as to non-members of that church was not illogical as a means of attaining religious objectives. So long as anti-use and anti-dissemination statutes could be kept alive, state-supported family planning programs could scarcely be proposed, and even private clinics would operate at the peril of police action.

Gradually, however, Catholic support of these statutes weakened, although without any change in the moral prohibition applicable to members of that church. Indeed, the Catholic Conference on Civil Liberties presented an amicus curiae brief in *Griswold* supporting invalidation, on privacy grounds, of the Connecticut law.

When the Supreme Court based its invalidation of the Connecticut law squarely on the privacy ground, few Catholic leaders expressed public disapproval, and some Catholics identified with the liberal tradition announced cautious approval.[103] Indeed, in a statement that had been approved before release by the National Catholic Welfare Conference, William Ball, general counsel for the Pennsylvania Catholic Conference, had some kind words for the decision.[104] But the focus had by this time shifted. Mr. Ball voiced Conference approval of *Griswold* in the context of his testimony in opposition to a Senate bill[105] which proposed authorization for the United States "more effectively to deal with rapid population growth throughout the world and the problems arising from or connected with such growth. . . ." Catholic critics of the bill feared that it was the first step, not only to promote study of population control, which they

102. See Kalven, *supra* note 101, at 1224-29; Ploscowe, *The Place of Law in Medico-Moral Problems: A Legal View*, 31 N.Y.U.L. REV. 1238, 1240-41 (1956): Comment, *History and Future of the Legal Battle Over Birth Control*, 49 CORNELL L.Q. 275 (1964).

103. See Ball, *The Court and Birth Control*, 82 COMMONWEAL 490 (1965). See also N.Y. Times, Aug. 26, 1965, p. 42, col. 1; *id.*, Aug. 29, 1965, p. E5, col. 1.

104. Statement prepared for presentation August 24, 1965, before the Subcommittee on Foreign Aid Expenditures of the Senate Committee on Government Operations (mimeo.).

105. S. 1676 (89th Cong., 1st Sess.).

did not oppose, but also to facilitate governmental efforts to disseminate birth control information at home and abroad.

It is somewhat ironic that the arguments against the bill were based on the new-found friend, the right of privacy. The argument went something like this: For better or for worse, this is the age of the welfare state. The welfare state and its companion, big government, raise problems for the individual, particularly as he seeks to preserve his identity from being submerged into the undifferentiated mass. Grounding of the *Griswold* decision on the right of privacy is said to illustrate again the Supreme Court's concern with individual liberty, already manifested in other areas. It is suggested that the *School Prayer Case*,[106] for example, manifested another facet of the same effort by the Court to protect against governmental intrusion into areas that should remain private. In forbidding state sponsorship of prayers in public schools, the Supreme Court is said to have "found coercion to be inherent in the child-state relationship, even though the project was broadly considered good for children and for society, and even though the child could be exempt by claiming his privilege of non-participation."[107]

We have been reminded of related dangers that lurk in social welfare programs. Professor Charles Reich has pointed out the dangers to privacy in the administration of welfare programs, and he cautions that some welfare regulations attempt "to impose a standard of moral behavior on beneficiaries."[108] Building upon all these concerns, Mr. Ball fears that the use of state power to disseminate birth control information may be regarded as coercive by the recipients. He suggests:

> The reach of the inquisitorial power of the state in the case-worker-client relationship, moreover, raises most serious questions precisely in the area of privacy now constitutionally zoned by the Supreme Court. Does it extend to such matters as frequency of sexual intercourse, ethical outlook, savings habits, drinking habits? What may be made a matter of record, and what guarantees of confidentiality are legally mandated? How far (apart from birth control) may the "planning" in family planning be carried?[109]

Even well-intentioned welfare workers, he fears, may tend to develop

106. Engel v. Vitale, 370 U.S. 421 (1962).

107. Statement, *supra* note 104, at 9.

108. Reich, *Individual Rights and Social Welfare—The Emerging Legal Issues*, 74 YALE L.J. 1245, 1247 (1965). See also Reich, *Midnight Welfare Searches and the Social Security Act*, 72 YALE L.J. 1347 (1963).

109. Ball, *supra* note 103, at 493.

a "highly managerial paternalism toward the poor,"[110] based upon "unspoken puritanical assumptions respecting 'undesirables.' "[111]

These suggestions seem alarming at first, but they may be only alarmist. It is doubtless true that there are possibilities for abuse, even serious abuse, in any governmental program. Even as members of disadvantaged groups are especially vulnerable to expressions of governmental hostility, they are also especially likely to misinterpret poorly administered attempts at governmental solicitude. But that is not to say that programs with humanitarian objectives should not be attempted because of the danger of overreaching. The risk involved should instead emphasize the need for careful surveillance of the administration of useful programs that are susceptible to abuse through excess of good will. Difficulties of administration should not be elevated to constitutional status.

Nowhere is the problem more acute than in the area of birth control information. If the dangers are substantial, the needs are equally so. It is perfectly clear that birth control information and anti-contraceptive devices are readily available to the well-to-do and middle classes of American society, where they are widely used. To deny similar information and equal availability to the poor and ill-informed seems likely to add yet another discrimination to those already suffered by the poor. Disadvantage because of poverty is already widespread, and must not be extended. To do so under a claim of privacy would make hollow the victory for individual liberty in *Griswold.*

110. *Ibid.*
111. *Ibid.*