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Griswold v. Connecticut: Towards a Constitutional Right of Privacy

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GRISWOLD v. CONNECTICUT: TOWARDS A CONSTITUTIONAL RIGHT OF PRIVACY

The right of married couples to employ contraceptive devices without state interference has been given constitutional recognition and protection in *Griswold v. Connecticut*,[1] where the United States Supreme Court through Mr. Justice Douglas held that the right to privacy surrounding the conjugal relationship may not be frustrated by state law. The purpose of this Note is to examine the evolution of the doctrine of a constitutional right of privacy and to weigh the charge made by the two dissenting Justices that the Court had resorted to judge-made remedies of "natural justice"[2] in order to declare an "uncommonly silly law"[3] unconstitutional.

On November 1, 1961, the Planned Parenthood Center was opened in New Haven, Connecticut, under the direction of Doctor C. Lee Buxton[4] and Mrs. Estelle T. Griswold.[5] The Center had as its purpose the providing of education, information and medical advice to married persons on various methods of contraception. During the ten days of operation the Center's personnel interviewed married women who came there on their own initiative, took their case histories, prescribed contraceptive devices, examined some patients and furnished them with contraceptive articles. On November 10, 1961, after Dr. Buxton and Mrs. Griswold had been arrested, the Center ceased operations. The co-appellants had been arrested for violating the birth control statutes of Connecticut.[6] They were tried without a jury, convicted and sentenced to pay fines of $100 each. Joint appeals, in which the constitutionality of the statutes was challenged, were taken to the Appellate Division which affirmed their convictions.[7] The Connecticut Supreme Court of Errors affirmed the judgment that the statutes were not in conflict with the United

1. 381 U.S. 479 (1965).
2. *Id.* at 511 (Justice Black, dissenting).
3. *Id.* at 527 (Justice Stewart, dissenting).
4. Dr. Buxton is Chairman of the Department of Obstetrics and Gynecology at Yale University Medical School and acted as Medical Director of the Center.
5. Mrs. Griswold is Executive Director of the Planned Parenthood League of Connecticut and was Acting Director of the Center in charge of administration and education.
6. CONN. GEN. STAT. ANN. tit. 53, § 53-32 (1960) provides:
> Use of Drugs or Instruments to Prevent Conception. Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be fined and imprisoned.

CONN. GEN. STAT. ANN. tit. 54, § 54-196 (1960) provides: "Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender."
7. 3 Conn., Cir. 6 (1963). The Appellate Division opinion can also be found in Brief for Appellee, Motion to Dismiss Appeal, pp. 13-20, Griswold v. Connecticut, 381 U.S. 479 (1965).

States Constitution.[8] The United States Supreme Court noted probable jurisdiction[9] and reversed holding that the Connecticut statutes were unconstitutional.[10]

In one form or another the Connecticut statute prohibiting the use of contraceptives[11] has been in effect since 1879.[12] Sixteen attempts, first initiated in 1917, to revise or repeal it have been made by the Connecticut Legislature, but all efforts have been blocked.[13]

The constitutionality of the Connecticut birth control statute was raised in *State v. Nelson*.[14] The highest court of Connecticut found that no exception could be read into the statutes in order to allow medical doctors to prescribe contraceptives for married women generally, and affirmed the convictions of two doctors and a nurse, who were involved in the operation of a birth control clinic. The *Nelson* court did not rule on the question of whether an implied exception might be read into the statute where a further pregnancy would endanger the life of the patient.[15] This question was raised two years later in *Tileson v. Ullman*,[16] where a divided court held that the statute contained no implied exceptions in favor of a medical prescription in a case where pregnancy might injure the health or take the life of the patient.[17] The *Tileson* decision was appealed to the United States Supreme Court, where the Court held that the appellant, a medical doctor, had no standing to raise the issue of the health of his patients in a suit for declaratory judgment.[18] In 1960 Connecticut's highest court refused to reach the merits of a declara-

8. State v. Griswold, 151 Conn. 544, 200 A.2d 479 (1964).

9. Griswold v. Connecticut, 379 U.S. 926 (1964).

10. Griswold v. Connecticut, 381 U.S. at 486.

11. Connecticut appears to be the only state which prohibited the *use* of contraceptive. See Note, 22 PITT. L. REV. 91, 94 (1960).

12. Being initially a part of the general obscenity statute, the present act was made a separate offense in 1885. The act has been revised five times without major change. For a thorough discussion of the history of the Connecticut birth control statute see Brief for Appellee, pp. 7-9, Griswold v. Connecticut, 381 U.S. 479 (1965); see also Note, *Connecticut's Birth Control Law: Reviewing a State Statute Under the Fourteenth Amendment*, 70 YALE L.J. 322 (1960).

13. See Brief for Appellee, pp. 32-34, Griswold v. Connecticut (1965). "Although similar legislation has passed the Connecticut House on several previous occasions, it has always lost out in the Senate. If the pattern is repeated this week, Connecticut will remain in the exclusive company of Massachusetts as the only states which still outlaw birth control." "68 Years," *The New Republic*, Vol. 16, p. 8 (May 19, 1947).

14. 126 Conn. 412, 11 A.2d 856 (1940).

15. *Id.* at 416, 11 A.2d at 859.

16. 129 Conn. 84, 26 A.2d 582 (1942). Justice Avery, in dissent, argued that:

> A reasonable construction of the statute . . . requires that it be so interpreted as to permit duly licensed physicians to prescribe to married women contraceptive devices and information necessary to prevent conception when in the judgment of the physician conception would imperil the life or health of the patient.

Id. at 96, 26 A.2d at 590. *Cf.* Jacobson v. Massachusetts, 197 U.S. 11 (1905).

17. Tileson v. Ullman, 129 Conn. at 90, 26 A.2d at 586.

18. 318 U.S. 44 (1943).

tory judgment action brought by a husband and wife on the basis that there was no uncertainty of law necessary for a declaratory judgment.[19] The following year the United States Supreme Court in *Poe v. Ullman*[20] dismissed a declaratory judgment suit brought by Dr. Buxton and four anonymous patients on the ground that there had been no convictions since *Nelson* and, therefore, there was no justiciable controversy and no pressing constitutional question.[21] The components of legislative inactivity, judicial self restraint and stare decisis combined to produce the elements necessary for the *Griswold* litigation.

Initially, the Court[22] held that no standing problem existed regarding the right of the appellants, convicted as accessories, to raise the constitutional rights of married persons who would have been principals under the statutes in question.[23]

The Court then noted that, due to certain "penumbras" and echos emanating from the Bill of Rights, "various guarantees create zones of privacy."[24] This was the point at which the two dissenting Justices seemed to disagree most strenuously,[25] and the point at which the concurring Justices departed in their opinions. In view of the heterogeneity of opinions expressed thereon, the question is raised whether there is a constitutional basis on which one can assert a protected right of privacy in face of state or federal legal processes to the contrary.

Although the right to privacy had its origins in tort law,[26] one starting point for a constitutional source of the right to privacy might be the fourth amendment[27] which, according to one authority, is "nearest to an explicit

19. Trubeck v. Ullman, 147 Conn. 633, 165 A.2d 158 (1960).

20. 367 U.S. 497 (1961).

21. Justice Douglas, in dissent, argued: "What are these people—doctors and patients—to do? Flout the law and go to prison? Violate the law surreptitiously and hope they will not get caught? By today's decision we leave them no other alternatives." *Id.* at 512.

22. Although Justice Douglas spoke for the Court, there were three concurring opinions by Justices White, Harlan and Goldberg. Chief Justice Warren and Justice Brennan joined in Justice Goldberg's concurring opnion. Justices Black and Stewart drafted separate dissents joining in each other's opinions. Thus it appears that of the nine members, Justice Clark was the only one who did not write an opinion, and therefore stood with Justice Douglas.

23. The Court cited as controlling Barrows v. Jackson, 346 U.S. 249; Pierce v. Society of Sisters, 268 U.S. 510 (1925); Truax v. Raich, 239 U.S. 33 (1915).

24. Griswold v. Connecticut, 381 U.S. at 484.

25. *Id.* at 508 (Justice Black); *id.* at 531 (Justice Stewart).

26. See Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890); see also Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905). See generally COOLEY, TORTS (2d ed. 1888); Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960).

27. U.S. CONST. amend. IV:

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

recognition" of privacy.[28] Justice Brandeis stated in his dissent to *Olmstead v. United States*[29] that "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."[30] The right of privacy was given express recognition in *Wolf v. Colorado*[31] where the Court stated that "the security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society."[32] This was so even though the Court refused to apply the fourth amendment to the states in the absence of arbitrary intrusion sanctioned by state law. This doubtful state of the law was clarified by the now famous decision in *Mapp v. Ohio*[33] where the Court spoke unhesitatingly about the right of privacy as being a recognized constitutional principle in connection with the fourth amendment, and as being applicable to all the states via the fourteenth amendment.[34] Therefore, it would seem that the *Griswold* Court was correct in relying in part on the fourth amendment as a source of privacy.

The Court also mentioned the self incrimination clause of the fifth amendment[35] as a residual source of privacy,[36] and Justices Goldberg, Harlan and White in their concurrences all mentioned the fourteenth amendment with particular reference to the word "liberty" or the phrase "ordered liberty,"[37] suggesting that a right to be let alone might be implicit in the concept of liberty from unreasonable police intrusion. The dissenting Justice Black took issue with this interpretation on two grounds: one, that by using the word "privacy" in lieu of "liberty" one could broaden constitutional guarantees to fit his conception of what should be protected; more specifically, however,

28. Beaney, *The Constitutional Right to Privacy in the Supreme Court*, 1962 SUP. CT. REV. 212.

29. 277 U.S. 438 (1928).

30. *Id.* at 478. See McDonald v. United States, 335 U.S. 451 (1948); Trupiano v. United States, 334 U.S. 699 (1948); Harris v. United States, 331 U.S. 145 (1947); Davis v. United States, 328 U.S. 582 (1945). See also State v. Jones, 358 Mo. 398, 214 S.W.2d 705 (1948); Bednarik v. Bednarik, 18 N.J. Misc. 633, 16 A.2d 80 (1940).

31. 338 U.S. 25 (1949) (Justice Frankfurter).

32. *Id.* at 27. See Stephanelli v. Minard, 342 U.S. 117 (1951).

33. 367 U.S. 643 (1960) (Justice Clark).

34. *Id.* at 655-57. See U.S. CONST. amend XIV, § 1, which provides in part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

35. U.S. CONST. amend. V provides in part that:

> No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

36. See, *e.g.*, United States v. Rumely, 345 U.S. 41, 58 (1953); *cf.* Public Utilities Comm'n v. Pollak, 343 U.S. 451, 467 (1952).

37. See Palko v. Connecticut, 202 U.S. 319, 325 (1937).

he felt that by using any "due process argument" the Court would revert to concepts of "natural justice" and invalidate any state law which the majority thought unwise regardless of the law's constitutionality.[38] What Justice Black probably had in mind were the "natural law" decisions rendered by earlier Courts in cases such as *Lockner v. New York*[39] and *Hammer v. Daggenhart*.[40] The criticism of these and similar cases may well be justified, but it must be remembered that nearly all of these decisions concerned economic legislation and property rights. Later Supreme Court decisions applied due process standards more strictly, as against the states or the Federal Government, when the personal rights of the individual were involved,[41] allowing broader standards of due process to apply when economic regulation was involved.[42] One authority in effect predicted that the charge leveled by Justice Black would be made, when he stated:

> It seems . . . to be more feasible to work out a right to privacy based on the "liberty" concept on the Fifth and Fourteenth Amendments. It might be said in opposition to this proposal that any process of reading new meaning into "liberty" is undesirable if it appears to call upon judges to read natural law concepts into the Constitution. . . . The charge is plausible. But what is sought here is a systematic development by the Court of a right that has always been thought to be part of the Constitutional heritage of every American —the right to be free from unjustified intrusion by the government —but one which has received less protection than seems desirable.[43]

Dean Pound has gone so far as to state that the fourteenth amendment in relation to privacy is "declaratory of a fundamental proposition of what may be justly called natural law."[44] Thus it would appear that the charge that the Court was resorting to concepts of natural law loses much of its sting when the subject matter is personal liberty and individual freedom.

Since the term "liberty" is the keystone of the fourteenth amendment approach to privacy, it would seem that the litigant claiming protection must show that the state's police power has interferred with his liberty in an unreasonable manner, since, as was stated in *N.A.A.C.P. v. Alabama*,[45] "a governmental purpose to control or prevent activities constitutionally subject

38. Griswold v. Connecticut, 381 U.S. at 511-18.
39. 198 U.S. 45 (1904).
40. 247 U.S. 251 (1917). See also Adkins v. Children's Hosp., 261 U.S. 525 (1921).
41. *E.g.*, Wieman v. Updegraff, 344 U.S. 183 (1952).
42. *E.g.*, West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).
43. Beaney, *supra* note 28, at 250.
44. Pound, *The Fourteenth Amendment and the Right of Privacy*, 13 W. RES. L. REV. 34, 54 (1961). See generally Griswold, *The Right to Be Let Alone*, 55 NW. U.L. REV. 217 (1960).
45. 377 U.S. 288 (1958).

to state power may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms."[46] Another example of such interference with liberty was *Meyer v. Nebraska*[47] where the Court declared unconstitutional a state statute prohibiting the teaching of a foreign language to pupils beneath the eighth grade level.[48] There are many other cases where the Court was convinced that the liberty of the individual had been unduely restricted by the state police power.[49] There have been other cases holding that when a law is too general in application, so as to affect the liberty of those who are committing no harm, such law is unconstitutionally vague.[50] These latter decisions were of particular importance to *Griswold* since the one substantial reason advanced for the preservation of the Connecticut birth control statute was that it acted as a deterrent on the crimes of adultery and fornication by making contraceptives unavailable and thereby imposing a higher fear of pregnancy on the participants.[51] Perhaps there could be no better illustration of the effects on innocent individuals that such a sweeping statute might have had if it had been allowed to stand. It would seem, therefore, to be a short step from the application of "liberty" as used in the fifth and fourteenth amendments to incorporate the concept of privacy as part of the due process clauses.

The Court noted two other sources of the doctrine of privacy, the first[52] and the ninth[53] amendments. The appellants claimed that their freedom of speech had been infringed because the accessory statute[54] made counseling the use of contraceptives a crime.[55] It was argued that if this interpretation were carried to extremes, the statutes involved would apply to faculty

46. *Id.* at 307.

47. 262 U.S. 390 (1923).

48. Justice McReynolds defined liberty:

> [It is] the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Id. at 399.

49. *E.g.*, Louisiana v. N.A.A.C.P., 366 U.S. 293 (1961); Shelton v. Tucker, 364 U.S. 479 (1960); Pierce v. Society of Sisters, 268 U.S. 510 (1925).

50. *E.g.*, Butler v. Michigan, 352 U.S. 380 (1958); Thornhill v. Alabama, 310 U.S. 88 (1940); Lanzetta v. New Jersey, 306 U.S. 451 (1939).

51. Brief for Appellee, p. 15, Griswold v. Connecticut, 381 U.S. 479 (1965). See also State v. Nelson, 126 Conn. 412, 11 A.2d 856 (1940).

52. U.S. CONST. amend. I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

53. U.S. CONST. amend IX: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

54. CONN. GEN. STAT. ANN. tit. 54, § 54-196 (1960).

55. Brief for Appellants, pp. 13, 90, 93; Griswold v. Connecticut, 381 U.S. 479 (1965).

members of a medical school or to organizations which printed pamphlets on birth control. The appellants claimed that it is not only what has or has not been done under a statute, but also what might be done that should guide a decision concerning its constitutionality.[56] The trial court, appellants claimed, by making findings of fact which contained both speech and acts in an indiscriminate mixture, abridged appellants' right of speech.[57] The Court apparently recognized the validity of this contention when it stated that "the State may not, consistently with the First Amendment, contract the spectrum of available knowledge."[58] And thereafter the Court found that, "the First Amendment has a penumbra where privacy is protected from governmental intrusion."[59] While Justice Stewart in dissenting could find no abridgment of speech involved, it is notable that Justice Black disagreed only with the application of the first amendment to the facts of the case. He did not feel that the defendant's convictions could be reversed on the basis of the first amendment, just because some speech accompanied their conduct, unless they had been convicted only for speaking out.[60]

Finally, the Court made a brief reference to the ninth amendment. Justice Goldberg, however, discussed this amendment at length claiming that it could be used by the Court as an interpretive tool since "the 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 are not exhaustive."[61] Among one of these rights retained by the people, claimed Justice Goldberg, is "the right of privacy in marriage," and having this right, the appellants, on behalf of married couples, may ask the Court to give it recognition and protection. Both Justices Black and Stewart claimed that the ninth amendment was not intended to give the Court additional powers since the intent of the drafters was to limit the powers of the federal government. It appears that the dissenting Justices shifted the emphasis of the argument advanced by Justice Goldberg, by claiming that rights advanced by the people for protection

56. Kunz v. New York, 340 U.S. 290 (1950); Yick Wo. v. Hopkins, 118 U.S. 536 (1886).

57. Brief for Appellants, p. 94, Griswold v. Connecticut, 381 U.S. 479 (1965). See also De Jonge v. Oregon, 299 U.S. 353 (1937).

58. Griswold v. Connecticut, 381 U.S. at 482. The *Griswold* Court relied primarily on Pierce v. Society of Sisters, 268 U.S. 510 (1925), and Meyer v. Nebraska, 262 U.S. 390 (1923).

59. Griswold v. Connecticut, 381 U.S. at 483. Cited as controlling by the Court was N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958).

60. Griswold v. Connecticut, 381 U.S. at 507-08.

61. *Id.* at 492. Very little has been written about the ninth amendment. See generally PATTERSON, THE FORGOTTEN NINTH AMENDMENT (1955); Redlich, *Are There "Certain Rights . . . Retained by the People"?*, 37 N.Y.U.L. REV. 787 (1962); Kelsey, *The Ninth Amendment of the Federal Constitution*, 11 IND. L.J. 309 (1936).

would broaden the powers of the Court. By contending that the Court's powers would thereby be enlarged, the dissenters avoided the fact that the Court acts as a remedial body and that one of its purposes is to protect and shelter rights retained by the people, regardless of whether the alleged infringement takes place under federal or state power. It would seem that since the people retain the rights, they alone would have the power, not the federal government.

CONCLUSION

It would appear that the Court and the concurring Justices advanced three broad arguments for a recognition of a right to marital privacy. The Court's opinion rested mainly on the Bill of Rights; Justices Harlan and White relied heavily on the word "liberty" in the due process clause of the fourteenth amendment; and Justice Goldberg submitted that the ninth amendment contained a residual right of marital privacy.[62] If the federal constitution can support a doctrine of marital privacy, then there appears to be little doubt that the Connecticut birth control statutes interferred with this right. By the decisions of the highest court of that state it was unlawful for a medical doctor to prescribe contraceptives for his married patients,[63] even in cases where future pregnancy might endanger the mother's life,[64] and it was certainly unlawful for a husband and wife to employ contraceptives in any case.[65] The question remaining in the minds of those who dissented and of interested observers of the Court is what effect the right of privacy will have upon future litigation. Is the right merely declaratory of the basic guarantees of the Bill of Rights or is it rather an expansion of these guarantees? The result reached by the *Griswold* Court was probably the only reasonable one in view of the facts involved; certainly the only alternative, to declare that Connecticut had properly exercised its police powers, would have been inconsonant with the recent record of the Court regarding individual liberty. The doctrine of marital privacy and of a general right to privacy may soon be asserted in other "penumbra" areas of constitutional litigation.

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62. One problem, alluded to by Justice Harlan in his concurrence, depends upon the source of a right to privacy. If it is found in the Bill of Rights generally, as the Court suggests, should it be incorporated into the Fourteenth Amendment and applied to the states?

63. State v. Nelson, 126 Conn. 412, 11 A.2d 856 (1940).

64. Tileson v. Ullman, 129 Conn. 84, 26 A.2d 582 (1942).

65. Tileson v. Ullman, 318 U.S. 44 (1943).