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On Privacy: Constitutional Protection for Personal Liberty

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NOTES

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I

INTRODUCTION

Throughout its short life, the constitutional right of privacy has been surrounded by controversy. Most recently, "privacy" provided the Supreme Court with a rationale for the holding in *Roe v. Wade*[1] that a woman has the right to choose to have an abortion. This decision prompted reactions ranging from cries of moral outrage[2] to expressions of delight[3] to accusations that the Court had usurped a legislative function.[4] The birth of the right of privacy, in *Griswold v. Connecticut*,[5] was no less provocative. In *Griswold*, the Court held that "privacy" protected a married couple's decision to use contraceptives. The constitutional origins of this right were hotly disputed; no more than three Justices could agree on any one theory about its parentage. Nonetheless, seven Justices did agree that a protectable interest had been asserted. Despite Justice Douglas' protestations, the Constitution does not explicitly guarantee a right to use contraceptives, a right to have an abortion, or a right of privacy. *Griswold* and *Roe* must be read as endorsing the view that individuals have an implicit constitutional right[6] to make certain decisions regarding the conduct of their personal lives even though the right is nowhere enumerated in the Constitution.

This idea is scarcely novel. Historically, unenumerated rights have been protected under the aegis of the fifth and fourteenth amendments'

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1 410 U.S. 113 (1973).

2 See, e.g., 119 Cong. Rec. S9973-10,001 (daily ed. May 31, 1973); Byrn, An American Tragedy: The Supreme Court on Abortion, 41 Fordham L. Rev. 807 (1973); N.Y. Times, Jan. 23, 1973, at 1, col. 2, 20, cols. 1-2; id. at 22, col. 1.

3 See, e.g., Heymann & Barzelay, *Roe v. Wade* and Its Critics, 53 B.U.L. Rev. 765 (1973); Note, In Defense of Liberty: A Look at the Abortion Decisions, 61 Geo. L.J. 1559 (1973); Lewis, Liberty, New and Old, N.Y. Times, Feb. 3, 1973, at 29, col. 1; N.Y. Times, Jan. 24, 1973, at 1, col. 2, 20, cols. 1-2; id. at 40, cols. 3-4.

4 See generally Ely, The Wages of Crying Wolf: A Comment on *Roe v. Wade*, 82 Yale L.J. 920 (1973); Note, *Roe v. Wade* and *Doe v. Bolton*: The Compelling State Interest Test in Substantive Due Process, 30 Wash. & Lee L. Rev. 628, 634-35, 642-43 (1973); Comment, 10 San Diego L. Rev. 844, 848-51 (1973).

5 381 U.S. 479 (1965).

6 The Supreme Court has recently acknowledged that "implicit" constitutional rights may be equal in dimension to "explicit" rights. See San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 30-34 (1973).

guarantee of "liberty." This use of the due process clauses is generally referred to as substantive due process. During the early years of this century, when the doctrine first achieved prominence, the Court used substantive due process freely and impoliticly to strike laws regulating economic relationships and practices.[7] When Justice Holmes condemned the Court's lack of restraint in his famous dissent in *Lochner v. New York*,[8] the golden days of substantive due process were numbered. By the early 1930's, a majority of the Court had adopted Holmes' views;[9] substantive due process and *Lochner* became epithets for unstructured judicial fiat.

For four decades, the Court repudiated the *Lochner* philosophy. Even the opinions in *Griswold*[10] and *Roe v. Wade*[11] begin by trying to exorcise its ghost. But the Court's decisions in *Meyer v. Nebraska*[12] and *Pierce v. Society of Sisters*,[13] made during the *Lochner* era and within the same doctrinal framework, escaped the brunt of the criticism. During the forty years' wanderings, the Court was quietly affording protection to certain unenumerated rights.[14] In retrospect, the Court has justified and adopted these decisions, while reiterating the repudiation of *Lochner*, by use of a double standard:[15] personal liberties are protected by the due process clause; "economic" rights are not.[16]

Griswold marks an important turning point in a renaissance of protection for unenumerated rights. The blatantly offensive nature of Connecticut's intrusion into the personal lives of its citizens prompted the Court to find a right of privacy that could not be infringed by government without substantial justification. But because of the *Lochner* debacle, there was no clear, acceptable doctrinal path to the result seven

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[7] E.g., Adkins v. Children's Hosp., 261 U.S. 525 (1923); Coppage v. Kansas, 236 U.S. 1 (1915); Adair v. United States, 208 U.S. 161 (1908); Lochner v. New York, 198 U.S. 45 (1905). Holding that the due process clause protected property and liberty of contract, the Court purported to measure such laws against a two-pronged standard: (1) is the state goal legitimate, *i.e.*, within the police power? and (2) is the statute rationally related to the achievement of the goal? See, e.g., Lochner v. New York, supra at 57-58. The major weakness of these cases lay less in the Court's use of the theory than in its total lack of judicial restraint, its failure to presume most statutes valid and its failure to apply the test honestly. See Ely, supra note 4, at 941-43; Engdahl, Requiem for Roth: Obscenity Doctrine is Changing, 68 Mich. L. Rev. 185, 224-26 (1969).

[8] 198 U.S. 45, 74-76 (1908).

[9] See Nebbia v. New York, 291 U.S. 502, 530-39 (1934).

[10] 381 U.S. at 481-82.

[11] 410 U.S. at 117.

[12] 262 U.S. 390 (1923) (the right to study a foreign language).

[13] 268 U.S. 510 (1925) (the right to educate a child in the school of the parents' choice).

[14] See, e.g., Aptheker v. Secretary of State, 378 U.S. 500 (1964) (the right to travel); Kent v. Dulles, 357 U.S. 116 (1958) (the right to travel); Schware v. Board of Bar Examiners, 353 U.S. 232 (1957) (the right to practice a profession).

[15] See Roe v. Wade, 410 U.S. 113, 152 (1973); Griswold v. Connecticut, 381 U.S. 479, 482 (1965).

[16] See note 190 infra. For recent criticism of this distinction, see Tribe, Foreword: Toward a Model of Roles in the Due Process of Life and Law, 87 Harv. L. Rev. 1, 9 (1973).

Justices ultimately reached. Justices Douglas and Goldberg devised two creative theories by which to justify the holding.[17] But Justice Stewart pierced through these solutions to point out that *Griswold* was nothing but a substantive due process decision in disguise.[18]

In *Roe v. Wade,* the Court admitted that substantive due process is no longer anathema, but a preferred ground of decision when a right of privacy is at stake.[19] If the Court is returning to a full-scale use of substantive due process, it faces the pitfalls of the *Lochner* era. The primary question to be asked here is whether there is any way to distinguish those personal interests that merit protection as aspects of privacy from interests that are of lesser significance. Nearly any human activity can press for recognition under the theories of *Griswold* and *Roe.* If the right of privacy is to be a viable doctrine, there must be limits to its application, but none of the opinions in *Griswold* was very helpful to courts trying to identify those limits. The purpose of this Note is to examine the struggles of lower courts trying to apply *Griswold* and to derive from their labors, and the pronouncements of the Court, a set of standards for deciding which unenumerated rights should be deemed constitutionally protectable rights of privacy.

The following section of this Note will be devoted to a detailed analysis of *Griswold* and subsequent Supreme Court decisions expanding the right of privacy, through *Roe v. Wade.* On the basis of this analysis, a doctrinal framework within which to view privacy claims will be suggested. We will then examine privacy claims in the lower courts, starting with the rights endorsed by *Griswold* and *Roe*—rights pertaining to family planning. Subsequent discussion will deal with rights extrapolated from a broader reading of *Griswold*: the right to engage in private sexual activities; rights pertaining to structuring one's family and home life; the right to engage in certain activities in the home, such as marijuana use; and broader rights of autonomy not confined to the home, such as the right to control the length of one's hair. The underlying concerns will be, first, to examine how decisions were made and, second, to determine what role the right of privacy has played, or might play, in the protection of personal liberties.

II

PRIVACY IN THE SUPREME COURT

A. Griswold v. Connecticut: *The Fountainhead of Privacy*

For close to eight years, *Griswold v. Connecticut*[20] contained the Supreme Court's only explication of the right of privacy. Lower courts

[17] See text accompanying notes 26-65 infra.

[18] Griswold v. Connecticut, 381 U.S. 479, 527-31 (1965) (dissenting opinion); see Roe v. Wade, 410 U.S. 113, 167-68 (1973) (Stewart, J., concurring).

[19] By analogy, other unenumerated rights not yet considered could also be lodged in the due process clause. For example, the Court could find a right to choice of employment, which would not be a right of privacy. Consideration of potential constitutional rights other than privacy rights is beyond the scope of this Note.

[20] 381 U.S. 479 (1965).

confronted with privacy arguments scrutinized the case and selected ideas, sentences, even single words from the majority and concurring opinions in an attempt to answer the myriad questions *Griswold* left open. Because the opinion of the Court and the three separate concurrences are complex and often contradictory, *Griswold* does not afford any clear or simple answers. Focusing on one thought in one opinion or trying to explain *Griswold* in a sentence is almost necessarily manipulative or misleading. The only way to determine what *Griswold* actually said and did is to examine all four opinions in some detail.

The relevant facts of the case are easily recited. The Connecticut law being challenged[21] prohibited the use and, through the state's general accessory statute,[22] aiding and abetting the use of any contraceptive device. Appellant Griswold, director of the Planned Parenthood League of Connecticut, had been convicted as an accessory for giving information and medical advice about contraceptives to a married couple. Griswold alleged that the statute violated the constitutional right of the married couple to use contraceptives.

One significant aspect of *Griswold* is that the Court decided to hurdle procedural barriers and to consider the substantive constitutional issues.[23] The same statute had been attacked in *Tileston v. Ullman*[24] and in *Poe v. Ullman*,[25] but the doctrines of standing and ripeness had proved fatal to those challenges.

The truly remarkable feature of *Griswold*, however, is that seven Justices, with neither precedent nor textual support from the Constitution to guide them, agreed that the Connecticut statute was unconstitutional. In order to reach that conclusion, each opinion had to answer three questions: (1) what constitutional provision is the source of protection for an unenumerated right? (2) why is the specific right of a married couple to use contraceptives a constitutionally protected right? and (3) why does the Connecticut statute abridge that right—is the right absolute, is the state's interest insufficient, or is the statute merely overbroad?

1. *The Opinion of the Court: Mr. Justice Douglas and "Limited Natural Law"*

Under Justice Douglas' exposition, certain unenumerated rights, including a right of privacy, are found in the "penumbra" formed by emanations of specific constitutional guarantees.[26] Douglas began his

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21 Conn. Gen. Stat. Rev. § 53-32 (1958).

22 Id. § 54-196.

23 381 U.S. at 481 (concluding that Griswold had standing to raise the constitutionality of the statute).

24 318 U.S. 44 (1943).

25 367 U.S. 497 (1961). For criticism of the Court's retreat from decision in *Poe*, see Redlich, Are There "Certain Rights ... Retained by the People"?, 37 N.Y.U.L. Rev. 787 (1962); Comment, 62 Colum. L. Rev. 106 (1962).

26 381 U.S. at 484. The concept of a constitutional penumbra did not originate with Douglas. Justice Holmes spoke of a fourth and fifth amendment penumbra in his dissent in Olmstead v. United States, 277 U.S. 438, 469 (1928). Douglas' use

analysis of the purported right by citing a number of cases where the Court had recognized and upheld rights not specifically mentioned in the Constitution,[27] including the family rights vindicated in *Meyer v. Nebraska*[28] and *Pierce v. Society of Sisters*.[29] The concept of freedom of association and other outgrowths of the first amendment were used to show that the Court had in the past extrapolated from specific rights in order to protect activities thought to be corollaries of those rights.[30] From the fact that the first amendment has a penumbra of protected activity, Douglas concluded that specific guarantees in the Bill of Rights can all have penumbras, "formed by emanations from those guarantees that help give them life and substance."[31] The first, third, fourth and fifth amendments all evince a concern with protecting interests which may be generally subsumed under the heading of "privacy"—or a right to be let alone. This pervasive constitutional concern, together with the ninth amendment's provision that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people,"[32] led Douglas to postulate that there is a general constitutional zone of privacy existing outside of and peripheral to the specified guarantees.[33]

Having thus grounded privacy in the Constitution, Douglas simply concluded that "[t]he present case... concerns a relationship *lying*

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of the penumbra concept in *Griswold* was foreshadowed by his dissent in Poe v. Ullman, 367 U.S. 497, 521-22 (1961): "This notion of privacy is not drawn from the blue. It emanates from the totality of the constitutional scheme under which we live."

27 381 U.S. at 482-83.

28 262 U.S. 390 (1923) (the right of a child to study a foreign language).

29 268 U.S. 510 (1925) (the right to educate a child in a school of the parents' choice).

30 381 U.S. at 482-83: "Without those peripheral rights the specific rights would be less secure. And so we reaffirm the principle of the Pierce and the Meyer cases." See also Poe v. Ullman, 367 U.S. 497, 518 (1961) (Douglas, J., dissenting).

31 381 U.S. at 484.

32 U.S. Const. amend. IX. "[Douglas] also threw in for good measure the ninth amendment, although its relevancy to his argument in showing a zone of privacy is not apparent." Kauper, Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The *Griswold* Case, 64 Mich. L. Rev. 235, 243 (1965). Professor Kauper's comment was apt at the time it was written. Douglas' use of the ninth amendment has since been elucidated. The ninth amendment is a "rule of construction, applicable to the entire constitution." Osborn v. United States, 385 U.S. 323, 352-53 n.15 (1966) (Douglas, J., dissenting), quoting Note, The Uncertain Renaissance of the Ninth Amendment, 33 U. Chi. L. Rev. 814, 835 (1966).

Professor Emerson suggested that Douglas' use of the ninth amendment carries a greater potential than Goldberg's and might be used to expand the concept of privacy or to guarantee other basic rights. Emerson, Nine Justices in Search of a Doctrine, 64 Mich. L. Rev. 219, 228 (1965). For a fulfillment of Emerson's prophecy, see Palmer v. Thompson, 403 U.S. 217, 233-37 (1971) (Douglas, J., dissenting) (suggesting that the ninth amendment's reserved rights include the right to be free from discrimination based on race, creed or color).

33 381 U.S. at 484-85.

within the zone of privacy."[34] While this conclusion was abrupt and unexplained, Douglas went on to mention several factors which might be viewed as rationales for placing a married couple's use of contraceptives within that zone. First, he commented that marriage is an old, intimate and noble institution,[35] apparently assuming that there are natural notions of privacy, or intimacy, surrounding the marital relationship. Second, Douglas stated that it would be "repulsive" to "allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives."[36] This idea suggests that the decision might lie in the periphery of the fourth amendment's proscription of unreasonable searches and seizures—that the most offensive aspect of the Connecticut statute was the mode of enforcement it necessitated. Third, Douglas defined marriage as an "association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions."[37] Taking this statement together with Douglas' explication of the first amendment peripheral right of association, and his statement that "we have protected forms of 'association' that are not political in the customary sense but pertain to the social, legal, and economic benefit of the members,"[38] one might infer that the marriage relationship, as an association, is located near the first amendment periphery.[39]

In his dissenting opinion in *Poe v. Ullman*,[40] Douglas had articulated a more general theory for deciding what rights are protected by the due process clause of the fourteenth amendment. Although the Bill of Rights is the "primary source of expressed information as to what is meant by constitutional liberty,"[41] it is not a complete expression of rights "implicit in a free society."[42] Douglas thought allowing the state leeway to intrude upon certain intimacies to be simply irreconcilable

[34] Id. at 485 (emphasis added).

[35] Id. at 486.

[36] Id. at 485. Douglas referred to a number of fourth amendment search and seizure cases in building the right to privacy. Id. at 484-85.

[37] Id. at 486.

[38] Id. at 483.

[39] While Douglas' seemingly random comments are not very helpful in analyzing his opinion, they have assumed importance in another context. A number of courts have thought that the protection of the right involved in *Griswold* turned on one or another of these factors. See, e.g., Lewis v. Stark, 312 F. Supp. 197, 206 (N.D. Cal. 1968) (three-judge court), rev'd sub nom. Lewis v. Martin, 397 U.S. 552 (1970) (distinguishing *Griswold* on the ground that the state's practices in enforcing California's "man-in-the-house rule" would not be as "repulsive" as the enforcement techniques Douglas mentioned in *Griswold*); People v. Frazier, 256 Cal. App. 2d 630, 631, 64 Cal. Rptr. 447 (1967) (distinguishing *Griswold* on the ground that sodomy, unlike marriage, is not for a noble purpose). Professor Kauper thought that *Griswold* might be limited to an idea of the "association" of marital partners, or the privacy of the home. Kauper, supra note 32, at 244.

[40] 367 U.S. 497, 509 (1961).

[41] Id. at 516.

[42] Id. at 521.

with a free, constitutional society and "congenial only to a totalitarian regime."[43] Despite a nod to the Bill of Rights which grew into a full constitutional theory in *Griswold,* Douglas seemed to be propounding fairly subjective criteria for decision: a right is protected if it is implicit in a free society and if state incursion upon it would be totalitarian.[44]

Douglas apparently thought that his creative penumbra theory immunized his *Griswold* opinion from accusations of returning to the *Lochner* philosophy.[45] His primary focus in *Griswold* had a more objective referent than did his opinion in *Poe*: would protecting certain phases of human activity help to preserve and give substance to the rights enumerated in the Bill of Rights? If this inquiry is viewed as determinative, the penumbra theory would be more limited than Harlan's due process formulation, or Douglas' opinion in *Poe.* Rather than affording protection to unspecified rights, the penumbra approach would only extend the protection given to specific guarantees.

Yet even if Douglas' explanation of how unenumerated rights gain constitutional protection is viewed as more limited and structured than "natural justice" formulations, his determination that the specific right involved in *Griswold* could claim constitutional protection cannot be distinguished from "natural law" analysis.[46] Unlike the zone of privacy itself, the right of married couples to use contraceptives is not shown to have any solid basis in the Bill of Rights. Notions of the venerability of the marriage institution or the sanctity of the marital bedroom can only be derived from "natural law" thinking: the marital bedroom is protected if a certain number of Justices think marriage is special. Thus Douglas' opinion might best be described as an exercise in limited natural law.

In addition to leaving lower courts on their own to determine when a specific activity falls within the zone of privacy, Douglas' opinion was ambiguous about the nature of the test to be applied in order to determine whether a state's intrusion into a protected area is constitutional. It is clear that the right to use contraceptives is not absolute—Douglas included it in the category of " 'activities constitutionally subject to state regulation.' "[47] Without any preliminaries of balancing or considering the state's justifications for the statute, Douglas resorted to

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[43] Id. at 522.

[44] These standards are typical of the Harlan approach to substantive due process. See text accompanying notes 73-79 infra.

[45] 381 U.S. at 482; see Doe v. Bolton, 410 U.S. 179, 212 n.4 (1973) (Douglas, J., concurring). In fact, Douglas now abhors substantive due process, in theory if not in result. Boddie v. Connecticut, 401 U.S. 371, 383-86 (1971) (Douglas, J., concurring). But see Roe v. Wade, 410 U.S. 113, 167-71 (1973), where Justice Stewart insisted that *Griswold* could only be rationally understood as a substantive due process decision.

[46] Indeed, Justice Black complained in dissent that the majority opinion was "natural justice" in disguise. 381 U.S. at 511-12; see Beaney, The Griswold Case and The Expanding Right to Privacy, 1966 Wis. L. Rev. 979, 982 (referring to Douglas' opinion as an exercise in "modified natural law").

[47] 381 U.S. at 485, quoting NAACP v. Alabama, 377 U.S. 288, 307 (1964).

the doctrine of overbreadth and concluded that regulating the *use* of contraceptives " 'sweep[s] unnecessarily broadly and thereby invade[s] the area of protected freedoms.' "[48] Thus, *Griswold* effectively guaranteed the freedom to use contraceptives for the unmarried residents of Connecticut as well as for the married couple Douglas' opinion exalted.

2. Mr. Justice Goldberg: The Discovery of the Ninth Amendment

Justices Goldberg, Warren and Brennan concurred in the opinion of the Court, but felt it necessary to write a separate opinion emphasizing the role of the ninth amendment in the decision.[49] Goldberg did not believe that the due process clause incorporates the Bill of Rights in toto. Rather, he felt that it protects "those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights."[50] Goldberg explained that the long-dormant ninth amendment is not a source of new rights, but "simply lends strong support to the view that the 'liberty' protected by the Fifth and Fourteenth Amendments from infringement by the Federal Government or the States is not restricted to rights specifically mentioned in the first eight amendments."[51] Thus, under Goldberg's view, finding the right in question to be lodged in a penumbra of the Bill of Rights would be neither conclusive (if the right is not "fundamental"), nor strictly necessary. The ninth amendment was used to repudiate Justice Black's notion that only rights specifically mentioned in the Bill of Rights may be protected against state intrusion.

It has been argued that the ninth amendment presents a more limited and ascertainable standard for decisionmaking than the fundamental rights due process approach, because the language and history of the amendment indicate that the rights reserved to the people must be "of a nature comparable to the rights enumerated."[52] Whether or not Goldberg's approach, relying on the ninth amendment and the fundamental rights due process theory, may be distinguished from the usual approach to fundamental rights due process is open to question. After explaining the relevance of the ninth amendment to the decision at hand, Goldberg went on to discuss the standards to be used in trying to determine whether an unspecified right is "fundamental." He quoted approvingly the statement from *Snyder v. Massachusetts*,[53] a classic exposition of fundamental rights due process: a judge 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.' "[54] In another formulation, "[t]he inquiry is whether a right involved 'is of such a character that it cannot be denied without violat-

48 381 U.S. at 485, quoting NAACP v. Alabama, 377 U.S. 288, 307 (1964).
49 381 U.S. at 486-99.
50 Id. at 486.
51 Id. at 493.
52 Redlich, supra note 25, at 810.
53 291 U.S. 97, 105 (1934).
54 381 U.S. at 493.

ing those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions"....' "[55] Fundamental rights also emanate from the " 'totality of the constitutional scheme under which we live.' "[56] Goldberg quoted the famous Brandeis dissent in *Olmstead v. United States*,[57] which spoke in broad terms of the "right to be let alone," as "comprehensively summariz[ing] the principles underlying the Constitution's guarantees."[58] One commentator thought that, by citing traditional fundamental rights due process tests, Goldberg "failed to differentiate between the ninth amendment 'retained' rights and the flexible due process concept.... 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.' "[59]

Yet Goldberg's opinion must be read in conjunction with the opinion of the Court, in which he concurred. He expressly endorsed Douglas' statement that liberty "also 'gains content from the emanations of... specific [constitutional] guarantees' and 'from experience with the requirements of a free society.' "[60] Goldberg's due process test may be interpreted as laying a new emphasis on the specific guarantees of the Bill of Rights and their underlying philosophy as a source for judicial decisions under the due process clause, and endorsing a narrower definition of liberty.

In deciding that the specific right of a married couple to use contraceptives is constitutionally protected, Goldberg drew upon sources demonstrating that "the rights to marital privacy and to marry and raise a family are *of similar order and magnitude* as the fundamental rights specifically protected."[61] Goldberg stressed the tradition protecting the marital relationship and the nature of that relationship, perhaps to show that these are things rooted in our collective conscience, but he also drew upon the specific provisions of the Bill of Rights in arriving at his decision. In fact, Goldberg's use of the Bill of Rights as a yardstick to determine whether the specific right is covered by the zone of privacy bears less resemblance to flexible due process than Douglas' treatment of that question.

According to Goldberg, the appropriate test where a state statute abridges a fundamental personal right is whether the state can show that the law is necessary to effectuate a compelling state interest.[62] Goldberg found the state's rationale, that the law helped prevent in-

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[55] Id. at 493, quoting Powell v. Alabama, 287 U.S. 45, 67 (1932).

[56] 381 U.S. at 493, quoting Poe v. Ullman, 367 U.S. 497, 521 (1961) (Douglas, J., dissenting).

[57] 277 U.S. 438, 478 (1928).

[58] 381 U.S. at 494.

[59] McKay, Emanations and Intimations, 64 Mich. L. Rev. 259, 270 (1965).

[60] 381 U.S. at 493, quoting Poe v. Ullman, 367 U.S. 497, 517 (1961) (Douglas, J., dissenting).

[61] 381 U.S. at 495 (emphasis added).

[62] Id. at 497.

dulgence in extramarital relations, "dubious, particularly in light of the admitted widespread availability to all persons in the State of Connecticut, unmarried as well as married, of birth control devices for the prevention of disease."[63] "But, in any event," he concluded, "the state interest in safeguarding marital fidelity can be served by a more discriminately tailored statute, which does not, like the present one, sweep unnecessarily broadly, reaching far beyond the evil sought to be dealt with."[64] Thus, Goldberg did not decide that the law was not necessary to promote a compelling state interest. Like Justice Douglas, he fell back on the concept of overbreadth to invalidate the statute.

In closing, Goldberg added a caveat that the Court's holding "in no way interferes with a State's proper regulation of sexual promiscuity or misconduct."[65] The significant impact this comment had will be explored later.[66]

3. *Mr. Justice Harlan: The Rational Continuum of Liberty*

Justice Harlan's concurring opinion,[67] unlike those of Justices Douglas and Goldberg, presented no surprises. Harlan had appraised the Connecticut statute at length four years earlier in *Poe v. Ullman*;[68] in *Griswold* he did little more than incorporate his earlier views by reference.[69] Using a theory of substantive due process tempered by judicial restraint,[70] Harlan lodged the right of privacy firmly within the confines of the "liberty" guaranteed by the fourteenth amendment.

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[63] Id. at 498.

[64] Id.

[65] Id. at 498-99; see text accompanying notes 303-419 infra.

[66] See text accompanying notes 313-19 infra.

[67] 381 U.S. at 499-502.

[68] 367 U.S. 497, 539-55 (1961) (dissenting opinion).

[69] 381 U.S. at 500. Hereinafter, Harlan's opinion in *Poe* will be treated as the expression of his opinion in *Griswold*.

[70] The school of thought to which Harlan belonged traces its origins to Palko v. Connecticut, 302 U.S. 319, 325-26 (1937), where Justice Cardozo stated that the fourteenth amendment affords protection to personal rights "implicit in the concept of ordered liberty" so that fundamental fairness will be assured. This approach gives substance to the due process clause not by focusing on potential "economic" rights, but by examining "personal" freedoms. See text accompanying notes 14-16 supra. Yet, it is indistinguishable in theory from the line of cases typified by Lochner v. New York, 198 U.S. 45 (1905), absent a clear, theoretical basis for distinguishing personal and economic interests.

In applying his version of substantive due process, Harlan avoided the abuses to which the doctrine is potentially subject by exercising judicial restraint and upholding state action in the vast majority of cases, even when it abridged rights that would have been secured to a defendant in a federal action. See, e.g., Duncan v. Louisiana, 391 U.S. 145, 171-93 (1968) (dissenting opinion); Malloy v. Hogan, 378 U.S. 1, 14-33 (1964) (dissenting opinion). When he did find that federal rights should be protected against state action, it was because of their "fundamentality," not their inclusion in the Bill of Rights. See, e.g., Pointer v. Texas, 380 U.S. 400, 408-09 (1965) (concurring opinion); Gideon v. Wainwright, 372 U.S. 355, 349-52 (1963) (concurring opinion).

In the words of one commentator, "[r]eview of state action on the basis of

Harlan rejected the Court's opinion in *Griswold* because it seemed to him to make the same assumption made by Justices Black and Stewart in dissent: if a right is not mentioned or implicit in the first eight amendments, it is not protected against state incursion by the fourteenth amendment due process clause.[71] Harlan believed that this theory —that the entire Bill of Rights and only the Bill of Rights is "incorporated" into the due process clause[72]—rests on an inflexible reading of the Constitution.[73] To Harlan, fourteenth amendment "liberty" is "not a series of isolated points pricked out" in the form of specific Bill of Rights guarantees, but rather "a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints."[74] Identifying the rights comprising the continuum is no easy task. They are "fundamental"[75] and "implicit in the concept of ordered liberty;"[76] they emerge from the history, traditions and basic values of American society;[77] they are reflected in the concerns that moved the Framers to embody some of them in the Bill of Rights.[78] But further definition is impossible.[79]

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fundamental fairness is simply a prevention-of-atrocities doctrine." Laughlin, A Requiem for Requiems: The Supreme Court at the Bar of Reality, 68 Mich. L. Rev. 1389, 1397-98 (1970). Although this is an overstatement, it may help to explain *Griswold-Poe*—one of the few instances in which Harlan was willing to curb state action. See Dorsen, The Second Mr. Justice Harlan: A Constitutional Conservative, 44 N.Y.U.L. Rev. 249, 267-69 (1969).

[71] 381 U.S. at 499. Justice Black rejected the Court's decision because he could find no mention in the Bill of Rights of the form of privacy at issue and was unwilling to inflate the amendments to penumbral dimensions. Id. at 508-10. His opinion summarizes his previously advanced criticisms of Harlan's flexible due process approach. Id. at 510-27; see Adamson v. California, 332 U.S. 46, 68-92 (1947) (Black, J., dissenting).

Justice Stewart shared Black's views generally, but seemed particularly concerned that *Griswold* represented an exhumation of substantive due process, which, in his view, had been formally buried only two years earlier in Ferguson v. Skrupa, 372 U.S. 726 (1963). See 381 U.S. at 527-28. This thought also disturbed Black. Id. at 523-24.

[72] This "incorporation" doctrine can be seen as yet another attempt to give substance to the fourteenth amendment due process clause, without lapsing into judicial legislation. Advocates hold that incorporation keeps the judges from "roam[ing] at large" by confining them within the bounds of the Bill of Rights. Adamson v. California, 332 U.S. 46, 90 (1947) (Black, J., dissenting); see Duncan v. Louisiana, 391 U.S. 145, 168-71 (1968) (Black, J., concurring).

[73] See 381 U.S. at 500; Poe v. Ullman, 367 U.S. 497, 540-41 (1961) (dissenting opinion). Harlan also rejected the theory that the fourteenth amendment ensured procedural due process alone. *Poe*, supra at 540-41.

[74] Poe v. Ullman, 367 U.S. 497, 543 (1961) (dissenting opinion).

[75] Id. at 541.

[76] 381 U.S. at 500, quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937); see note 69 supra.

[77] 381 U.S. at 501; Poe v. Ullman, 367 U.S. 497, 542-43 (1961) (dissenting opinion).

[78] See 381 U.S. at 500; Poe v. Ullman, 367 U.S. 497, 544 (1961) (dissenting opinion). This point is implicit in Harlan's use of the third and fourth amendments to argue for finding a right of privacy in fourteenth amendment liberty. See *Poe*, supra at 549-51; note 82 infra.

[79] Harlan countered accusations that his standards led to subjective review

Reasoning from the "common understanding [of] the English-speaking world,"[80] from the traditional protections given to marriage in American society,[81] and from the concerns reflected in the third and fourth amendments,[82] Harlan found that "the privacy of the home" was one aspect of fourteenth amendment liberty. He did not describe this privacy precisely, but presented its outlines. Harlan was not concerned with physical invasion and saw no visions of state troopers in the marital bedroom.[83] Rather, he focused on the right of a couple to control information about their intimacy[84] and, more importantly, on their " 'right to be let alone' " in directing and conducting their family life.[85] The "private use of their marital intimacy" should not subject them to the state's rude intrusion, with the intimidating baggage of the criminal law, into their home life.[86] Thus, Harlan's "privacy of the home" combined the idea of a place where activities beyond the state's purview commonly occur with the notion that an individual could decide the form and extent of those activities.

Yet each of these concepts was weakened by the limitations Harlan placed on the right of privacy. Perceiving that this constitutional right could be used to strike at fornication, adultery and sodomy laws,[87]

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and lack of judicial restraint by claiming that the first eight amendments were just as susceptible to varied interpretations as the due process clause. See 381 U.S. at 501. Critics have pointed out that this is not necessarily the case, since the Bill of Rights at least provides a specific referent for reasoning. See, e.g., Cushman, Incorporation: Due Process and the Bill of Rights, 51 Cornell L.Q. 467, 499 (1966). See also Duncan v. Louisiana, 391 U.S. 145, 171 (1968) (Black, J., concurring).

[80] Poe v. Ullman, 367 U.S. 497, 548 (1961) (dissenting opinion).

[81] Id. at 546, 551-53.

[82] Id. at 549-51. Harlan argued that although the third and fourth amendments limited the "methods" of state intrusion, the underlying concern of the Framers was to protect the privacy of home life. At the time the Bill of Rights was drafted, experience suggested that the quartering of soldiers in homes and the general warrant constituted the most severe threats to such privacy. The specific constitutional provisions that guarded our ancestors are not directly applicable to consideration of the contraception statute except as they indicate this underlying concern. Id.

[83] See id. at 549.

[84] Id. at 548. Only Harlan expressed concern with the individual's ability to control personal information, which one commentator has viewed as the central interest protected by any legally recognized right of privacy. See Gross, The Concept of Privacy, 42 N.Y.U.L. Rev. 34, 35-38 (1967). Control over personal information is the primary interest protected by tort privacy law. Id. at 46-54; see text accompanying notes 650-60 infra. Rights to seclusion and autonomy, on which the *Griswold* Court focused, may enable an individual to protect this narrowly conceived right of privacy more easily. See id. at 39. Yet, the "right to be let alone" and the right to make personal decisions certainly have value independent of their function as preconditions for the effective control of information.

[85] Poe v. Ullman, 367 U.S. 497, 550-51 (1961) (dissenting opinion), quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

[86] Poe v. Ullman, 367 U.S. 497, 548 (1961) (dissenting opinion).

[87] Harlan made no effort to differentiate among these "crimes" according to the intensity of the personal interest or the harm done to other members of society. Indeed, he rejected the idea that "consensual behavior having little or no direct impact on others" was in any way beyond state regulation by virtue of that fact alone. Id. at 546.

Harlan asserted that the privacy of the home presented no barrier to state intrusion when those dwelling within were homosexuals or unmarried heterosexuals. Although such persons have a right of privacy,[88] it is negated in this context by the state interest in limiting sexual conduct to married couples. Harlan did not explain why the liberty of the unmarried is so much less substantial than that of the married that the state can forbid all sexual activity to the former but cannot interfere with the latter. He did not speak of the imposition on, for example, two homosexuals forced to reveal the details of their intimacy in a public forum, although he was outraged and eloquent when describing a married couple in the same situation.[89] Instead, he argued that tradition and law specified marriage as the approved locus for sexual activity. Having "fostered and protected" an institution in which sexual intimacy was "essential and accepted," the state could not "regulate... the details of that intimacy."[90] His argument amounts to an assertion of estoppel: since the state has promoted sex within marriage, it cannot regulate it; since it has never promoted fornication and sodomy, it may continue to forbid them.

Nevertheless, Harlan seemed willing to circumscribe a couple's right to use contraceptives. Although a statute prohibiting use is "unjustifiable," a statute discouraging use indirectly might well be legitimate.[91] He did not discuss whether the state could regulate distribution of contraceptives so as to prohibit them in effect.[92] Thus, the right of privacy recognized by Harlan contains notions of the home as a center of personal life and of the ability to make decisions within that context, but is not exempted in either aspect from some forms of state intrusion.

Since a "basic liberty" was involved in *Poe* and *Griswold*, Harlan was unwilling to presume the Connecticut statute constitutional and he subjected it to "closer scrutiny," using what is in essence an overbreadth test to measure its legitimacy.[93] He found that the state's ultimate goal —to protect morality—was within the police power and that its immediate goal—to discourage contraception—was at least arguably valid.[94] But the means the state had chosen were "obnoxiously intrusive;" the statute was unconstitutional.[95]

Harlan's substantive due process theory, to which he clung tena-

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88 See id. at 552.

89 Id. at 548, 553.

90 Id. at 553.

91 Id. at 539, 546-48.

92 Harlan did compare the Connecticut statute to other statutes that forbade or regulated distribution of contraceptives. Although his implication was that such statutes were preferable, he did not discuss how they might be limited by the privacy of the home. Id. at 554-55. For a discussion of subsequent litigation in this area, see text accompanying notes 162-84, 221-26 infra.

93 Poe v. Ullman, 367 U.S. 497, 545, 547, 548, 554 (1961) (dissenting opinion); see 381 U.S. at 500.

94 Poe v. Ullman, 367 U.S. 497, 545-47 (1961) (dissenting opinion).

95 Id. at 554-55.

ciously during the turbulent days of piecemeal incorporation[96] and experimentation with equal protection[97] in the 1960's, has assumed greater importance since his retirement and death. Although the Supreme Court has not abandoned the theory of incorporation,[98] it has indicated that protection will be given to certain fundamental, unenumerated rights.[99] Since incorporation as expounded so far provides no theoretical basis for extending protection beyond the Bill of Rights, the Court may have to turn to other theories if it decides to protect other unenumerated rights. The Court has recently stated that the source of the right of privacy—and presumably of other unenumerated rights—is "the Fourteenth Amendment's concept of personal liberty and restrictions upon state action."[100] If so, Harlan's approach may well supply the framework for some of the Court's future decisions.

4. Mr. Justice White: A Narrower Focus

Justice White agreed with Justice Harlan that the traditional approach to invalidation of a statute through the due process clause was preferable to the novel routes chosen by their colleagues. But White's opinion[101] differed from Harlan's—and indeed from Douglas' and Goldberg's—in one important respect. Alone among the Justices in the majority, White seemed reluctant to term the right infringed by the statute a "right of privacy." Instead, he viewed the freedom to use contraceptives as a narrow, specific liberty, protected in itself rather than because it could be viewed as an aspect of privacy.[102]

The opinion wasted few words on doctrinal theory. Claiming that it would be "unduly repetitious, and belaboring the obvious," to describe the perimeters of the liberty secured by the fourteenth amend-

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[96] See, e.g., Williams v. Florida, 399 U.S. 78, 118, 129-33 (1970) (concurring opinion); Duncan v. Louisiana, 391 U.S. 145, 171-83 (1968) (dissenting opinion); Gideon v. Wainwright, 372 U.S. 335, 352 (1963) (concurring opinion).

[97] See, e.g., Shapiro v. Thompson, 394 U.S. 618, 661-63, 669-77 (1969) (dissenting opinion); Douglas v. California, 372 U.S. 353, 360-67 (1963) (dissenting opinion).

[98] It has, however, adopted a different approach in applying the theory. While the Warren Court applied broadly viewed federal guarantees against the states, the Burger Court has "diluted" federal standards by finding that lesser state requirements satisfy constitutional demands. The common components of certain enumerated rights have been found not constitutionally compelled, but simply a matter of federal judicial practice. Thus, although the sixth amendment right to a jury trial in criminal cases applies equally to the state and federal governments, the only constitutional requirement is the presence of a jury. The practice in federal courts of having 12 persons and unanimous verdicts is not constitutionally necessary. See Johnson v. Louisiana, 406 U.S. 356, 360 (1972); Williams v. Florida, 399 U.S. 78, 86 (1970).

[99] See, e.g., Roe v. Wade, 410 U.S. 113, 152-53 (1973). See also San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 32, 33-36 (1973) (reaffirmation of right to interstate travel; discussion of "implicit" rights).

[100] Roe v. Wade, 410 U.S. 113, 153 (1973).

[101] 381 U.S. at 502-07.

[102] The one time White employed the term "privacy," he appeared to be criticizing the cursory treatment of the test used in other opinions. Id. at 503.

ment, White simply stated that the statute "deprives [married couples] of 'liberty' without due process of law."[103] He buttressed this contention by citing other cases in which unenumerated rights had been granted constitutional protection,[104] but declined to propose standards by which an aspect of liberty might be identified—neglecting even general referents like the Bill of Rights, history and tradition, and "fundamentality."

Nor did White define in detail the interest invaded and why it is constitutionally protected by the concept of "liberty." Framing the issue narrowly, he described the constitutional liberty in *Griswold* as "the right . . . to be free of regulation of the intimacies of the marriage relationship."[105] By associating this right with certain other protected unenumerated rights,[106] White fixed it within " 'a realm of family life' " that is generally beyond the scope of governmental regulation.[107] It is not clear whether White viewed this "realm" as in any way coextensive with Harlan's concept of "home."

White's focus was clearly on the marriage relationship and the kinds of decisions necessarily reserved to those who establish such a relationship.[108] Like Harlan, White did not seem concerned with physical intrusion into the house so much as with mental and emotional intrusion into the household.[109] But, unlike Harlan, he made no attempt to say why marital status invokes certain protections not given to other citizens. By confining the nature of the right and framing it with the marriage relationship, White avoided having to consider the possibility that unmarried persons have a comparable right to govern their intimate behavior. Instead, he assumed that the state can regulate their conduct.[110] Furthermore, White did not suggest what other narrow rights[111]

103 Id. at 502.

104 Among the cases he cited are: Aptheker v. Secretary of State, 378 U.S. 500 (1964) (the right to travel); Schware v. Board of Bar Examiners, 353 U.S. 232 (1957) (the right to choose one's profession); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (the right to direct the education of one's children); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (the right to marry and raise a family); Jacobson v. Massachusetts, 197 U.S. 11 (1905) (the right to control one's body). 381 U.S. at 504 n.

105 381 U.S. at 502-03.

106 The rights he mentions are protected in Skinner v. Oklahoma, 316 U.S. 535 (1942) (the right to procreate); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (the right to direct the education of one's children); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (the right to marry and raise a family).

107 381 U.S. at 502, quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944). White contrasts this type of personal liberty with liberties derived " 'from shifting economic arrangements.' " 381 U.S. at 503, quoting Kovacs v. Cooper, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring).

108 381 U.S. at 503. To a lesser extent, White was also concerned about the inhibiting effect the statute might have on doctors and about the denial of equal protection to poor persons who could not afford private counselling on birth control. Id.

109 This judgment is implicit in White's conclusion that the statute was an ineffective device by which to control the sexual behavior of individuals. Id. at 506-07; see text accompanying note 83 supra.

110 381 U.S. at 505-07.

111 Given White's narrow definition of the right and his lack of measurable

might fall within the "realm of family life" or how one should determine whether a right is protected under this rubric, protected under the more general concept of liberty or not protected at all.

White devoted most of his opinion to applying the appropriate test to the facts of the case. When a "sensitive area of liberty" is invaded, the statute demands "strict scrutiny." If this scrutiny reveals that "less drastic means" are available to accomplish the state end, the statute will fall. If there is an unavoidable conflict, only a "subordinating interest which is compelling" will justify the state's action.[112] In this case, White found that the state's purpose was not to discourage contraception per se[113] but to reinforce prohibitions on "promiscuous or illicit sexual relationships, . . . concededly a permissible and legitimate legislative goal."[114] He could not understand how a ban on the use of contraceptives by married persons furthered such a purpose, particularly when other laws allowed unmarried persons access to contraceptives for reasons of health. Because of its "marginal utility" and overbreadth, the statute was unconstitutional.[115]

White's reasoning in applying the test is unassailable, given his initial conclusions. His doctrinal approach through substantive due process represents one major—albeit somewhat discredited[116]—tradition in Supreme Court adjudication. His reluctance to acknowledge a broad right of privacy is understandable; he may well have concluded that finding "privacy" an aspect of "liberty" merely would give the Court two difficult concepts to characterize instead of one. Yet his failure to delineate standards by which to discriminate among interests potentially entitled to constitutional protection as aspects of "liberty" made his opinion almost useless in subsequent adjudication concerning unenumerated rights. Although White clearly mapped the route that lower courts are to follow once a basic liberty has been recognized, he gave them no guidance at the initial fork in the road.

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standards by which to estimate the magnitude of personal liberties, one can explain his dissent in Roe v. Wade, 410 U.S. 113, 221-23 (1973), without great difficulty. Since White does not acknowledge a right of privacy, he did not have to grapple with the notion that a woman's decision to have an abortion might be an aspect of such a right. Instead, he construed her interest narrowly as "the convenience, whim, or caprice of the putative mother" and found it easily outweighed by the state's interest in protecting fetal life. Id. at 221.

112 381 U.S. at 503-04. In constructing the test, White quoted heavily from other cases, mixing indiscriminately decisions involving equal protection, due process and first amendment issues. Id.

113 Id. at 505. The state had abandoned the argument that contraception was immoral in itself, which contention it had advanced in Poe v. Ullman, 367 U.S. 497, 545 (1961) (Harlan, J., dissenting).

114 381 U.S. at 505.

115 Id. at 505-07.

116 See text accompanying notes 8-11 supra. Both Harlan and White used this doctrinal approach without embarrassment, although other Justices were distressed at the notion of a possible return to the era of Lochner v. New York, 198 U.S. 45 (1905). See text accompanying note 45 supra; note 71 supra. For a recent view that privacy decisions, particularly Roe v. Wade, 410 U.S. 113 (1973), involve greater judicial incontinence than *Lochner*, see Ely, supra note 4, at 937-49.

B. *The Expanding Right of Privacy*

While *Griswold* announced the existence of a constitutional zone of privacy, it did little to sketch the perimeters of that zone. The factual setting of the case combined several different elements which various Justices found relevant in differing ways. First, the protected activity took place in the home—a private locus which for several reasons might itself invoke constitutional protection. Second, the challenged statute purported to regulate marital intimacies, intruding upon a type of association possibly entitled to constitutional protection. Finally, the prohibition on the use of contraceptives involved the state in the highly personal determination of whether or not to have children —a decision which the Constitution arguably reserves as a right of autonomy to the individual. These three themes reappeared in varying combinations in subsequent privacy cases.

1. Stanley v. Georgia: *Privacy of the Home*

In *Stanley v. Georgia*,[117] the Supreme Court combined the concept of the privacy of the home, derived from *Griswold*, with peripheral first amendment rights to invalidate a state statute that prohibited possession of obscene materials in one's own home.[118] When the opinion was first handed down, it seemed to signal a new, enlightened approach to the problem of obscenity[119] and to create a powerful hybrid right to freedom of thought and moral self-determination.[120] More recent decisions,[121] however, have whittled *Stanley*'s holding down to its facts and reneged on much of the language and reasoning in its majority opinion. The Court's current view is that *Stanley* "was hardly more than a reaffirmation that 'a man's home is his castle' "[122]—an interpretation that strips the case of all first amendment content and leaves it a bare privacy decision.

Although Justice Marshall, writing for the majority in *Stanley*, claimed that his opinion was not intended to disturb the holding of

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117 394 U.S. 557 (1969).

118 *Stanley* was not the first case to combine the two concepts with this result. A California court had held that a statute prohibiting possession or preparation of obscene matter was a violation of an individual right to personal expression and enjoyment. In re Klor, 64 Cal. 2d 816, 820-21, 415 P.2d 791, 794, 51 Cal. Rptr. 903, 906 (1966).

119 See Laughlin, supra note 70, at 1391.

120 In the lower courts, the issue had turned on the validity of the search under the fourth amendment. Stanley v. State, 224 Ga. 259, 161 S.E.2d 309 (1968), rev'd, 394 U.S. 557 (1969). By neglecting this alternative and carving out a new ground for decision, the Court gave *Stanley* a significance it would otherwise not have had.

121 United States v. Orito, 413 U.S. 139 (1973); United States v. 12 200-Ft. Reels of Super 8MM. Film, 413 U.S. 123 (1973); Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973); Miller v. California, 413 U.S. 15 (1973); United States v. Thirty-Seven (37) Photographs, 402 U.S. 363 (1971); United States v. Reidel, 402 U.S. 351 (1971).

122 Paris Adult Theatre I v. Slaton, 413 U.S. 49, 66 (1973).

Roth v. United States[123] that obscenity is not protected by the first amendment,[124] the opinion derived substantial content from notions of freedom of expression and thought. "If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch."[125] The individual retains the right "to receive information and ideas, regardless of their social worth,"[126] to determine "the moral content of [his] thoughts"[127] and "to satisfy his intellectual and emotional needs"[128] even if the materials he uses to do so are obscene. Although the decision could have been read as extending first amendment protection to obscene materials in some circumstances,[129] in retrospect it appears that the Court was more concerned with other first amendment values: to ensure an individual's access to protected ideas and expression, state regulation of unprotected ideas and expression would be limited.[130]

The other major constitutional source of Stanley's right was the privacy of the home. Initially, this interest overlaps with the first amendment concerns: the image of the police weeding through a personal library for potentially obscene books was probably as offensive to the Court as the image of police in the marital bedroom. But notions of privacy also had independent force. The fact that Stanley's activities took place in the privacy of his home gave the case an "added dimension. For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy."[131] The added dimension was present not only because the home is a particularly intimate locus of activity,[132] but also because the activ-

123 354 U.S. 476 (1957).

124 See Stanley v. Georgia, 394 U.S. 557, 560-63, 567 (1969).

125 Id. at 565.

126 Id. at 564.

127 Id. at 565-66.

128 Id. at 565.

129 See Stein v. Batchelor, 300 F. Supp. 602, 606 (N.D. Tex. 1969) (three-judge court), vacated and remanded per curiam sub nom. Dyson v. Stein, 401 U.S. 200 (1971); Engdahl, supra note 7, at 200-01. See also United States v. B & H Distrib. Corp., 319 F. Supp. 1231, 1232, 1235 (W.D. Wis. 1970), vacated and remanded, 403 U.S. 927, judgment reinstated, 347 F. Supp. 905 (W.D. Wis. 1972), vacated and remanded, 413 U.S. 909 (1973); United States v. Lethe, 312 F. Supp. 421, 423 (E.D. Cal. 1970).

130 See United States v. Reidel, 402 U.S. 351, 355-56 (1971); id. at 359-60 (Harlan, J., concurring). Even this relatively limited view of the first amendment interest in *Stanley* may no longer be viable after Chief Justice Burger's decision in Paris Adult Theatre I v. Slaton, 413 U.S. 49, 65-68 (1973). See text accompanying note 147 infra.

131 394 U.S. at 564.

132 One commentator has analyzed *Stanley* as being grounded in a fourth amendment penumbra derived from Douglas' opinion in *Griswold:*

> If a particular mode of criminal conduct cannot be discovered except by the invasion of a "sanctuary" in order to seize some particularly private item—like birth control devices—the procedural bar operates to invalidate the substantive crime in the absence of a sufficiently strong governmental interest for invasion of the sanctuary. This seems to be the meaning of

ities involved implicate individuals' "beliefs, their thoughts, their emotions and their sensations," focal values of the "right to be let alone."[133]

The Court posited that an infringement upon one's right to be let alone cannot be justified simply by the state's desire to confiscate obscene material, thus implying that regulation of obscenity must be justified, and that it must be justified on grounds other than a concern for the morality of the actor himself.[134] The Court also rejected the notion that the state may limit the ideas a person receives in order to protect society from unlikely but possible resulting deviant behavior, suggesting that such behavior could be punished directly.[135] However, the state may validly regulate obscene materials in order to prevent their potential exposure to children or intrusion upon the sensibilities of persons who do not wish to view them.[136] Such dangers are not inherent in private possession of obscene matter; and, since other permissible justification had not been demonstrated, the state's action in confiscating Stanley's obscene films was found unconstitutional.

The considerations which the Court viewed as sufficient to justify regulation of public distribution of obscenity seemed indirectly to endorse the Model Penal Code[137] and Wolfenden Report[138] position that private behavior of consenting adults, having no substantial significance except as to the morality of the actor, is beyond governmental regulation. Under that view, regulation is legitimate only if the activity is forced upon an unwilling person or if a minor is involved.[139] Thus, Justice Marshall's opinion in *Stanley* might have been interpreted as requiring a justification for state regulation of immorality in terms of direct or potential impact on society.[140]

> [*Griswold*] that the Court had in mind in *Stanley*. If the criminal conduct (possession of obscene material) requires for its enforcement governmental inquiry into the contents of one's library, a particularly private res by definition, the criminal statute is itself unconstitutional because of the absence of a sufficiently strong countervailing state interest.

Katz, Privacy and Pornography: Stanley v. Georgia, 1969 Sup. Ct. Rev. 203, 205.

133 394 U.S. at 564, quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

134 "If the State can protect the body of a citizen, may it not, argues Georgia, protect his mind?" 394 U.S. at 560. The Court answered the question in the negative. Id. at 565-66; see Katz, supra note 132, at 209.

135 394 U.S. at 566-67.

136 Id. at 567; see Redrup v. New York, 386 U.S. 767, 769 (1967) (per curiam) (citing the same justifications for state regulation of obscenity).

137 Model Penal Code § 207.1, Comment at 207 (Tent. Draft No. 4, 1955).

138 Committee on Homosexual Offenses and Prostitution, Report, Cmd. No. 247 (1957) [hereinafter Wolfenden Report].

139 See Model Penal Code § 213 (Proposed Official Draft 1962); Model Penal Code § 207, Comments at 204-65 (Tent. Draft No. 4, 1955); Wolfenden Report, supra note 138.

140 Marshall's subsequent obscenity opinions indicate that he did intend to require such justification from the state. See California v. LaRue, 409 U.S. 109, 132 n.10 (1972) (dissenting opinion); United States v. Reidel, 402 U.S. 351, 360 (1971) (concurring opinion) ("[*Stanley*] fully canvassed the range of state interests that might possibly justify regulation of obscenity."). See also Paris Adult Theatre I v.

In subsequent decisions, however, the Court has, on the one hand, explicitly rejected the "consenting adults" theory in its most extenuated form and on the other, been willing to hypothesize an adverse impact on society caused by the very presence of obscene materials in the streams of commerce. Although reserving decision on the question of direct governmental regulation of purely private, consensual behavior,[141] Justice Burger's recent majority opinion in *Paris Adult Theatre I v. Slaton*[142] made clear that the state retains an interest in the moral content of its citizens' thoughts[143] and can restrict that content to protect the general moral climate of society and to prevent antisocial conduct, however unlikely to result.[144] Furthermore, although the individual may retain the right to view obscene materials in his home, the Court's decisions have so stringently limited his ability to acquire the materials from outside the home[145] that he can exercise his right only if he "writes salacious books in his attic, prints them in his basement, and reads them in his living room."[146]

Paris Adult Theatre and other recent decisions have not only reduced *Stanley* to its facts; they have also erased all of its first amendment content and transformed it into a pure privacy case. Throughout these opinions, Chief Justice Burger, speaking for the Court, rarely mentioned *Stanley* and the first amendment in the same breath. When he did discuss them, the "privacy of the home protected by *Stanley*"

Slaton, 413 U.S. 49, 105-08 (1973) (Brennan, J., dissenting, joined by Marshall, J.).

141 The Court rejected the idea that "conduct involving consenting adults only is *always* beyond state regulation," Paris Adult Theatre I v. Slaton, 413 U.S. 49, 68 (1973) (emphasis added), and found that in this instance, the public and commercial nature of the activity made the judgment that it was harmful to society "morally neutral." Although the opinion referred in a footnote to some other, less public forms of consenting behavior, id. at 68 n.15, the Court refrained from explicit discussion of what it might do if faced with a decision concerning "wrong" or "sinful" private activity.

142 413 U.S. 49 (1973) (consenting adults have no right to watch an obscene film in a public theatre from which minors and unwilling adults have been excluded).

143 The Court denied that the state was trying to control the moral content of individual thought, reasoning that since obscenity by definition lacks communicative value, denial of access to it would have little effect on "reason" and "intellect." Id. at 67. Nevertheless, by allowing the state to limit access in order to prevent potential antisocial conduct, the Court does imply an interest in individual thought which has not been manifested in conduct. In addition, concern with the moral "tone" of urban commerce, id. at 58-59, may be rooted in part in the notion that continued exposure to advertisement of the obscene may adversely affect the moral content of many minds.

144 Id. at 60-63; see Kaplan v. California, 413 U.S. 115, 120 (1973).

145 United States v. Orito, 413 U.S. 139 (1973) (no right to transport obscene materials intended for personal use in interstate commerce); United States v. 12 200-Ft. Reels of Super 8MM. Film, 413 U.S. 123 (1973) (no right to import for personal use); United States v. Reidel, 402 U.S. 351 (1971) (no right to receive obscene materials through the mail).

146 United States v. Thirty-Seven (37) Photographs, 402 U.S. 363, 382 (1971) (Black, J., dissenting).

was juxtaposed against the first amendment as a separate limitation on the state's power to regulate human thoughts and utterances in pursuit of legitimate state interests.[147]

The nature of the privacy protected under *Stanley* is definitely tied by Chief Justice Burger to the home as a physical locus of activity.[148] Simply by virtue of being at home, one acquires the right to do things that one cannot do elsewhere. One of these things is to possess and view obscenity. But no penumbra of privacy surrounds either the obscene materials when they leave the home[149] or the individual when he goes to his local theater to watch an obscene film with other consenting adults.[150] If he can get the same film over his threshold without being caught, Burger implied, he is home free. But any place else, he is vulnerable to prosecution.[151]

If this notion of privacy of the home is carried to its logical extreme, it becomes somewhat startling. Burger stated: "It is hardly necessary to catalog the myriad activities that may be lawfully engaged in within the privacy and confines of the home, but may be prohibited in public."[152] In spite of this disclaimer, such a catalog would be informative. One can assume that some of those activities would be protected by the privacy of relationship he described.[153] But what activ-

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147 Where communication of ideas, protected by the First Amendment, is not involved, or the particular privacy of the home protected by *Stanley*, or any of the other "areas or zones" of constitutionally protected privacy, the mere fact that, as a consequence, some human "utterances" or "thoughts" may be incidentally affected does not bar the State from acting to protect legitimate state interests....

Paris Adult Theatre I v. Slaton, 413 U.S. 49, 67 (1973); see United States v. 12 200-Ft. Reels of Super 8MM. Film, 413 U.S. 123, 126-27 (1973) (*Stanley* did not rest on first amendment rights).

148 See Paris Adult Theatre I v. Slaton, 413 U.S. 49, 66 & n.13 (1973).

149 See United States v. Orito, 413 U.S. 139, 143 (1973).

150 Paris Adult Theatre I v. Slaton, 413 U.S. 49, 66 (1973).

151 Burger consistently draws a distinction between the home on the one hand and the streams of commerce or places of public accommodation on the other. See United States v. Orito, 413 U.S. 139, 142-43 (1973); United States v. 12 200-Ft. Reels of Super 8MM. Film, 413 U.S. 123, 126-27 (1973); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 57, 66, 67, 69 (1973). As Justice Douglas points out in dissent, this rigid distinction means that a person who moves or takes a trip cannot take with him books that he would be allowed to read at home. *Orito*, supra at 146.

152 United States v. Orito, 413 U.S. 139, 142-43 (1973).

153 Burger separated "privacy of the home" from privacy derived from a "protected intimate relationship;" he included in the latter category rights protected in *Griswold* and *Roe*. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 66 n.13 (1973). Although it may scarcely be fair to criticize this brief, tantalizing reference, one questions whether the "relationship" concept is consistent with the holdings in *Roe* and *Eisenstadt* that the right of privacy is an individual right. Furthermore, it is not at all clear whether the "relationship" he perceived in *Roe* is that between a woman and her doctor or between a woman and her lover. See id. The *Roe* opinion assigned the right to the woman alone. Roe v. Wade, 410 U.S. 113, 153 (1973); see note 197 infra. The putative father may have a separate interest. See Roe v. Wade, supra at 165 n.67; text accompanying notes 239-56 infra.

Burger's inventive dictum on the subject of privacy probably does not represent

ities might be protected by the privacy of the home itself? Smoking marijuana? Gambling? Fornication?[154]

This "privacy of the home" seems significantly different from other forms of privacy which are currently given constitutional protection. For example, until recently, fourth amendment case law drew distinctions based largely on property law notions of governmental trespass upon personal sanctuaries.[155] But the Court has now rejected the idea that the privacy secured by the fourth amendment depends for its viability on the place where an illegal search is made.

> [T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.... But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.[156]

Furthermore, the rights secured by *Griswold,* seen through the prism of later decisions in *Eisenstadt v. Baird*[157] and *Roe v. Wade,*[158] inhere in individual people, not places. Perhaps all that Burger meant was that certain activities, which are not inherently damaging to society but which are eccentric or intimate, would be unacceptable conduct if performed in public but are perfectly legitimate if performed in one's home where no one can observe them.[159] But *Stanley* was a rather large vehicle for such a small idea. Indeed, it would be difficult to interpret *Stanley* as standing for this proposition. The recent obscenity decisions indicate that the promulgation and observation of obscene materials is inherently damaging to society in some vaguely articulated way. An individual's possession of such materials cannot now be viewed as inherently harmless; mere possession outside the home, even if unwilling persons are not exposed to the materials, can be prohibited. On the other

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the views of a majority of the Court and should be handled with care. Judging by his dissent in Eisenstadt v. Baird, 405 U.S. 438, 465-72 (1972), and his tepid concurring opinion in Roe v. Wade, supra at 207-08, the Chief Justice is noticeably unenthusiastic about the right of privacy.

154 Burger implied that such activities would not be protected simply because "consenting adults" engaged in them. See Paris Adult Theatre I v. Slaton, 413 U.S. 49, 68 n.15 (1973). However, he did not discuss how they might be affected by privacy of the home.

155 See Goldman v. United States, 316 U.S. 129, 134-36 (1942); Olmstead v. United States, 277 U.S. 438, 457, 467 (1928). By 1961, the Court no longer relied on notions of trespass, but nevertheless spoke in terms of a "constitutionally protected area." Silverman v. United States, 365 U.S. 505, 512 (1961); see Note, From Private Places to Personal Privacy: A Post-Katz Study of Fourth Amendment Protection, 43 N.Y.U.L. Rev. 968, 971-78 (1968).

156 Katz v. United States, 389 U.S. 347, 351-52 (1967) (citations omitted); see Katz, supra note 132, at 206.

157 405 U.S. 438 (1972); see text accompanying notes 171-84 infra.

158 410 U.S. 113 (1973); see text accompanying notes 185-207 infra.

159 Burger may well have wished to restrict *Stanley* to its least possible content. He was clearly dismayed at the uses to which the case had been put and stated that had it meant anything more than that the privacy of the home was protected, "*Stanley* would not be the law today." United States v. 12 200-Ft. Reels of Super 8MM. Film, 413 U.S. 123, 127 (1973).

hand, possession in the home is not viewed as an evil that justifies intrusion by state officials. Thus, *Stanley* suggests that there is a certain type of activity which, while socially disapproved, is not so damaging to society as to justify state disruption of the seclusion of the home. If *Stanley* bears any significant content outside of the obscenity context—if it protects a range of activities of a similar nature—the "privacy of the home" may prove to be a potent constitutional right.

2. Eisenstadt v. Baird: *Privacy and the Individual*

While *Stanley* and *Paris Adult Theatre* focused on the home as a place where protected activity may occur, *Eisenstadt v. Baird*[160] and *Roe v. Wade*[161] developed another of *Griswold*'s primary themes, the right of personal autonomy. In each case, the Court was asked to decide whether the Constitution protected the individual's ability to make a decision crucial to his or her personal life and whether or how the state could limit that ability.

When *Griswold* was decided in 1965, Connecticut was the only state to prohibit use of contraceptives.[162] Strictly speaking, therefore, the decision had little direct impact on existing statutes, which prohibited or regulated distribution of contraceptives to a greater or lesser degree depending on legislative concern with health or morality.[163] In fact, however, whether moved by a broad reading of the holding, by acknowledgement of changing morality or by acceptance of new policy considerations, several states took their cue from *Griswold* and revised their statutes.[164]

Nevertheless, the laws of many states, even after revision, contained severe restrictions on the availability of contraceptives. Some

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160 405 U.S. 438 (1972).

161 410 U.S. 113 (1973).

162 See Poe v. Ullman, 367 U.S. 497, 554 (1961) (Harlan, J., dissenting). The statement was still valid in 1965.

163 See, e.g., Idaho Code Ann. §§ 39-801 to -810 (1961) (mostly concerned with health); Wis. Stat. Ann. § 151.15 (1957) (now § 450.11 (Supp. 1973)) (mostly concerned with morality).

164 See Me. Rev. Stat. Ann. tit. 17, § 53 (Supp. 1972); Mass. Gen. Laws Ann. ch. 272, §§ 21-21A (1970); Minn. Stat. Ann. § 617.25 (Supp. 1973); Mo. Rev. Stat. § 542.380 (Supp. 1973); Ohio Rev. Code Ann. §§ 2905.32, 2933.21(D) (Page 1972); Pa. Stat. Ann. tit. 18, § 4525 (Supp. 1973). A few states undertook positive programs to provide their residents with comprehensive family planning advice. Colo. Rev. Stat. Ann. §§ 66-32-1, 66-32-2 (Supp. 1971); Fla. Stat. Ann. § 381.382 (1973); Ga. Code Ann. §§ 99-3101 to -3109 (Supp. 1972); Mich. Comp. Laws § 325.7a (1967); Nev. Rev. Stat. §§ 422.235, 442.080(7) (1967); Okla. Stat. Ann. tit. 63, §§ 2071-75 (1973); Ore. Rev. Stat. § 435.205 (1971); W. Va. Code Ann. § 16-2B-1 (1972). Some of these states included the caveat that the state would not coerce acceptance of the advice, since family planning decisions were fundamental personal rights reserved to the individual. Ga. Code Ann. § 99-3105 (Supp. 1972); Ore. Rev. Stat. § 435.215 (1971); W. Va. Code Ann. § 16-2B-1 (Supp. 1972).

In 1971, the federal government revised its laws on importation and mailing of obscene or immoral articles to omit materials relating to contraception. Act of Jan. 8, 1971, Pub. L. No. 91-622, 84 Stat. 1973, amending 18 U.S.C. §§ 1461-62 (1970) and 19 U.S.C. § 1305(a) (1970).

states had complex regulatory schemes allowing distribution only by doctors or by licensed pharmacies,[165] and occasionally providing access to married persons only.[166] Often these regulations were accompanied by statutes prohibiting the advertisement or display of contraceptives;[167] in some instances, such statutes clearly suggested that the legislature believed that any public reference to contraception was somehow obscene.[168] Many states prohibited distribution of contraceptives by vending machine.[169]

These statutes raised a question as to how extensively a state could limit access to contraceptives if the right to use them was constitutionally protected. If the right was derived from the notion of a locus of privacy centered about the home, then statutes regulating distribution would seem less intrusive than one prohibiting use. If the right was grounded in the view that the marital association was constitutionally protected, then a prohibition of distribution to unmarried persons might survive. But if the right was derived from the concept of autonomous decision about one's personal life, any restriction on distribution would burden it, perhaps to an unconstitutional degree.

In practice, few persons were actually concerned with this problem; either they were willing to use existing channels of distribution or were able to circumvent them. One who was concerned, however, was birth control advocate William Baird.[170] In *Eisenstadt*, Baird challenged a Massachusetts statute which prohibited the distribution of contraceptives to unmarried persons, but which granted married persons access to contraceptives through the medium of a doctor's prescription, without limitation as to reasons for use.[171] In April 1967, in

[165] E.g., Ark. Stat. Ann. §§ 82-944 to -954 (1960); Del. Code Ann. tit. 16, §§ 2501-03 (1953); Mont. Rev. Codes Ann. §§ 94-3620 to -3623 (Supp. 1973); Ore. Rev. Stat. §§ 435.010-.130 (1971).

[166] Mass. Gen. Laws Ann. ch. 272, §§ 21-21A (1970); Wis. Stat. Ann. § 151.15 (1957) (now § 450.11 (Supp. 1973)).

[167] E.g., Ark. Stat. Ann. § 82-950 (1960); Del. Code Ann. tit. 16, § 2502 (1953); Ore. Rev. Stat. § 435.110 (1971) (advertisement must be "discreet and tasteful").

[168] E.g., Iowa Code Ann. § 725.5 (1946); Mich. Comp. Laws Ann. § 750.40 (1968).

[169] E.g., Hawaii Rev. Stat. §§ 321-112 to -114 (Supp. 1972); Ky. Rev. Stat. Ann. § 214.240 (1972); Md. Ann. Code art. 27, § 41 (1971) (no vending machine distribution except where alcohol sold for consumption on premises); Ore. Rev. Stat. § 435.040 (1971).

[170] Prior to *Eisenstadt*, Baird had attacked laws which regulated the distribution of contraceptives in New York and New Jersey. In New York, he was convicted under a statute that had been amended extensively during the litigation and did not pursue an appeal. See People v. Baird, 47 Misc. 2d 478, 262 N.Y.S.2d 947 (Dist. Ct. 1965). The statute was N.Y. Penal Law § 1142 (McKinney 1944), as amended, N.Y. Penal Law § 1142 (McKinney 1967). In New Jersey, where exposing and discussing contraceptives in public "without just cause" is disorderly conduct, N.J. Rev. Stat. § 2A:170-76 (1971), the constitutional issues Baird had raised were mooted when the New Jersey Supreme Court was able to find him innocent by construing the statute narrowly. See State v. Baird, 50 N.J. 376, 235 A.2d 673 (1967).

[171] Mass. Gen. Laws Ann. ch. 272, §§ 21-21A (1970). The exception in the

violation of this law, Baird exhibited contraceptives to a large audience at Boston University and gave a package of contraceptive foam to a member of the audience. In upholding Baird's conviction, the Supreme Judicial Court of Massachusetts found that the state had a valid health purpose in allowing only doctors to dispense contraceptives.[172] Shortly after this decision, the court shifted its ground a bit, finding that the statute also served a "more compelling" moral purpose in that it reinforced laws controlling the private sex lives of the unmarried.[173] Thus, applied to married persons, the statute was construed as a health measure and, applied to the unmarried, as a morality measure.

Soon after his conviction and appeal, Baird petitioned for habeas corpus in federal court, alleging among other charges that the statute invaded the privacy of unmarried persons and denied them equal protection. The district court, however, construed *Griswold* narrowly, finding that the right of privacy barred only statutes regulating use of contraceptives by married persons.[174] The court accepted the reasoning of the Supreme Judicial Court as to the purposes and validity of the statute and found it rationally related to state goals.[175] The court of appeals reversed, finding that the statutory purpose was to bar as immoral the use of contraceptives by unmarried persons and that such a goal was "beyond the competency of the state" under *Griswold*.[176] The Supreme Court upheld the reversal, but avoided deciding whether the statute impinged upon the right of privacy.

Justice Brennan's plurality opinion held that the statutory distinction between married and unmarried persons violated equal protection.[177] As observers have noted,[178] the opinion applied a more strin-

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case of a doctor prescribing contraceptives for married persons was created by the Massachusetts legislature in the aftermath of *Griswold* in an effort to salvage what it could of the state's long-standing prohibition on the distribution of contraceptives. See Commonwealth v. Baird, 355 Mass. 746, 748, 247 N.E.2d 574, 576 (1969).

[172] See Commonwealth v. Baird, 355 Mass. 746, 753, 247 N.E.2d 574, 578 (1969).

[173] Sturgis v. Attorney General, 358 Mass. 37, 40-41, 260 N.E.2d 687, 690 (1970). The case was brought by physicians challenging the statute's distinction between married and unmarried persons.

[174] Baird v. Eisenstadt, 310 F. Supp. 951, 956 (D. Mass.), rev'd, 429 F.2d 1398 (1st Cir. 1970), aff'd, 405 U.S. 438 (1972). The district court also denied Baird's standing to raise the privacy issue on behalf of his distributee. Id. at 957.

[175] Id. at 953-54.

[176] Baird v. Eisenstadt, 429 F.2d 1398, 1402 (1st Cir. 1970), aff'd, 405 U.S. 438 (1972).

[177] Eisenstadt v. Baird, 405 U.S. 438, 453-55 (1972). Justice Brennan was joined by Justices Douglas, Stewart and Marshall; Justice Douglas also wrote a concurring opinion based on the first amendment; Justice White concurred, joined by Justice Blackmun; Chief Justice Burger dissented; and Justices Powell and Rehnquist did not participate.

[178] See Gunther, Foreword to The Supreme Court, 1971 Term, 86 Harv. L. Rev. 1, 18-20 (1972); Note, Public Access to Beaches, 48 N.Y.U.L. Rev. 369, 390-91 (1973); Note, Fundamental Personal Rights: Another Approach to Equal Protection, 40 U. Chi. L. Rev. 807, 818-21 (1973).

gent "rational relationship" test than the Court had used in the past, following a few prior decisions and implying development of a middle ground between the "compelling state interest" test and the uncritical "rational relationship" test.[179] The use of this intermediate standard allowed the Court to examine the statute closely without having to determine whether the statute invaded rights that were constitutionally protected under *Griswold*.[180] Thus, the Court followed the court of appeals in holding that the alleged health purpose was illusory, or, if not, that the statute bore no rational relation to such a goal. Health needs of citizens do not vary by marital status. Not all contraceptives are dangerous to health and those that are would be subject to federal and state drug laws.[181]

The Court also followed the court of appeals in holding that the alleged morals purpose was not treated rationally in the statute. The statute was "riddled with exceptions" by case law, allowing certain unmarried persons access to contraceptives. More important, fornication was a misdemeanor carrying a 90-day jail term; violation of the distribution statute carried a five-year sentence. Thus, the aider and abettor of a misdemeanor received 20 times the punishment of the perpetrator; and the perpetrator was faced with the exorbitant unwritten penalty of possible pregnancy and an illegitimate child.[182]

Finally, the Supreme Court mentioned the court of appeals' holding that the real and impermissible purpose of the statute was to prevent contraception itself as an immoral act. The Court reserved decision on whether this was impermissible under *Griswold* and held that, whatever its purpose, the statute violated equal protection by treating married and unmarried persons differently. Thus the Court intimated that the holding in *Griswold,* despite its extensive reliance on the concept of the sanctity of the marital relationship,[183] could not be limited to a right of "marital privacy."

> If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional

[179] Compare *Eisenstadt* and Reed v. Reed, 404 U.S. 71 (1971) (stringent rational relationship test), with Shapiro v. Thompson, 394 U.S. 618 (1969) (compelling state interest test), and Williamson v. Lee Optical Co., 348 U.S. 483 (1955) (uncritical rational relationship test).

[180] Eisenstadt v. Baird, 405 U.S. 438, 447 n.7 (1972). The Court did say that if *Griswold* rights had been invaded, a compelling state interest test would have been used. Id.

[181] Id. at 450-52; see Baird v. Eisenstadt, 429 F.2d 1398, 1400-01 (1st Cir. 1970), aff'd, 405 U.S. 438 (1972).

[182] 405 U.S. at 448-50; see Baird v. Eisenstadt, 429 F.2d 1398, 1401-02 (1st Cir. 1970), aff'd, 405 U.S. 438 (1972).

[183] See, e.g., 381 U.S. at 495-96, 499 (Goldberg, J., concurring); id. at 502-03 (White, J., concurring). See also Poe v. Ullman, 367 U.S. 497, 553 (1961) (Harlan, J., dissenting).

> makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.[184]

The Court's language suggests that *Griswold* should not be read too narrowly, reaffirms the Court's support for unspecified rights, and suggests that a decision as to when a state must bear the extraordinary burden of justification for intruding into a personal decision must refer to how fundamentally the activity in question affects the individual.

3. Roe v. Wade: *Privacy and Autonomy*

The most significant exposition of the right of privacy to date is the Court's opinion in *Roe v. Wade*,[185] declaring that the decision to have an abortion is within the protected zone of privacy. Although not overly concerned with the doctrinal origin of the right, the Court, speaking through Justice Blackmun, did express a doctrinal preference.

> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, *as we feel it is*, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy....[186]

This passage seems to indicate that, in spite of the traditional exorcism of *Lochner* found at the beginning of the opinion,[187] the present Court is inclined to adopt the substantive due process views[188] espoused by Justice Harlan in *Griswold*, *Poe* and earlier cases,[189] at least insofar as personal rights are concerned.[190] This view is reinforced by Blackmun's

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184 405 U.S. at 453 (citations omitted).

185 410 U.S. 113 (1973).

186 Id. at 153 (emphasis added).

187 Id. at 117.

188 In his concurring opinion in *Roe*, Justice Stewart noted that, in his mind, *Griswold* had been a disguised substantive due process decision. Although he had opposed *Griswold* because of its doctrinal uncertainty, see note 71 supra, he bowed to stare decisis in *Roe* and accepted substantive due process with some enthusiasm. See 410 U.S. at 167-71.

On the other hand, Justice Douglas continued in *Roe* to reject the notion that *Griswold* had anything to do with substantive due process. See id. at 212 n.4 (concurring opinion).

Chief Justice Burger's opinion in Paris Adult Theatre I v. Slaton, 413 U.S. 49, 65-66 (1973), confirmed the view that the doctrinal source of the right of privacy is the due process clause.

189 See text accompanying notes 67-100 supra.

190 The distinction between "personal" and "economic" rights has been endorsed with varying degrees of explicitness by certain members of the Court. In *Roe*, neither Blackmun nor Stewart made specific reference to the use of a double standard in this area, although such a distinction is implicit in the way each limited the right of privacy to personal liberties. 410 U.S. at 152-53; id. at 168-71 (Stewart, J., concurring). Justice Rehnquist criticized the resurrection of substantive due process, yet his mention of "economic and social welfare legislation" suggests that he may acknowledge a difference between such legislation and that affecting personal rights. Id. at 174; see id. at 172-73 (dissenting opinion). Justice White,

use of one of the benchmarks of Harlan's school of thought in setting standards by which rights within the perimeters of privacy may be known: "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' ... are included in this guarantee of personal privacy."[191]

In spite of a mild preference for fourteenth amendment 'liberty,' Blackmun seemed unwilling to jettison any doctrinal theory that might help to anchor the right of privacy to the Constitution. He mentioned that the "roots of that right" had also been found in the first, fourth, fifth and ninth amendments, and in the penumbras of the Bill of Rights as a whole.[192] While apparently not an endorsement of Justice Douglas' peripheral rights theory, this passage suggests that the Court is willing to use the concepts underlying certain of the first nine amendments as one standard by which to judge whether a given personal interest is to be afforded constitutional protection.

Blackmun's opinion also suggests two other criteria for making this same determination. First, the Court looked to its earlier decisions, both those concerned with specific Bill of Rights guarantees and the series of substantive due process cases, beginning with *Meyer v. Nebraska,* which evinced a concern with protecting rights pertaining to marriage, family and procreation.[193] Blackmun was as willing as Douglas had been in *Griswold* to view such previous decisions expansively.[194]

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who dissented in *Roe,* made it clear in his opinion in *Griswold* that he perceived a difference between economic and personal rights. 381 U.S. at 502-03. Finally, the Court as a whole has implicitly accepted the distinction by, on the one hand, deciding *Roe* and, on the other, reversing summarily a decision that attempted to resuscitate the old notion of economic due process rights. Dean v. Gadsen Times Publishing Corp., 412 U.S. 543 (1973) (per curiam). For the argument that the Court now gives constitutional substance to property rights through procedural safeguards, see generally Note, The Growth of Procedural Due Process Into a New Substance, 66 Nw. U.L. Rev. 502 (1971).

191 410 U.S. at 152 (citation omitted).

192 Id.

193 Id. at 152-53.

194 Id. at 152-53. Blackmun cited Loving v. Virginia, 388 U.S. 1 (1967), for example, as a case endorsing the right to marry. Some dictum in *Loving* spoke of the fundamental nature of the right to marry. Id. at 12. But, the actual holding of the case simply struck down anti-miscegenation statutes on equal protection grounds, because of their inherent racism. Id. Similarly, Skinner v. Oklahoma, 316 U.S. 535 (1942), was cited as endorsing the right to procreate. The actual holding in *Skinner* was that a state statute authorizing sterilization of certain convicted felons denied equal protection. Id. at 541. Again, some dictum spoke of marriage and procreation as "basic civil rights of man." Id. at 536, 541.

The Court cited Prince v. Massachusetts, 321 U.S. 158 (1944), for the proposition that family relationships may be deemed "fundamental." In *Prince,* the Court held that the state's interest in protecting children outweighed parental and religious interests so as to justify the application of a child labor law to convict Prince, a Jehovah's Witness who allowed her nine-year old ward, also a Jehovah's Witness, to fulfill what both saw as a religious duty to sell the sect's religious tracts on the streets of Boston. Despite the one sentence of dictum, id. at 166, to which the Court referred, *Prince* cuts against the fundamentality of parental control of family relationships.

The Court also considered the personal cost to a woman if the state were allowed to prevent her from having an abortion.[195] This consideration seems derived from the idea in *Eisenstadt* that one test of a right is how fundamentally state action abridging that right would affect the individual.[196] On a related point, *Roe* implicitly confirmed the dictum in *Eisenstadt* that privacy rights belong to the individual and bear no relation to marital status.[197]

The Court held that when a "fundamental" right, protected as an aspect of fourteenth amendment liberty, is involved, the state must have a "compelling interest" in order to limit the right, and the statute "must be narrowly drawn to express only the legitimate state interests at stake."[198] Justice Blackmun rejected several interests asserted on behalf of the state. First, reasoning from the language and history of the Constitution and the history of abortion statutes, the Court held that the fetus was not a "person" to be protected by the terms of the fourteenth amendment.[199] Second, like several lower courts, the Court referred only briefly to the notion that abortion statutes could be viewed as attempts to control extramarital sexual behavior.[200] In addi-

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195 410 U.S. at 153. The detriments mentioned by the Court were "[s]pecific and direct harm medically diagnosable even in early pregnancy;" the fact that "[m]aternity or additional offspring may force upon the woman a distressful life and future;" the possibility of imminent psychological harm; the fact that the woman's "[m]ental and physical health might be taxed by child care;" "the distress, for all concerned, associated with the unwanted child;" "[t]he problem of bringing a child into a family already unable, psychologically and otherwise, to care for it;" and "the additional difficulties and continuing stigma of unwed motherhood."

196 Eisenstadt v. Baird, 405 U.S. 438, 453-54 (1972).

197 The named plaintiff in *Roe* was an unmarried, pregnant woman. 410 U.S. at 120. Although a woman's right to have an abortion is predicated on her consultation with a doctor, see id. at 153, 156; id. at 208 (Burger, C.J., concurring), the "privacy" involved is clearly the woman's. Id. at 153 ("This right of privacy ... is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.").

198 Id. at 155. As Justice Rehnquist aptly noted, this test is a transplant from equal protection analysis. Id. at 173 (dissenting opinion).

199 Id. at 156-59. For a lower court opinion holding the contrary, see Steinberg v. Brown, 321 F. Supp. 741, 745-46 (N.D. Ohio 1970) (three-judge court). See also Abele v. Markle, 342 F. Supp. 800, 815 (D. Conn. 1972) (three-judge court) (dissenting opinion), vacated and remanded, 410 U.S. 951 (1973); Byrn v. New York City Health & Hosp. Corp., 38 App. Div. 2d 316, 329 N.Y.S.2d 722 (2d Dep't), aff'd, 31 N.Y.2d 194, 286 N.E.2d 887, 335 N.Y.S.2d 390 (1972), appeal dismissed, 410 U.S. 949 (1973). Senator James Buckley of New York has proposed a constitutional amendment that would make an embryo or fetus a person under the fourteenth amendment. See 13 Crim. L. Rptr. 2546 (Sept. 19, 1973).

200 410 U.S. at 148. This argument was never seriously advanced in abortion cases and those courts that mentioned it generally did so only to reject it. See, e.g., Abele v. Markle, 342 F. Supp. 800, 802 n.10 (D. Conn. 1972) (three-judge court), vacated and remanded, 410 U.S. 951 (1973); Babbitz v. McCann, 310 F. Supp. 293, 301 (E.D. Wis. 1970) (three-judge court), appeal dismissed per curiam, 400 U.S. 1 (1970). But see Rosen v. Louisiana State Bd. of Medical Examiners, 318 F. Supp. 1217, 1228 (E.D. La. 1970) (three-judge court), vacated and remanded, 412 U.S. 902 (1973).

tion, the Court declined to hold that the question of abortion was the exclusive province of the legislature, beyond the competence of the courts, simply because of the insoluble moral and philosophical issues involved.[201] Instead, the Court determined that the individual had a fundamental right under the Constitution to resolve these difficult issues herself in consultation with her physician. The Court did, however, recognize two state interests which limit the right of a woman to have an abortion.

The first of these limitations is the interest in protecting "potential life," which becomes compelling at viability, 24 to 28 weeks after conception.[202] The state may prohibit abortions after that point, except when the woman's life or health is imperiled.[203] Second, the state's interest in the mother's health is "important and legitimate" and enables the state to protect her against her own lack of care. This interest becomes compelling at the end of the first trimester of pregnancy and, to further it, the state may regulate where and by whom an abortion is performed.[204]

The right recognized by the Court protects an individual's ability to make fundamental personal decisions that will have a major impact on his or her life. This fact may explain the Court's preference for fourteenth amendment liberty as a source of the right, as opposed to the penumbral theory, which, in its emphasis upon the first, third and fourth amendments, suggests more of a notion of a place of activity, such as the home, that is normally beyond the scope of government concern. This idea of an intimate locus of activity is present in *Roe*, but the elements of *Griswold* which could have been viewed as limiting the decision to a simple matter of the physical privacy of the home are missing. Abortions do not generally take place within the home; armies of state troopers invading the marital bedroom play no part in the decision that state regulation of abortion is repulsive; the issue of nondisclosure is not so prominent in *Roe* as it was in *Griswold*. *Roe* is a straightforward endorsement of the individual's right to make certain decisions regarding the conduct of his or her personal life.[205]

On the other hand, the Court gave short shrift to a concept of physical autonomy derived from the individual's interest in controlling his or her body.

> [I]t is not clear to us that the claim asserted by some *amici* that one has an unlimited right to do with one's body as one pleases bears a close

201 410 U.S. at 156-59. For lower court opinions holding the contrary, see Corkey v. Edwards, 322 F. Supp. 1248, 1253-54 (W.D.N.C. 1971) (three-judge court), vacated and remanded, 410 U.S. 950 (1973); Rosen v. Louisiana State Bd. of Medical Examiners, 318 F. Supp. 1217, 1229-30 (E.D. La. 1970) (three-judge court), vacated and remanded, 412 U.S. 902 (1973).

202 410 U.S. at 160, 163-64.

203 Id. at 163-64.

204 Id. at 163.

205 Id. at 153.

relationship to the right of privacy previously articulated in the Court's decisions.[206]

Although the Court has recognized in other decisions that the individual does have a strong interest in his or her physical integrity,[207] the Court obviously believes that this interest is distinct from interests protected by the right of privacy.

III

THE METHODOLOGY OF PRIVACY

The group of cases comprised of *Griswold, Stanley, Eisenstadt* and *Roe* is obviously meaningful to persons who wish to use contraceptives, obtain abortions or view obscenity in their homes. Few other things about these decisions are clear. The opinions could engender endless scholarly debates on the adequacy and whereabouts of the constitutional underpinnings of the newly declared rights, the logical force and consistency of the opinions, and so on. But the question courts will be called upon to answer concerns not the origin of the right of privacy, but its application. To decide what other personal liberties the right of privacy may protect, the courts must undertake the task the Supreme Court has not yet faced: locating the boundaries of the right of privacy.

Several assumptions are necessary at the outset of this inquiry. First, it must be assumed that the right of privacy is a viable constitutional doctrine rather than a disingenuous excuse for legislative decisions by the Court.[208] Second, the Supreme Court privacy cases must be viewed as consistent with one another.[209] Finally, it must be assumed that there is some rational way to fashion limits to what is now an extremely amorphous right.

As discussed above, *Roe v. Wade* protects what is most appropriately denominated a right of autonomy. Certain concerns of *Gris-*

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[206] Id. at 154.

[207] The Constitution as interpreted by the Court does recognize an individual interest in one's person, although there is disagreement as to its extent. See Breithaupt v. Abram, 352 U.S. 432, 439-40 (1957); Rochin v. California, 342 U.S. 165, 172 (1952); Jacobson v. Massachusetts, 197 U.S. 11, 26 (1905); Union Pacific R.R. v. Botsford, 141 U.S. 250, 251 (1891).

[208] Some critics of *Roe* are unwilling to make this assumption. See, e.g., Ely, supra note 4. From this perspective, there would be no privacy rights other than the ones the Supreme Court has declared because there would be no real doctrine of privacy.

[209] Alternatively, one may argue that there is a viable constitutional right of privacy, but that the Court has been misapplying it. See id. at 928-30. But for the lower courts to adopt this view and to create their own independent doctrine of privacy would seem rather quixotic.

Also, if the Court's consistency were not assumed, one would be tempted to ignore *Stanley v. Georgia* on the theory that the Court has only barely refrained from overruling that case. See text accompanying notes 141-59 supra. But taking the Court's explanation of *Stanley* at face value requires viewing *Stanley* as a case involving the privacy of the home, a view which can have broad implications. See text accompanying notes 535-40, 558-60 infra.

wold—the seclusion of the home and the sanctity of a relationship created and nurtured by the state—receded into the background in *Roe.* But the Court's focus on autonomy obviously cannot mean that all rights of autonomy or all personal decisions are protected by the so-called right of privacy. If the state were required to demonstrate a compelling need in order to infringe upon any personal decision, there would be few laws, if any, left on the books. There must be some factor separating constitutionally protectable rights of privacy from spheres of human activity which are properly regulable by the state.

One starting point for identifying that limiting factor is the group of rights already declared by the Court to be privacy rights. The Court has labeled these rights as "fundamental" or "implicit in the concept of ordered liberty," standards derived from *Palko v. Connecticut.*[210] It is possible to view "fundamentality" as the only limiting factor and to posit that all rights meeting the *Palko* standard are constitutionally protected. Any human activity which is not deemed fundamental then could not claim any measure of constitutional protection.

The chief problem with this approach is the ambiguity of the fundamentality test. Since few human activities are clearly fundamental or nonfundamental, this test is conducive to subjective, result-oriented decisions. And, while the standard is vague, the classification of a right as "fundamental" or not is virtually outcome-determinative. If a judge calls a right fundamental, the state must demonstrate a compelling need for any interference with that right. Only one law has ever been found by the Supreme Court to be valid under this test.[211] If, on the other hand, the judge were to conclude that the right is not "fundamental," the state would only be required to have a colorably rational basis for any law vitiating that right. *Paris Adult Theatre I v. Slaton*[212] shows how lenient tests for state abridgement of nonfundamental rights may be. The question of whether a state law will stand or fall is too critical to hinge on the ambiguous word "fundamental."

The all-or-nothing approach to constitutional law has already been called into question in another context. The two-tiered test was first adopted to facilitate analysis of equal protection claims.[213] Fundamental rights were in, all others were out. The current Court seems to have found the dichotomous approach unworkable and has been reaching for some middle ground.[214] When a state classification has impinged on certain nonfundamental personal interests, the Court has applied the

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210 302 U.S. 319, 325 (1937), cited in Roe v. Wade, 410 U.S. 113, 152-53 (1973).

211 Korematsu v. United States, 323 U.S. 214 (1944). The Court held that the federal law in question was justified by the compelling interest in preserving national security during time of war. But "no state law has ever satisfied this seemingly insurmountable standard." Dunn v. Blumstein, 405 U.S. 330, 363-64 (1972) (Burger, C.J., dissenting).

212 413 U.S. 49, 60-63 (1973).

213 Roe v. Wade, 410 U.S. 113, 173 (1973) (Rehnquist, J., dissenting).

214 See Gunther, supra note 178, at 17-20.

lower-level rational basis test more rigorously, examining whether the classification does in fact promote a legitimate state end.[215] In some cases, the Court has found that promotion of a valid governmental purpose does not justify a classification that deprives individuals of personal rights.[216] It would be ironic indeed if the Justices were to escape in this manner from the rigid, two-tier equal protection model only to find that they had built the same cage from a different constitutional doctrine.

The magnitude of a right—whether or not that right is deemed fundamental—should be a secondary inquiry. Fundamentality may be a legitimate determinant of how much leeway a state should be allowed in circumscribing certain personal activities, but it should not be the exclusive test of whether or not that activity deserves any measure of constitutional protection. It is not the magnitude, but the nature of a right or activity which demands protection against wanton state intrusion. The Supreme Court has exhibited a concern with protecting activities which are "private" in nature against state interference. If the idea of privacy has any meaning, it must reflect a concern the Court feels for certain human values. These same values may be implicated in rights or activities which should not properly be classified as fundamental but which should be recognized as aspects of fourteenth amendment liberty. Thus, certain rights might be viewed as commanding some degree of constitutional protection less than the compelling state interest standard used where fundamental rights are at stake. If there are nonfundamental privacy rights, then courts faced with privacy claims must answer two questions: first, is the right asserted a right of privacy? and second, is it a fundamental privacy right?

The answer to the first question depends wholly on the nature of the right involved. The first step a court should take in analyzing the purported right is to compare the interests involved with the interests protected in previous Supreme Court cases. In *Roe v. Wade*, Justice Blackmun took a broad view of what constitutes precedent for finding rights of privacy. Grouping early cases such as *Meyer* and *Pierce* with more recent decisions like *Griswold, Eisenstadt* and *Stanley*, Blackmun sketched a sphere of constitutionally protected rights involving contraception, home, family and the rearing of children.[217] His approach suggests that it is the underlying concerns rather than the specific holdings of these cases that should be consulted when a privacy argument is advanced. In particular, does the claimed right either further or depend on values deemed important in those cases? Does it commonly involve the home? Does it concern values associated with the home, such as seclusion, intimacy or the pleasures of associating with family or close friends? Is it a right of personal autonomy? More particularly, does it involve autonomous decisions that shape an individual's personal life,

215 See, e.g., Eisenstadt v. Baird, 405 U.S. 438 (1972).
216 See, e.g., Reed v. Reed, 404 U.S. 71 (1971).
217 Roe v. Wade, 410 U.S. 113, 152-53 (1973).

whether in a long-term or short-term sense? One may also consider whether the values protected are similar to the values underlying those Bill of Rights amendments found relevant in prior privacy cases.[218] In particular, does the interest involve the security and seclusion of the home, protected in the third and fourth amendments? Does it bear upon the rights of personal security and autonomy protected in the fourth and fifth amendments? To some extent, this inquiry will overlap with examination of precedent.

Once it has been determined that a given interest deserves protection as a privacy right, the second question should be whether or not it is "fundamental." Here, inquiry should focus on whether the right may be deemed "implicit in the concept of ordered liberty" and on its importance to the individual asserting it. If a court determines that a privacy right is fundamental, the state should have to show that its infringement is necessary to promote a compelling governmental interest. If the right is deemed less important, the court should ask whether the state's restriction is in fact reasonably related to promotion of a legitimate state interest.

This latter test should not be applied with the traditional, almost total deference normally shown to the state's judgments. One of the most notable themes in privacy cases is the fact that the state's interest is usually ill-defined at best and nonexistent at worst. Frequently, challenged legislation reflects an effort to impose a particular moral code on affected individuals rather than a concern with public health, safety or welfare. Although protection of public morals is within the traditional police power of the state, the legitimacy of this state interest may be questioned, especially when the goal is promotion of "morality" in the abstract, without any examination of how a particular form of conduct adversely affects the individual or society as a whole. Furthermore, this goal may be less valid when there is a significant divergence of opinion among the members of the public as to what constitutes "moral" behavior.[219] The abortion controversy ultimately centered upon the morality of the decision to abort a fetus. Nevertheless, recognizing the insoluble nature of this question, most courts, including the Supreme Court, preferred to leave the moral judgment to the person most directly concerned. Instead, the courts focused on the more tangible state interests in the mother's health and in potential life.[220]

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218 See id. at 152; Griswold v. Connecticut, 381 U.S. 479, 482-85 (1965); Poe v. Ullman, 367 U.S. 497, 549-52 (1961) (Harlan, J., dissenting).

219 See text accompanying notes 409-10 infra.

220 The Court's decision that the state has a cognizable interest in potential life can be seen as a limitation on the woman's ability to make a judgment that abortion is morally justified. However, the state interest becomes compelling only at viability, when "the fetus ... presumably has the capability of meaningful life outside the mother's womb." Roe v. Wade, 410 U.S. 113, 163 (1973). Although the Court denied that a fetus was a "person" within the meaning of the fourteenth amendment, id. at 156-59, it allowed the state to step in to protect the rights of a potential person once live birth has become possible. Thus, the decision involves not a moral judgment on the justifiability of abortion, but rather an effort to protect

The essence of privacy is the notion that certain basic decisions about how one will conduct his or her life—whether on a day-to-day basis or in a long-term sense—are reserved to the individual. If the state wishes to make or restrict these decisions, it should have good reason for doing so. This does not mean that the presumption of constitutionality traditionally afforded state enactments need be discarded. It should mean, however, that the individual who has established that his privacy is infringed by government action will be allowed to assert that the state has no legitimate interest in regulating his conduct or that the enactment is not rationally related to the achievement of the state's purpose. A court should give serious consideration to such assertions in a privacy context. If a plaintiff or defendant can show that the statute will not in fact promote evident and legitimate state interests, the burden should be shifted to the state to identify its legitimate interests or to show that there is good reason to believe that the measure will in fact achieve its intended purpose. In other words, the court should use what has been termed a "means test" to determine whether the means chosen by the state are rationally related in fact to realization of a legitimate end.

If there is a direct conflict between a privacy right and governmental action that effectively promotes a legitimate goal, the court might inquire as to whether the state can achieve its purpose by means that do not prohibit or burden the exercise of the right. In other words, the court should determine whether the statute is unnecessarily overbroad. Since in this context rights are by definition nonfundamental, the court should consider the burden that a different form of regulation would impose on the state. If this burden is excessive, or if there is irreconcilable conflict between individual and state interests, the state should prevail.

Against this background, this Note will now turn to a discussion of issues in privacy litigation that have not been resolved by the Supreme Court. The first section examines some peripheral issues that have arisen with regard to established privacy rights in the area of family planning. Next, we consider several types of privacy rights that have not yet been acknowledged as such. Finally, we examine an important interest commonly confused with constitutional privacy rights.

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an entity that will have rights separate from the mother's once born. Cf. Tribe, supra note 16, at 21-29. Tribe argues that the question of when life begins is a "religious" one and is thus beyond the province of the state under the reasoning of the establishment clause. Id. at 21-25. This may be true in the abortion context because of the positions taken by organized religious groups. However, the question is at base a moral one and a person who does not belong to an organized church may hold strong opinions on it. Whether an individual has a right to make a given moral decision should not turn on the fortuitous circumstance that organized religions take or do not take an official position on the issue. Tribe also asserts that the abortion question changes at viability because of the presence of a being who can exist apart from the mother. His position on this issue is similar to, but more extensively developed than, the position assumed here. See id. at 26-29.

IV

THE RIGHT OF PRIVACY IN THE LOWER COURTS

Griswold was a puzzle for the state and lower federal courts. Its doctrinal origins were suspect, grounded as they were in "emanations," a "forgotten" amendment and substantive due process. But doctrine did not present a serious problem, since *Griswold* itself could always be cited as the source of the right of privacy. The greater problem, as just noted, lay in defining the right itself. A "zone of privacy" existed, but no one was sure of its dimensions.

Some courts, dismayed by the potential scope of *Griswold*, limited it strictly to its holding. Others assumed that the zone of privacy contained more than the right of a married couple to use contraceptives in their bedroom without state intrusion. The notions of home and family, personal autonomy, sexual intimacy and the right to be let alone all suggested paths that various courts eventually explored.

A. Family Planning

After *Griswold* and *Roe*, it is reasonably clear that the right of privacy, whatever its ultimate limits, subsumes the right to make and implement family planning decisions. Controversy has centered about the issues of how far the state can regulate exercise of the right and whether the individual can demand that the state facilitate exercise of the right.

1. Contraception

Neither *Griswold* nor *Eisenstadt* declared a constitutional right of access to contraceptives,[221] and the question to what extent the state may burden the right to use them remains technically unanswered. Nevertheless, it is clear from *Griswold* and *Roe* that the right of privacy embraces the basic right to decide to use them if access can be secured. Furthermore, *Eisenstadt* and *Roe* suggest that the state may restrict that right only in order to protect the health of its citizens and that a threat to health must be genuine. Thus, the Supreme Court's pronouncements have broad implications for future regulation.

None of the existing statutes distinguishes between contraceptives that may be dangerous to the health of the user and those that are not. Statutes that require an individual to secure a doctor's prescription before he or she can obtain contraceptives from a druggist[222] may well be invalid when applied to harmless devices. States which prohibit vending machine distribution would have to show that the contraceptives in question present a danger to health. Since many of the vending machine statutes clearly rest on the ground, stated or implied, that

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[221] Later Supreme Court citation of *Eisenstadt* suggests, however, that the Court recognizes it as an implied extension of privacy rights to cover access to contraceptives. See Paris Adult Theatre I v. Slaton, 413 U.S. 49, 65 (1973); Roe v. Wade, 410 U.S. 113, 129, 152-53 (1973); id. at 213 (Douglas, J., concurring).

[222] See statutes cited in note 165 supra.

contraceptives are "indecent articles,"[223] it may be difficult to justify them as health measures. An alternative argument that public display of contraceptives is somehow "obscene" seems foreclosed by the Supreme Court's obscenity decisions, which limit permissible regulation to communications that "depict or describe sexual conduct."[224]

Finally, it seems unlikely that a state statute could permissibly restrict distribution in order to prevent immoral conduct. The effect of any such statute, even if carefully drawn to avoid a disparity in penalties imposed by law, will always be potentially to punish fornication with pregnancy and the birth of an illegitimate child. Although it might be argued that such punishment is not inevitable, since a woman now has the right to an abortion, the decision whether she should undergo that trauma is reserved to her and not to government. More broadly, under *Roe* the state cannot penalize a woman for fornication by forcing her to make a private decision that she would otherwise not have had to make. If "immoral" conduct is to be punished, the state must punish it directly.

It is interesting to note that there has been very little litigation in this area after *Eisenstadt,* in spite of the vulnerability of many state statutes. Most of those who wish to use contraceptives have access to them. Because of population growth, state interest increasingly coincides with individual interest, so that severely restrictive laws may not be rigorously enforced. Nevertheless, the prevalence of abortion litigation indicates that some members of society do not have adequate access to contraceptive information and devices.[225] Perhaps it is time that more states took action to eliminate restrictions on these items[226] and to implement affirmative programs to inform and aid their citizens.

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223 See, e.g., Del. Code Ann. tit. 16, § 2501 (1953) (implied); Wis. Stat. Ann. § 450.11 (Supp. 1973) (stated). See also authorities cited in note 169 supra.

224 Miller v. California, 413 U.S. 15, 24 (1973).

225 One individual whose lack of access to contraceptives—and perhaps to other rights of privacy—may raise difficult problems is the minor. Some states supply minors with contraceptive information and devices regardless of parental consent. See Colo. Rev. Stat. Ann. § 66-32-2 (Supp. 1971); Georgia Code Ann. § 99-3103 (Supp. 1972). Some require consent. See Fla. Stat. Ann. § 381.382(5)(a)(4) (Supp. 1973). See also Note, Minors and Contraceptives: The Physician's Right to Assist Unmarried Minors in California, 23 Hastings L.J. 1486 (1972). Although minors have constitutional rights, see Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969); In re Gault, 387 U.S. 1 (1967), the extent to which these rights may be limited by the state either directly or indirectly through statutes authorizing parental controls remains problematical. Compare Doe v. Planned Parenthood, 29 Utah 2d 356, 510 P.2d 75 (1973), with In re P.J., 12 Crim. L. Rptr. 2549 (D.C. Super. Ct. Feb. 6, 1973). Examination of the precise nature of a minor's constitutional rights and permissible legislative limitations on them lies beyond the scope of this Note. For an analysis of some of the relevant issues, see R. Zuckerman, Abortion and the Constitutional Rights of Minors (A.C.L.U. Pamphlet July 1973).

226 Although the concern with access to contraceptives is not so substantial as it once was, the American Bar Association, at its 96th Annual Meeting, passed a resolution asking all states to repeal statutes restricting access to contraceptive information, services and supplies. 13 Crim. L. Rptr. 2438 (Aug. 15, 1973).

2. Abortion

In *Roe v. Wade,* the Supreme Court made it clear that a woman's decision to have an abortion is an aspect of the more general, constitutional right of privacy protected by the fourteenth amendment. The Court acknowledged, however, that the right can be restricted by the state in pursuit of its compelling interests in the potential life of the fetus and in the health of the mother. Although the decision was very explicit with regard to the extent of such restrictions, it left unanswered several questions about the doctor's role in the abortion decision, the potential interest of the putative father, and the ability of the woman to compel the state's cooperation in implementing her abortion decision.

During the first trimester of pregnancy, the task of protecting the woman's health is left to her personal physician, with whom she consults as to the advisability of abortion.[227] The precise nature of the doctor's role is one of the great mysteries of the *Roe* decision.[228] The Court clearly stated at one point that the right of privacy encompasses "a woman's decision whether or not to terminate her pregnancy."[229] Yet, other language used by the Court suggests that the decision to proceed is almost as much the doctor's as the patient's. The state may require that all abortions be performed by a physician.[230] The woman "will consider" with the doctor the personal, emotional, psychological, familial and physical factors involved in the decision.[231] The doctor will exercise his "best medical judgment" in considering these factors.[232] He may at his discretion decide to consult with other doctors.[233] Then, the doctor, "in consultation with his patient, is free to determine" that an abortion should be performed.[234] It appears from this language that the Court considered the "responsible physician" to be a restrictive influence on the woman's ability to make a private decision.[235] Although the doctor is to exercise his "medical" judgment, his own ethical beliefs will no doubt contribute to his "decision."[236] In actuality, this fact may not limit a woman's ability to obtain an abortion when she desires one, since there will undoubtedly be doctors who will be willing to perform

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227 410 U.S. at 163.

228 See Ely, supra note 4, at 922 & n.22; 13 Crim. L. Rptr. 2415 (Aug. 8, 1973) (report on address by Judge Harold Leventhal at the 96th Annual Meeting of the American Bar Association).

229 410 U.S. at 153.

230 Id. at 165.

231 Id. at 153.

232 Doe v. Bolton, 410 U.S. 179, 192 (1973).

233 Id. at 199.

234 Roe v. Wade, 410 U.S. 113, 163 (1973); see id. at 164-65.

235 This interpretation is strengthened by the concurring opinion of Chief Justice Burger, which states that the Court's opinion does not sanction "abortion on demand" because "the vast majority of physicians ... act only on the basis of carefully deliberated medical judgments relating to life and health." Id. at 208.

236 The Court, however, felt that fears of the doctor's imposing his beliefs on patients were baseless. Doe v. Bolton, 410 U.S. 179, 196-97 (1973).

abortions without imposing their own ethical views on their patients.[237] Nevertheless, the central role given to the doctor by the Court's dicta might place an unreasonable burden on the woman's right of privacy, if the Court intended to say that she must follow his judgment about the nonmedical aspects of the decision.[238] In practice, it means that she may have to consult several doctors before she finds one willing to carry out her decision. If she is poor or lives in a rural area, this will be a serious hardship. In theory, however, the doctor's role may be even more insidious, for it dilutes her constitutional right: although the "privacy" is hers, the decision is, to some undefined degree, shared.

Another limiting factor of uncertain dimension is the potential right of the putative father. In *Roe,* the Court mentioned that in some circumstances, certain states require the consent of the father of the embryo or the parents of the woman before an abortion will be performed. The Court declined to decide the nature of the father's rights, "if any exist in the constitutional context," since the issue had not been raised by the parties.[239] Since *Roe,* at least two courts have been faced squarely with this problem and both have found that the father's interest does not override the woman's constitutional right.

In *Coe v. Gerstein,*[240] two pregnant women, one married and the other an unmarried minor, and two doctors challenged a Florida statute that required a physician to obtain the husband's consent before performing an abortion on a married woman and parental consent before performing an abortion on an unmarried minor. Failure to do so constituted a misdemeanor.[241] The court reasoned that if the state cannot interfere directly to protect potential life or the mother's health before viability and the second trimester respectively, it cannot interfere on behalf of the father or the parents of the mother to protect the same interests.[242] The court also found that fathers and parents might be independently concerned with the abortion decision. The father's interest "in seeing his procreation carried full term is, perhaps, at least equal to that of the mother," and this interest may attach at conception. The parents' interest in their family as a "self-governing entity" should also be considered.[243] But since the statute did not distinguish between the latter personal interests which the father and parents might justifiably assert and interests in potential life and maternal health which the state could not permissibly "delegate" to them, the statute was invalid.[244] The court added that the father and the parents could press similar

237 Two-thirds of the doctors responding to a nationwide poll early in 1973 favored the decision in *Roe.* N.Y. Times, May 13, 1973, § 1, at 40, col. 3.

238 Cf. Tribe, supra note 16, at 37. Tribe does not frame the issue in terms of privacy, but in terms of associational rights and his own role analysis.

239 410 U.S. at 165 n.67.

240 Civil Action No. 72-1842 (S.D. Fla. Aug. 13, 1973) (three-judge court).

241 Fla. Stat. Ann. §§ 458.22(3), 458.22(6)(c) (Supp. 1973).

242 Civil Action No. 72-1842, at 4 (S.D. Fla. Aug. 13, 1973) (three-judge court).

243 Id. at 5.

244 Id. at 5-6.

claims on their own behalf but could not rely on the state to do it for them.[245]

The district court's decision seems ultimately valid, although its reasoning may be questioned. The interests in potential life and maternal health recognized, but limited, in *Roe* were asserted by the state on its own behalf through its statutes. The Florida consent statute, which carried a criminal penalty, recognized an additional state interest in family stability and in seeing that concerned parties are consulted in the abortion decision. Under *Roe,* the question is whether this interest is sufficiently compelling to warrant limiting a woman's right of privacy and it seems doubtful that it is. If the state cannot restrict a woman's right of privacy because of its direct concern for potential life itself until almost six months after conception, it probably cannot restrict that right throughout pregnancy because of its more peripheral concern for the emotional health of father and family.

This is not to say that the state may not recognize the personal interests of the father and the woman's parents and provide them with a means of asserting their rights in the courts. The state does not "delegate" an interest in maternal health, in potential life, in family privacy or in the father's procreation, but rather acknowledges that such interests exist independent of the state's own interests. Indeed, if the private parties have a constitutional right of privacy to be consulted about matters with which they are intimately and fundamentally concerned, it is at least arguable that the state must provide them with an opportunity to assert their rights in the courts.[246] The plaintiff in such a case would have the anomalous task of arguing that the state must intervene in a situation from which the state has otherwise been excluded because of its private and personal nature.

There are several ways in which the state might recognize the father's interest[247] by statute. For example, the state might provide him with a right to sue in tort for damages caused by a woman's failure to secure his consent to her abortion.[248] In such an action, the question would be whether his right is sufficiently powerful to override the woman's countervailing constitutional right to make her own decision

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245 Id. at 6-7.

246 The father would have a difficult time raising such a claim, since he would be alleging that state inaction in failing to provide him with a forum to assert his interests had deprived him of constitutional rights. However, he might try to bring an action in state court against the mother. If the court denied him a cause of action, he could sue in federal court under 28 U.S.C. § 1343(3) (1970) and 42 U.S.C. § 1983 (1970). Cf. Shelley v. Kraemer, 334 U.S. 1 (1948). For cases suggesting that state inaction may sometimes constitute state action, see Bell v. Maryland, 378 U.S. 226, 309-11 (1964) (Goldberg, J., concurring); Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961); Terry v. Adams, 345 U.S. 461, 473 (1953).

247 The discussion focuses on the father's interest for two reasons: first, his interest seems more direct than that of the woman's parents; second, the question of the constitutional rights of minors vis-à-vis their parents and others raises complex issues that are beyond the scope of this Note. See note 225 supra.

248 See Utah Code Ann. §§ 76-7-307, 76-7-308 (Supp. 1973).

to have an abortion. The primary interest of the father, which may be in opposition to that of the mother, is in seeing that "his procreation" is carried to full term. In this instance, he shares with the mother an interest, derived from privacy concepts, in deciding whether or not to raise and support a child.[249] Although it is difficult to balance the father's rights against the mother's, it seems clear that her right must predominate.[250] If his right is deemed equal to hers, if he can force her to choose between bearing a fetus to term or paying damages, he would by analogy be able to force her to undergo an abortion or to forego use of contraceptives in the same way. Since the constitutional right of privacy is an individual, not a group, right,[251] such compulsion through operation of a state statute is unconstitutional. In addition, as a matter of pure balancing, it seems evident that her interest in the basic decision is stronger than his. Both share an interest in potential life. But only she must undergo abortion or childbirth, either of which will be emotionally, psychologically and physically debilitating if performed against her will.

On the other hand, the state may be able to create a different kind of statutory cause of action which would recognize the father's interest. The Supreme Court has seen fit, at least in dictum, to suggest that a woman should accept a doctor's advice before undergoing abortion. By analogy, the state might require her to consult with the father of the fetus before deciding to have an abortion, at least if he can reasonably be assumed to be interested in the decision.[252] Such a statute would impinge less substantially on her right of privacy than a statute requiring consent and would also afford the father some protection. Alternatively, the state might provide a husband with a cause of action for divorce if his wife refused to bear him children. In any case, a statutory attempt to give effect to a man's right of privacy in this area must be narrowly drawn so as to restrict a woman's right to the least possible extent.

The difficulties a father may encounter in pressing a nonstatutory claim are revealed in *Jones v. Smith*,[253] in which a putative father asked for injunctive relief to prevent a woman, to whom he was not

249 Cf. Stanley v. Illinois, 405 U.S. 645 (1972). The father's interest in this context might be more compelling if he were seeking to make the woman undergo abortion. Since state statutes often place on the father, whether married or not, the primary responsibility for child support, he arguably has a stronger interest in the financial burden of child raising. See, e.g., N.Y. Family Ct. Act §§ 413-414 (McKinney Supp. 1973). But see R.I. Gen. Laws Ann. §§ 15-11-7, 33-15-1 (1969). This interest is perhaps counterbalanced by the fact that society holds the mother primarily responsible for the day-to-day task of raising a child.

250 Cf. Tribe, supra note 16, at 39-41.

251 See text accompanying notes 184, 197 supra.

252 Thus, if a pregnant woman is married and living with the father of the embryo, he will presumably retain an interest. If she is unmarried or separated from the father, her interest in termination will be greater and his will be less and, in some cases, virtually nonexistent. Cf. Tribe, supra note 16, at 41.

253 278 So. 2d 339 (Fla. App. 1973), petition for cert. filed, 42 U.S.L.W. 3434 (U.S. Jan. 21, 1974) (No. 73-1133).

married, from having an abortion. Without a statutory claim,[254] the plaintiff relied basically on contract theory. The court rejected his claims and stated in addition that his interest as a father was less compelling than the state's interests in maternal health and in potential life.[255] It is difficult to devise an alternative ground on which he might have sued.[256] Indeed, it seems that unless the state provides a putative father with a statutory cause of action, he will have a difficult time asserting his right. And, if he is given a statutory claim, it is likely to be subservient to a woman's more powerful privacy right.

In addition to raising interesting questions about the rights of doctors and potential fathers, the *Roe* decision has prompted other forms of litigation in the lower courts. Old state abortion laws[257] and new state abortion laws that attempted to evade the thrust of *Roe*[258] have been voided. New issues have been raised. The most interesting problems now facing the courts involve the questions of whether a woman can demand that a hospital provide facilities for her abortion[259] and that the cost of her operation be borne by the state through medical insurance.

The first question so far has turned on whether a hospital's refusal to perform abortions constitutes state action. Courts so far have found that a public hospital is a state actor required to perform abortions,[260] while a private hospital is not.[261] The second question was addressed by a

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254 The court implied that the criminal statute mentioned above in connection with *Gerstein* might provide a husband with a derivative civil action. Since the plaintiff was not married to the defendant, the issue was not considered in detail. Id. at 342.

255 Id. at 341.

256 Tort law seems to provide him with little relief, particularly since the woman can assert a defense based on exercise of constitutional rights. Cf. New York Times Co. v. Sullivan, 376 U.S. 254 (1964). If he believes his constitutional right of privacy has been infringed, he might try suing the woman and her doctor under 42 U.S.C. § 1985(3) (1970). But the Supreme Court has not as yet recognized actions against private parties under this section beyond situations involving the thirteenth amendment and the right to travel. See Griffin v. Breckenridge, 403 U.S. 88, 107 (1971); Comment, 47 N.Y.U.L. Rev. 584, 585 (1972). Furthermore, the Court has held that to come within section 1985(3), a conspiracy must be motivated by "some racial, or perhaps otherwise class-based, invidiously discriminatory animus." *Griffin*, supra at 102.

257 See, e.g., Doe v. Woodahl, 360 F. Supp. 20 (D. Mont. 1973); Henrie v. Derryberry, 358 F. Supp. 719 (N.D. Okla. 1973).

258 See Doe v. Rampton, 366 F. Supp. 189 (D. Utah 1973) (three-judge court); Doe v. Israel, 358 F. Supp. 1193 (D.R.I.), motion for stay pending appeal denied, 482 F.2d 156 (1st Cir. 1973).

259 For an argument that the state must provide access to abortion facilities based on alternative premises, see Tribe, supra note 16, at 47-50.

260 E.g., Nyberg v. City of Virginia, 361 F. Supp. 932 (D. Minn. 1973); see N.Y. Times, July 2, 1973, at 11, col. 1. As of the time this Note goes to print, of the decisions requiring public hospitals to perform abortions, only *Nyberg* has been published. The *Nyberg* court followed the reasoning of the First Circuit in a sterilization case, Hathaway v. Worcester City Hosp., 475 F.2d 701 (1st Cir. 1973), discussed in text accompanying notes 282-85 infra.

261 Doe v. Bellin Memorial Hosp., 479 F.2d 756, 759-62 (7th Cir. 1973);

three-judge court in *Klein v. Nassau County Medical Center*.[262] The medical center, a public hospital, ceased performing elective abortions for women who could not afford to pay for them when the State Commissioner of Social Services ruled in an administrative letter that such abortions were not "medically indicated" and thus were not covered by Medicaid payments. The court held that abortions were "necessary" medical care within the meaning of the federal Medicaid statute in the same sense that prenatal, obstetrical and post-partum services were "necessary" in the case of pregnancy.[263] Since state law did not distinguish between therapeutic and elective abortions, the Commissioner could not impose a different public policy in the administration of Medicaid payments. His attempt to do so denied indigent women equal protection since they alone would not have the resources to secure elective abortions.[264] Since the decision was rendered prior to *Roe*, the court did not base its holding on the constitutional right to have an abortion. However, a reference by the court indicated that if such a right were recognized, the state clearly could not burden it by providing Medicaid assistance for one type of abortion and not another. This in effect would force an indigent woman to forego a constitutionally sanctioned choice.[265]

3. Sterilization

The right to voluntary sterilization clearly falls within the bounds of the zone of privacy. As early as 1942, the Supreme Court held that the ability to procreate was "one of the basic civil rights of man."[266] *Griswold* and *Roe* have ensured that the ability to refrain from procreation and to exercise individual control over the timing of procrea-

Watkins v. Mercy Medical Center, 364 F. Supp. 799, 801 (D. Idaho 1973); see Allen v. Sisters of Saint Joseph, 361 F. Supp. 1212 (N.D. Tex. 1973) (sterilization); cf. S.D. Compiled Laws Ann. §§ 34-23A-14 to -15 (Supp. 1973).

262 347 F. Supp. 496 (E.D.N.Y. 1972) (three-judge court) (per curiam), vacated and remanded "in light of *Roe v. Wade* and *Doe v. Bolton*," 412 U.S. 925 (1973).

263 Id. at 500.

264 Id.

265 Id.

266 Skinner v. Oklahoma, 316 U.S. 535, 541 (1942). In *Skinner*, a statute which provided for the sterilization of "habitual criminals" was voided as a denial of equal protection in that it discriminated arbitrarily among various classes of convicts. The Supreme Court's citation of the case, however, suggests that the Court views it as establishing a right to control one's power of procreation. See Paris Adult Theatre I v. Slaton, 413 U.S. 49, 65-66 (1973); Roe v. Wade, 410 U.S. 113, 152, 159 (1973); Griswold v. Connecticut, 381 U.S. 479, 502 (1965) (White, J., concurring).

On the other hand, the Court has held that the state may decide to sterilize "feeble minded" persons, if procedural safeguards are observed. Buck v. Bell, 274 U.S. 200 (1927). Several states provide for this. E.g., Miss. Code Ann. §§ 41-45-1 to -19 (1972); Okla. Stat. Ann. tit. 43A, §§ 341-44 (1973); Utah Code Ann. §§ 64-10-1 to -14 (Supp. 1967). In view of the fact that such action impinges a right now recognized as constitutionally protected, *Buck* may be of questionable validity without a showing of a substantial state need.

tion is "fundamental" and constitutionally protected. Voluntary sterilization provides the individual with one means of exerting control over this basic aspect of his or her life.

Sterilization resembles both contraception and abortion. Yet, because it differs from each of them, it has generated a different kind of case law since 1965. In the first place, unlike either abortion or contraception, sterilization has in the past been neither prohibited by statute nor highly regulated.[267] In 1965, only one state—Connecticut—prohibited sterilization,[268] and one other—North Carolina—regulated it, by imposing a waiting period on the individual requesting sterilization and by requiring the consent of a spouse or parents in some circumstances and the concurrence of three doctors.[269] Second, like contraception, sterilization by and large prevents conception. Thus, it has not stirred the same type of controversy over potential life that has surrounded abortion. Finally, like abortion, sterilization is achieved through a medical procedure that is not normally performed in the home. Under *Roe,* this fact does not make the right to choose to be sterilized less an aspect of privacy, but it does mean that to enjoy the right, the individual must enlist the services of others. Litigation in this area has centered around the nature and extent of these services.

Although voluntary sterilization has been legal in virtually every state, the right to choose it as a method of birth control was not unburdened prior to *Griswold.* A person who wished to be sterilized did not have to risk criminal prosecution. Nevertheless, since public policy did not favor any restrictions on procreation, one who contracted to be sterilized found himself or herself subject to a lesser penalty: if the operation failed, he or she did not have the usual recourse in damages against the doctor who had performed it. Case law had established that there was no general policy against voluntary sterilization performed for reasons of health[270] or family planning.[271] However, when the operation failed and a child was conceived and born, courts refused on policy grounds to award damages for "the normal birth of a normal child."[272] They challenged the motives of plaintiffs in such suits and refused to acknowledge that there is no necessary conflict between loving an unplanned child and being damaged financially and emotionally by the overexpansion of a family unit.[273]

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[267] It has been suggested that the operation's legality, for whatever reasons, was assumed in most jurisdictions. Note, Sterilization and Family Planning, 56 Geo. L.J. 976, 977 n.8 (1968) [hereinafter Note, Family Planning].

[268] Conn. Gen. Stat. Ann. § 53-33 (1958) (repealed 1969). Conn. Gen. Stat. Ann. § 19-66(b) (Supp. 1973) now requires that the patient consent and that a doctor perform the operation.

[269] N.C. Gen. Stat. § 90-271 (Supp. 1965).

[270] See, e.g., Christensen v. Thornby, 192 Minn. 123, 125, 255 N.W. 620, 621 (1934).

[271] See, e.g., Shaheen v. Knight, 11 Pa. D. & C.2d 41, 43 (1957).

[272] See Christensen v. Thornby, 192 Minn. 123, 126, 255 N.W. 620, 622 (1934); Shaheen v. Knight, 11 Pa. D. & C.2d 41, 45 (1957).

[273] See Shaheen v. Knight, 11 Pa. D. & C.2d 41, 45-46 (1957). But cf. Note, Elective Sterilization, 113 U. Pa. L. Rev. 415, 435 (1965).

Although there were signs of a shift in attitude before *Griswold*,[274] the decision had a major impact on this form of litigation. In *Custodio v. Bauer*,[275] the court suggested that *Griswold* had made decisions like sterilization a matter of individual conscience, beyond state control. The court refused to set artificial limits upon the damages that plaintiffs might claim when a doctor did not perform his service adequately. They could seek the costs of the operation, the costs of pregnancy and birth, compensation for mental anguish, pain and suffering, and compensation for the loss of the mother's attention by other members of the family.[276] Other courts have followed the lead of *Custodio*, refining the theories of liability[277] and damages.[278] They have recognized *Griswold* as a source of a "constitutionally protected right not to have children."[279]

The other major issue in sterilization litigation concerns the extent to which the state may be compelled to aid its citizens in exercising this constitutionally protected right. Two recent cases suggest that persons who wish to be sterilized may in some circumstances compel the state, acting through public hospitals, to provide facilities for the operation. In *McCabe v. Nassau County Medical Center*,[280] a female plaintiff was denied a tubal ligation by a public hospital because hospital regulations required that a woman of her age have five children before such an operation would be performed. She alleged that the regulation invaded her marital privacy, imposed the religious beliefs of others upon her and denied her equal protection, and she sued for injunctive relief and damages. The hospital eventually withdrew its objection, performed the operation, and then moved to dismiss the complaint. Reversing the lower court's dismissal, the Second Circuit held that the issue was not moot, since plaintiff had stated a colorable claim for damages under section 1983.[281]

The second decision actually established a plaintiff's right to compel performance of the operation. In *Hathaway v. Worcester City Hospital*,[282] the First Circuit held that a public hospital which has undertaken to provide short-term medical care, including operations

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274 See Ball v. Mudge, 64 Wash. 2d 247, 391 P.2d 201 (1964).

275 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967).

276 Id. at 323-26, 59 Cal. Rptr. at 476-78.

277 See Jackson v. Anderson, 230 So. 2d 503 (Fla. App. 1970). For a discussion of the various forms such actions can take, see Note, Family Planning, supra note 267, at 985-90; Annotation—Malpractice—Sterilization, 27 A.L.R.3d 906, 911-16 (1967).

278 See Coleman v. Garrison, 281 A.2d 616, 617-19 (Del. Super. 1971); Troppi v. Scarf, 31 Mich. App. 240, 250-62, 187 N.W.2d 511, 518-21 (1971) (involving negligent failure to fill birth control pill prescription correctly). The damage issue in this area can become even more complex. See Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967) (denial of cause of action for doctor's negligent failure to warn before birth of defective child).

279 Coleman v. Garrison, 281 A.2d 616, 618 (Del. Super. 1971). See also Troppi v. Scarf, 31 Mich. App. 240, 246, 254, 187 N.W.2d 511, 513, 517 (1971).

280 453 F.2d 698 (2d Cir. 1971).

281 42 U.S.C. § 1983 (1970).

282 475 F.2d 701 (1st Cir. 1973).

comparable to sterilization in terms of the facilities and skill required for performance, "may not constitutionally draw the line at medically indistinguishable surgical procedures that impinge on fundamental rights."[283] The court found that under state law, the trustees of the hospital would normally have the discretion to decide whether or not to perform a given operation that came within the bounds of their enabling statute.[284] However, citing *Eisenstadt* and *Roe*, the court held that the right to choose to be sterilized was a fundamental interest of the individual, which had to be protected from undue state restrictions.[285] Although the state had a valid interest in the individual's health, that interest was not greater than its interest when comparable operations were performed and certainly was not so great as the state interest asserted in *Roe*. The hospital could not refuse to perform the operation if it performed similar procedures, such as appendectomies.

The *Hathaway* decision is of great importance in that it assures the individual that his or her fundamental personal decision not to procreate will be effected. In this way, it is similar to an action that would compel a state to provide reasonable access to contraceptives. It may also have broader ramifications. In states that have established public health facilities to provide family planning services at little or no cost or insurance programs to cover medical procedures, individuals may justifiably assert that the state must not only provide them with facilities, but also pay for the procedure.[286] This would be of particular importance to indigent persons, who derive little benefit from making the decision to use contraceptives, to be sterilized or to have an abortion if they cannot afford to implement their choice.

If such facilities are provided and paid for, however, procedures must be carefully administered so as not to impinge upon constitutional rights by imposing services that are not desired. A few states have written into their statutes provisions designed to insure that no person will be coerced into accepting advice or services he does not wish to receive.[287] Such strictures should be observed in order to avoid the type of incident that recently occurred in Alabama, where officials of a family planning clinic ordered two girls, aged 12 and 14, sterilized because "boys were hanging around" them.[288] A class action suit was filed by the girls, based in part on a claim of invasion of constitutional

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283 Id. at 706.

284 Id. at 704.

285 Id. at 705-06.

286 Cf. Klein v. Nassau County Medical Center, 347 F. Supp. 496 (E.D.N.Y. 1972) (three-judge court) (per curiam), vacated and remanded, 412 U.S. 925 (1973); Jessin v. County of Shasta, 274 Cal. App. 2d 73, 79 Cal. Rptr. 359 (1969); text accompanying notes 262-65 supra.

287 Ga. Code Ann. § 99-3105 (Supp. 1972); Ore. Rev. Stat. § 435.215 (Supp. 1971). Other states protect the right of an advisor or hospital to refuse for various reasons to provide such advice or services. Fla. Stat. Ann. § 381.382 (1973); N.J. Rev. Stat. § 30:11-19 (1971); Ore. Rev. Stat. § 435.225 (1971).

288 N.Y. Times, June 28, 1973, at 14, col. 2.

privacy and failure to provide adequate procedural safeguards to prevent such incidents.[289]

Sterilization cases reveal the degree to which *Griswold* has had an effect as cause, catalyst or reflection of a decided shift in public policy. Contraception and other forms of family planning are no longer viewed as immoral or unhealthy. Instead, the right to make family planning decisions is constitutionally protected, to the extent that it must be fostered by the state. The next section will deal with a related, but slightly different, issue: the extent to which the state can burden one's right to become pregnant and bear a child.

4. Pregnancy

It seems evident that if the right to choose not to bear a child is constitutionally protected as an aspect of privacy, the right to choose to bear a child is similarly protected. Encouragement of childbirth is rooted in our history. Nevertheless, the decision to exercise this right has not been unburdened. Society imposes many disabilities upon women who are pregnant or who have the capacity to become pregnant.[290] A prominent example of such disabilities is the fact that a woman who becomes pregnant commonly has been required to leave her job at a point early in pregnancy and often has not been assured of reemployment after the birth of her child. In a few recent cases, women so deprived by the state as an employer have asserted that the state cannot deny them a benefit simply because they are exercising a constitutional right of privacy.[291]

The claims have been made in two contexts: by women discharged from the military and by women fired or forced to take leaves of absence from teaching school. Aside from the fact that the courts seem to show somewhat more deference to the military than to school boards, the decisions are very similar. One court, in a decision rendered prior to *Roe,* refused to recognize that any privacy right was involved in the matter.[292] The more common approach was to state simply that a woman had a right to bear a child but not a right to be a teacher or an Air Force officer at the same time.[293]

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289 Complaint at 16-17, Relf v. Weinberger, Civil Action No. 1557-73 (D.D.C., filed July 31, 1973).

290 See Cary, Pregnancy Without Penalty, 1 Civil Liberties Rev. 31 (1973).

291 In this area, a more commonly raised claim is that the state has made an impermissible, sex-based classification that does not bear a rational relationship to a permissible state goal. See, e.g., Green v. Waterford Bd. of Educ., 473 F.2d 629 (2d Cir. 1973); LaFleur v. Cleveland Bd. of Educ., 465 F.2d 1184 (6th Cir. 1972), cert. granted, 411 U.S. 947 (1973).

292 Struck v. Secretary of Defense, 460 F.2d 1372, 1376 (9th Cir. 1972), vacated and remanded for consideration of mootness, 409 U.S. 1071 (1973).

293 Green v. Waterford Bd. of Educ., 349 F. Supp. 687, 691-92 (D. Conn. 1972), rev'd, 473 F.2d 629 (2d Cir. 1973) (teacher); Gutierrez v. Laird, 346 F. Supp. 289, 293 (D.D.C. 1972) (Air Force officer). See also Houston v. Prosser, 361 F. Supp. 295 (N.D. Ga. 1973). The court in *Houston* held that a school board could require a student who had borne an illegitimate child to attend school at night rather than during the day. The court recognized a privacy interest, but found it

Only one court made a serious attempt to separate out the relevant aspects of the issue. In *Robinson v. Rand*,[294] a pregnant WAF challenged a mandatory discharge regulation. The court reasoned that a woman, like a man, may have a basic interest in having both a family life and a career. This individual interest was strong enough to compel the court to examine the Air Force's reasons for discharge carefully. The service's interest in a simplified procedure that would be efficient and would save money was not sufficient to override a woman's rights. On the other hand, the Air Force was validly concerned with the pregnant woman's inability to perform her job adequately in a combat zone. The court found that a less onerous means of achieving its goals was available to the Air Force: it could transfer the woman from hazardous assignments during her pregnancy, but could not discharge her.[295]

The *Robinson* court's analysis seems preferable to the analysis of other courts in that it attempts to isolate the important interests at stake. There is no doubt that by firing a woman for pregnancy, the state impinges on her right of privacy. If it imposes a mandatory maternity leave, it impinges less seriously, but does so nonetheless. The question is whether the state is justified in imposing such restrictions in pursuit of legitimate goals like protection of the woman's health and that of her child and assuring her efficient performance of her job, whether military or educational. Such interests do not become "compelling" until the woman's health and efficiency are truly impaired. Since this impairment will vary from individual to individual, the effect is to require the state to proceed on a case-by-case basis.

Equal protection analysis may produce the same result, on the rationale that there is no valid reason for distinguishing between pregnant women and others, male or female, who may suffer temporary medical disabilities.[296] The advantage of a privacy claim is that in this context—where family planning is involved—the individual's right is "fundamental" and the state must show a compelling interest to override it. Since sex is not yet a suspect classification,[297] courts faced with an equal protection argument have used the "rational basis" test, which leaves a great deal of discretion to the individual court.[298] Perhaps the best approach is to combine the two claims, arguing that the right of privacy, including a decision to have a child, is a fundamental, consti-

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had not been infringed. The state's interest in protecting other students from the "precocious" plaintiff was sufficient to justify the rule.

294 340 F. Supp. 37 (D. Colo. 1972).

295 Id. at 40-41.

296 See, e.g., Green v. Waterford Bd. of Educ., 473 F.2d 629 (2d Cir. 1973). See also Note, Pregnancy Discharges in the Military: The Air Force Experience, 86 Harv. L. Rev. 568, 588-93 (1973).

297 See Frontiero v. Richardson, 411 U.S. 677 (1973) (four of nine justices held sex a suspect classification); Reed v. Reed, 404 U.S. 71 (1971).

298 Compare Cohen v. Chesterfield County School Bd., 474 F.2d 395 (4th Cir.), cert. granted, 411 U.S. 947 (1973), with Green v. Waterford Bd. of Educ., 473 F.2d 629 (2d Cir. 1973), and LaFleur v. Cleveland Bd. of Educ., 465 F.2d 1184 (6th Cir. 1972), cert. granted, 411 U.S. 947 (1973).

tutionally protected interest, so that a state classification impinging upon that right must promote a compelling state interest to be valid.[299]

This argument was successful in *Buckley v. Coyle Public School System,*[300] where a court held that mandatory termination of employment after six months of pregnancy violated a woman's right of privacy by requiring her to choose between employment and pregnancy, "curtailing her interest in having a child."[301] She might not have a right to public employment, but did have a right to be free of unconstitutional conditions on her employment. The state had to have a compelling interest to burden her right of privacy.[302]

The rights discussed in these sections—to bear a child, to prevent conception, to have an abortion—are aspects of the constitutional right of privacy. They derive much of their content from that part of *Griswold* which protected the individual's ability to make fundamental, autonomous decisions about his or her personal life. In the following sections, we will discuss rights which have not as yet received protection as aspects of privacy.

B. Private Sexual Behavior

Anglo-American tradition, grounded in the Bible[303] and various early English laws,[304] has long viewed deviate and extramarital sexual behavior as proper subjects for governmental regulation. Nearly every state retains laws prohibiting forms of private, consensual sexual behavior, including fornication, adultery, sodomy, perversion and cohabitation.[305] The validity of these laws, once unquestioned, has become a

299 See San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 29, 31-32, 33-34 (1973) (only rights protected by the Constitution are fundamental interests requiring strict scrutiny).

300 476 F.2d 92 (10th Cir. 1973).

301 Id. at 96.

302 Id.

303 See Leviticus 18:21-23, 20:13; Deuteronomy 23:18 (Rev. Standard Version).

304 E.g., 5 Eliz. 1, c. 17 (1562); 25 Hen. 8, c. 6 (1533); see 4 W. Blackstone, Commentaries ** 215-16.

305 Fornication statutes proscribe heterosexual intercourse between unmarried individuals. E.g., Idaho Code § 18-6603 (1948); N.J. Rev. Stat. § 2A:110-1 (1969). Adultery statutes generally forbid sexual intercourse between individuals at least one of whom is married. E.g., S.D. Comp. Laws Ann. §§ 22-22-17 to -18 (1969). Some states only prohibit adultery and fornication if the illicit relationship is continuous —a single act is not criminal. E.g., Wyo. Stat. Ann. § 6-86 (1959); see Kennedy v. State, 470 P.2d 372 (Wyo. 1970), cert. denied, 401 U.S. 939 (1971). Sodomy statutes, by their terms or by interpretation, often cover a broad range of activities: heterosexual or homosexual anal intercourse, fellatio, cunnilingus and bestiality. E.g., N.M. Stat. Ann. § 40A-9-6 (1972). Most state statutes do not distinguish between consensual and forcible sodomy. E.g., Iowa Code Ann. § 705.1-.2 (1950) (defining sodomy as "carnal copulation in any opening of the body except sexual parts"); R.I. Gen. Laws Ann. § 11-10-1 (1970) (defining sodomy as the "abominable and detestable crime against nature," punishable by seven to 20 years); see State v. Milne, 95 R.I. 315, 187 A.2d 136 (1962), appeal dismissed, 373 U.S. 542 (1963) (construes Rhode Island statute as covering consensual fellatio). The Rhode Island statute's failure to discriminate between consensual sodomy and homosexual

prime subject for judicial concern. Courts have been entertaining contentions that state sex laws are vague,[306] prescribe cruel and unusual punishments[307] and violate the establishment clause.[308] But the primary tactical weapon in the new war against state sex laws is the right of privacy.

1. Challenges to Criminal Statutes

After *Griswold,* many commentators and litigants assumed that the rationale of the right of privacy would protect private sexual behavior and require the state to demonstrate overriding justifications for all laws criminalizing such behavior.[309] But the numerous adjudications testing this assumption—mostly challenges to state laws proscribing sodomy and fornication—have left few tangible results in their wake. Only a very few decisions have led to the invalidation or narrowing of state laws. And, since most courts managed to circumvent the issue, only

rape means that anyone who is prosecuted for any homosexual act is subjected to a seven-year *minimum* penalty. Some states deal with "perversions" or "unnatural or lascivious acts" in separate statutes with lighter penalties than the sodomy statutes. Compare Ariz. Rev. Stat. Ann. § 13-651 (Supp. 1972) (sodomy, punishable by five to 20 years imprisonment), with id. § 13-652 ("lewd or lascivious acts," punishable by one to five years). Several states have recently redrafted their statutes to decriminalize consensual sodomy, e.g., [1971] Oregon Laws c. 743, § 432, or to provide lighter penalties where the participation of both parties was voluntary, e.g., Minn. Stat. Ann. § 609.293(5) (Supp. 1973); Pa. Stat. Ann. tit. 18, § 3124 (1972).

Because legislators have generally approached sex crimes with exceeding delicacy, many state statutes are amazingly vague and could be interpreted as overlapping a great deal. For example, most adultery statutes do not specify that adultery can only be committed between members of the opposite sexes. E.g., Me. Rev. Stat. Ann. tit. 17, § 101 (1965). Thus, homosexual adultery might be punishable under both the adultery and the sodomy statutes. For an extensive discussion of the problem of vagueness in sodomy statutes, see W. Barnett, Sexual Freedom and the Constitution 21-39 (1973).

[306] See, e.g., Harris v. State, 457 P.2d 638 (Alas. 1969); State v. Jones, 8 Ariz. App. 381, 446 P.2d 487 (1968); Franklin v. State, 257 So. 2d 21 (Fla. 1971); People v. Haggerty, 27 Mich. App. 594, 183 N.W.2d 862 (1970); State v. Crawford, 478 S.W.2d 314 (Mo.), appeal dismissed, 409 U.S. 811 (1972); Hogan v. State, 84 Nev. 372, 441 P.2d 620 (1968); Jones v. State, 55 Wis. 2d 742, 200 N.W.2d 587 (1972).

[307] See, e.g., State v. Phillips, 102 Ariz. 377, 430 P.2d 139 (1967); People v. Roberts, 256 Cal. App. 2d 488, 64 Cal. Rptr. 70 (1967); People v. Stevenson, 28 Mich. App. 538, 184 N.W.2d 541 (1970); State v. Stubbs, 266 N.C. 295, 145 S.E.2d 899 (1966).

[308] See, e.g., State v. Trejo, 83 N.M. 511, 512, 494 P.2d 173, 176 (1972) (dissenting opinion); State v. Rhinehart, 70 Wash. 2d 649, 424 P.2d 906, cert. denied, 389 U.S. 832 (1967); Note, Private Consensual Adult Behavior: The Requirement of Harm to Others in the Enforcement of Morality, 14 U.C.L.A.L. Rev. 581, 600-01 (1967).

[309] See Barnett, supra note 305, at 52-69; Doss & Doss, On Morals, Privacy, and the Constitution, 25 U. Miami L. Rev. 395, 401-03 (1971); Emerson, supra note 32, at 231-33; Note, The Bedroom Should Not Be Within the Province of the Law, 4 Calif. W.L. Rev. 115, 123 (1968) [hereinafter Note, Bedroom]; Project, The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement and Administration in Los Angeles County, 13 U.C.L.A.L. Rev. 643, 647 n.3 (1966) [hereinafter U.C.L.A. Project].

a few decisions provide any guidance in analyzing whether or not private sexual behavior is protected by the right of privacy.

One reason for the stunted growth of the right of privacy in this area is that the courts are seldom faced with proper litigants to raise privacy arguments. Under the doctrine of ripeness, as enunciated in *Poe v. Ullman*,[310] a constitutional challenge to a state criminal law may generally be brought only by persons who have been prosecuted under that law. Private, consensual, adult sexual behavior is only rarely prosecuted.[311] Conversely, the courts have held that those most often prosecuted—persons who have committed acts involving force, children or public exposure—have no standing to raise an overbreadth argument premised on the privacy rights of others.[312]

Litigants with justiciable claims have had to overcome other threshold problems before a court would seriously entertain a privacy argument. The authors of the three concurring opinions in *Griswold* stated explictly that the decision was not meant to interfere with the state's "proper regulation of sexual promiscuity or misconduct."[313] A number of courts viewed these dicta as dispositive and refused to engage in any independent analysis.[314] Some courts insisted that *Griswold* and the right of privacy were simply inapposite to a claim of sexual privacy.[315] Others viewed *Griswold* as a case protecting marriage because it is a noble activity and announced that sodomy is not noble but repulsive.[316] Still others thought that the privacy argument being urged upon them sounded suspiciously like the Model Penal Code recommendations,[317]

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310 367 U.S. 497, 501-09 (1961).

311 See Note, Bedroom, supra note 309, at 126; Note, The Crimes Against Nature, 16 J. Pub. L. 159, 171-75 (1967); Note, Sodomy Statutes—A Need for Change, 13 S.D.L. Rev. 384, 395-96 (1968).

312 See United States v. Brewer, 363 F. Supp. 605, 608-10 (M.D. Pa. 1973); Polk v. Ellington, 309 F. Supp. 1349, 1351-52 (W.D. Tenn. 1970); Raphael v. Hogan, 305 F. Supp. 749, 756 (S.D.N.Y. 1969); Towler v. Peyton, 303 F. Supp. 581, 582-83 (W.D. Va. 1969); Harris v. State, 457 P.2d 638, 648 (Alas. 1969); Dixon v. State, 256 Ind. 266, 269-70, 268 N.E.2d 84, 86 (1971); Hughes v. State, 14 Md. App. 497, 503, 287 A.2d 299, 304, cert. denied, 409 U.S. 1025 (1972); Jones v. State, 85 Nev. 411, 414, 456 P.2d 429, 430 (1969); State v. Kasakoff, 84 N.M. 404, 503 P.2d 1182 (Ct. App. 1972); Washington v. Rodriguez, 82 N.M. 428, 431, 483 P.2d 309, 312 (Ct. App. 1971); Warner v. State, 489 P.2d 526, 528 (Okla. Crim. App. 1971).

313 381 U.S. at 498-99 (Goldberg, J., concurring, joined by Warren, C.J. & Brennan, J.); see id. at 505 (White, J., concurring); Poe v. Ullman, 367 U.S. 497, 546, 553 (Harlan, J., dissenting).

314 People v. Drolet, 30 Cal. App. 3d 207, 212, 105 Cal. Rptr. 824, 826-27 (1973); Hughes v. State, 14 Md. App. 497, 505 & n.7, 287 A.2d 299, 304 & n.7, cert. denied, 409 U.S. 1025 (1972); State v. Lutz, 57 N.J. 314, 315, 272 A.2d 753 (1971).

315 People v. Roberts, 256 Cal. App. 2d 488, 495, 64 Cal. Rptr. 70, 74 (1967); State v. Barr, 110 N.J. Super. 365, 367-68, 265 A.2d 817, 818-19 (1970).

316 People v. Frazier, 256 Cal. App. 2d 630, 631, 64 Cal. Rptr. 447 (1968); Pruett v. State, 463 S.W.2d 191, 195 (Tex. Crim. App. 1970), appeal dismissed, 402 U.S. 902 (1971).

317 See Model Penal Code § 207.1, Comment at 207 (Tent. Draft No. 4, 1955).

and declined to consider what they thought to be a legislative question.[318]

Many litigants were stymied by the language of *Griswold* itself. Most courts were understandably prone to interpret *Griswold* as a case involving only *marital* privacy. These courts were unwilling to entertain arguments by unmarried plaintiffs that statutes were overbroad for infringing marital privacy, and unwilling to extend the protection of the right of privacy to unmarried persons.[319] While this now questionable limitation[320] led to many facile rejections of the claim that the right of privacy encompasses all private sexual behavior, it did prompt an extension of *Griswold*'s protection. In *Cotner v. Henry*,[321] a court was confronted for the first time with a marital privacy argument in a justiciable context; Charles Cotner had actually been prosecuted for an act of sodomy with his wife. The Court of Appeals for the Seventh Circuit declared that "[t]he import of the *Griswold* decision is that private, consensual, marital relations are protected from regulation by the state through the use of a criminal penalty."[322] The court thus held that a state could not constitutionally prosecute a married person for a consensual act of sodomy involving his spouse.[323]

The court apparently found the decision an easy one and did not articulate any analysis of the right involved. Rather, the opinion relied upon the superficial resemblance of the *Griswold* and *Cotner* situations. The language in *Griswold* exalting the marital bedroom[324] as sacred and inviolable was directly applicable. Yet the Seventh Circuit did work a theoretical expansion of the right of privacy by holding that a new type of behavior—the private, consensual, deviate sexual activities of married adults—is protected by the right of privacy. The court did not strike the state sodomy law as overbroad, but rather gave the state courts a chance to construe the statute so as to exempt married couples from its prohibition.[325] Thus, the court limited the effect of the decision, as well as its rationale, to married couples.

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[318] State v. Barr, 110 N.J. Super. 365, 369, 265 A.2d 817, 819 (1970).

[319] See Polk v. Ellington, 309 F. Supp. 1349, 1353 (W.D. Tenn. 1970); Dixon v. State, 256 Ind. 266, 269-70, 268 N.E.2d 84, 86 (1971); Hughes v. State, 14 Md. App. 497, 503-05, 287 A.2d 299, 304, cert. denied, 409 U.S. 1025 (1972); Jones v. State, 85 Nev. 411, 414, 456 P.2d 429, 430 (1969); Washington v. Rodriguez, 82 N.M. 428, 431, 483 P.2d 309, 312 (Ct. App. 1971); Warner v. State, 489 P.2d 526, 528 (Okla. Crim. App. 1971).

[320] See Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438, 453-54 (1972); text accompanying notes 183-84, 197 supra.

[321] 394 F.2d 873 (7th Cir.), cert. denied, 393 U.S. 847 (1968).

[322] Id. at 875 (footnote omitted).

[323] Id. at 876.

[324] 381 U.S. at 485.

[325] Under *Griswold* Indiana courts could not interpret the statute constitutionally as making private consensual physical relations between married persons a crime absent a clear showing that the state had an interest in preventing such relations, which outweighed the constitutional right to marital privacy.

394 F.2d at 875.

The decision in *Cotner* was met with critical approval[326] and was tentatively accepted as a valid but distinguishable precedent by a number of courts.[327] Some courts seemed to accept the idea that the state cannot proscribe such behavior for married couples, but continued to reject overbreadth arguments and declined to take any action to narrow or invalidate existing statutes when the petitioners before them were, as was most usual, not married couples.[328] One exception to this conservative trend was the activist three-judge court in *Buchanan v. Batchelor*,[329] which allowed a married couple to intervene in the sodomy prosecution of a homosexual,[330] and then struck the entire Texas sodomy law as overbroad for potentially infringing the intervenors' constitutional rights. The court insisted that such a course of action "in no way interfere[d] with a State's proper regulation of sexual promiscuity or misconduct."[331] The court also seemed attracted to a broader rationale than that of the *Cotner* court: "Absent some demonstrable necessity, matters of (good or bad) taste are to be protected from state regulation."[332] By invalidating the entire sodomy law, the *Buchanan* court protected the good or bad taste of everyone who engaged in deviate sexual behavior—not just married persons—at least until the Texas legislature could pass a new, narrower statute.[333] Thus, the practical implications of the *Buchanan* decision reached beyond the holding.

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326 See, e.g., Note, The Cotner Case: Indiana Witch Hunt, 2 Ind. Legal F. 336 (1969); Comment, 23 U. Miami L. Rev. 231, 233 (1968).

327 See Raphael v. Hogan, 305 F. Supp. 749, 756 (S.D.N.Y. 1969); Towler v. Peyton, 303 F. Supp. 581, 582-83 (W.D. Va. 1969); Jones v. State, 85 Nev. 411, 414, 456 P.2d 429, 430 (1969).

328 See, e.g., Lovisi v. Slayton, 363 F. Supp. 620, 628-29 (E.D. Va. 1973); Polk v. Ellington, 309 F. Supp. 1349, 1353 (W.D. Tenn. 1970); Dixon v. State, 256 Ind. 266, 269-71, 268 N.E.2d 84, 86 (1971). But see State v. Lair, 62 N.J. 388, 396-97, 301 A.2d 748, 753 (1973), where the New Jersey Supreme Court declared that the state sodomy law could not constitutionally be applied to married couples, while refusing relief to the unmarried defendant who had raised the overbreadth argument.

329 308 F. Supp. 729 (N.D. Tex. 1970) (three-judge court), vacated and remanded on other grounds sub nom. Wade v. Buchanan, 401 U.S. 989 (1971).

330 The state argued that the married couple failed to satisfy the requirements of standing and ripeness, since no married couple had been prosecuted under the state statute. See Poe v. Ullman, 367 U.S. 497, 501-09 (1961). The *Buchanan* court thought the married couple's fear of prosecution sufficient to confer standing. 308 F. Supp. at 735.

331 308 F. Supp. at 733.

332 Id.

333 Vehement opposition to this creative, interventionist approach was evidenced by a Texas state court in Pruett v. State, 463 S.W.2d 191, 193, 197 (Tex. Crim. App. 1970), appeal dismissed, 402 U.S. 902 (1971). The state court refused to follow *Buchanan* and upheld the sodomy conviction of an unmarried defendant under the law the *Buchanan* court had declared void. The court disagreed with the conclusion that the zone of privacy could be extended to cover such "offensive" practices. Since no married couple had ever been prosecuted under the Texas sodomy law, and since such prosecutions seemed unlikely, the court did not find it necessary to reach the issue of whether or not such a prosecution would be constitutional. Id. at 193-94; accord, Hughes v. State, 14 Md. App. 497, 504-05, 287 A.2d 299, 304, cert. denied, 409 U.S. 1025 (1972).

There has not been much disagreement about the "marital privacy" premise of *Cotner*. The only open question about marital privacy was whether that rationale could support an overbreadth argument. That issue now seems to be settled, since every court but *Buchanan* has rejected the idea that an entire statute can be struck if it potentially applies to married couples. Thus, the only real effect of the *Cotner* line of reasoning has been to protect a class of persons who, since they are virtually never prosecuted, scarcely need the benefit of a constitutional ruling.

More troublesome for the courts has been the claim that the right of privacy also protects the private sexual behavior of unmarried persons. While justiciability was in this context too a substantial obstacle to a determination on the merits, more courts were approached by litigants who were being prosecuted on the basis of the very activities for which they claimed constitutional protection. Usually these courts were content to distinguish *Griswold* privacy in one of the facile ways discussed above,[334] and thus upheld challenged statutes. A handful of judges, almost always in dissent, concluded that the right of privacy should protect the right of all adults to engage in private, consensual sexual behavior, and thus would have invalidated state sex laws.[335] These judges generally were no more helpful in framing an analysis of the issue than those who cavalierly dismissed the argument. Virtually all of them focused on what they viewed as the state's lack of interest in preventing private sexual behavior, rather than on the nature of the activity involved.[336] The state's interest, or lack of interest, should not compel any conclusions about whether or not an affirmative constitutional right is at stake.

One judge on the District of Columbia Superior Court has offered a series of reasons for affording constitutional protection to private sexual behavior: the right to control the use and function of one's own body,[337] the intimate nature of sexual activity,[338] and the idea that the

The Supreme Court vacated *Buchanan* for reconsideration in light of its recent decision in Younger v. Harris, 401 U.S. 37 (1971), that a federal court may not enjoin a pending state criminal prosecution. Wade v. Buchanan, 401 U.S. 989 (1971).

334 See text accompanying notes 314-19 supra.

335 Lovisi v. Slayton, 363 F. Supp. 620 (E.D. Va. 1973) (Merhige, J.); United States v. Doe, 12 Crim. L. Rptr. 2531 (D.C. Super. Ct. Feb. 21, 1973) (Halleck, J.); United States v. Moses, 12 Crim. L. Rptr. 2198 (D.C. Super. Ct. Nov. 3, 1972) (Halleck, J.); State v. Silva, 53 Hawaii 232, 242, 491 P.2d 1216, 1222 (1971) (Levinson, J., dissenting in part); Miller v. State, 256 Ind. 296, 302, 268 N.E.2d 299, 303 (1971) (DeBruler & Prentice, JJ., dissenting); Dixon v. State, 256 Ind. 266, 272, 268 N.E.2d 84, 87 (1971) (DeBruler & Prentice, JJ., dissenting); State v. Trejo, 83 N.M. 511, 513, 494 P.2d 173, 175 (1972) (Sutin, J., dissenting); cf. Harris v. State, 457 P.2d 638, 648 (Alas. 1969).

336 State v. Silva, 53 Hawaii 232, 242, 491 P.2d 1216, 1222 (1971) (dissenting opinion); State v. Trejo, 83 N.M. 511, 513, 515, 494 P.2d 173, 177 (1972) (dissenting opinion).

337 United States v. Doe, 12 Crim. L. Rptr. 2531, 2532 (D.C. Super. Ct. Feb. 21, 1973); United States v. Moses, 12 Crim. L. Rptr. 2198, 2199 (D.C. Super. Ct. Nov. 3, 1972).

338 United States v. Doe, 12 Crim. L. Rptr. 2531, 2532 (D.C. Super Ct. Feb. 21, 1973).

right of privacy shields a consenting individual's unorthodox activity from governmental scrutiny.[339] In discussing what interests the state might have to justify sodomy and solicitation laws, he noted first that the behavior is harmless,[340] second that according to the Kinsey Report, homosexual behavior is not even distasteful to a majority of persons,[341] and third that the government's failure to prosecute sodomy laws against consensual, private homosexual acts is sure proof that there is no compelling governmental interest in criminalizing such behavior.[342] Thus, he invalidated a District of Columbia solicitation statute,[343] and narrowly construed the sodomy statute so as to exempt private, consensual behavior.[344]

The most perceptive discussion to date of the right of privacy as applied to private sexual behavior took place in one of the most recent cases. The court in *Lovisi v. Slayton*[345] was faced with a habeas corpus challenge to a conviction for sodomy under Virginia law. A husband and wife had engaged in private, consensual acts of sodomy with a third party. Prosecution was precipitated when the couple's children found photographs of these activities which the parents had taken and left lying around the house. The district judge accepted *Roe v. Wade*'s "candid approach" to substantive due process and declared that the due process clause protects fundamental human values "implicit in the concept of ordered liberty."[346] His conclusion that the private sexual behavior of husband and wife is a fundamental right was based directly on *Griswold*'s proclamation of the sanctity of the marital relationship. Thus, the broad Virginia sodomy law "doubtless threatens an invasion of the right of privacy" because it would apply to private, marital acts.[347] The court also concluded that the marital-nonmarital distinction was no longer viable after *Eisenstadt v. Baird*, and therefore thought that the sodomy law could not constitutionally be applied to any private, consensual, adult sexual behavior.[348] In drawing this conclusion, he avoided the facile assumption that such activity is protected *because* it only involves consenting adults. He focused rather on the in-

339 Id.

340 Id. at 2533.

341 Id.

342 Id.

343 United States v. Moses, 12 Crim. L. Rptr. 2198 (D.C. Super. Ct. Nov. 3, 1972).

344 United States v. Doe, 12 Crim. L. Rptr. 2531 (D.C. Super. Ct. Feb. 21, 1973). This decision was rather quixotic in light of a stipulation entered in a federal court case several months earlier where the District of Columbia agreed that the sodomy statute would not be, and probably could not constitutionally be, applied against private, consensual sexual acts involving adults. Schaefers v. Wilson, 11 Crim. L. Rptr. 2252 (D.D.C. May 24, 1972).

345 363 F. Supp. 620 (E.D. Va. 1973).

346 Id. at 624.

347 Id. at 625.

348 Id. But see People v. Drolet, 30 Cal. App. 2d 207, 212, 105 Cal. Rptr. 824, 826-27 (1973); Hughes v. State, 14 Md. App. 497, 505-06, 287 A.2d 299, 305, cert. denied, 409 U.S. 1025 (1972); State v. Lair, 62 N.J. 388, 397, 301 A.2d 748, 753 (1973). These cases rejected the argument that *Eisenstadt* dictates this result.

tensely personal and intimate nature of sexuality itself.[349] Thus, the court would have required a showing of a compelling state interest to justify a challenged sodomy law.[350]

The judge in *Lovisi* did not have to engage in such a balance, however, because he decided that the petitioners' conduct could not be characterized as private. He astutely pointed out that privacy has a double meaning—it may refer to seclusion or to personal acts and decisions.[351] While the constitutional right of privacy is generally concerned with acts and decisions, regardless of whether or not they are seclusive, he thought seclusion to be a prerequisite to constitutional protection for sexual behavior.[352] Public sexual activity lacks the very characteristic that makes private sex protectable—it is not private. Since petitioners had publicized their activities through careless treatment of the photographs, they forfeited constitutional protection, and therefore were held not to have standing to challenge the sodomy law on privacy grounds.[353]

The court's ultimate holding seems sound. More importantly, the privacy analysis, although embedded in dicta, is a paragon. In fairness to the courts which distinguished away *Griswold* and the right of privacy, it should be noted that earlier courts lacked the clarification supplied by *Eisenstadt* and *Roe*. Since these cases have removed several of the crutches courts used to hobble around the issue of private sexual behavior—notably the insistence that the right of privacy belongs only to married couples—more courts may be forced to engage in serious analysis of the individual rights and state interests involved.

2. *Challenges to Noncriminal Penalties*

In addition to the battery of laws directly prohibiting sexual behavior, the state and federal governments have indirect means of penalizing those who engage in deviate or extramarital sex. Homosexuality, cohabitation and adultery often provide a basis for denials of public employment,[354] security clearances,[355] naturalized citizenship,[356] liquor

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[349] 363 F. Supp. at 625.

[350] Id.

[351] Id.

[352] Id. at 626.

[353] Id. at 629.

[354] See, e.g., Fisher v. Snyder, 476 F.2d 375 (8th Cir. 1973); McConnell v. Anderson, 451 F.2d 193 (8th Cir. 1971), cert. denied, 405 U.S. 1046 (1972); Norton v. Macy, 417 F.2d 1161 (D.C. Cir. 1969); Richardson v. Hampton, 345 F. Supp. 600 (D.D.C. 1972); Mindel v. United States Civil Serv. Comm'n, 312 F. Supp. 485 (N.D. Cal. 1970); Morrison v. State Bd. of Educ., 1 Cal. 3d 214, 461 P.2d 375, 82 Cal. Rptr. 175 (1969); Note, Government-Created Employment Disabilities of the Homosexual, 82 Harv. L. Rev. 1738 (1969).

[355] See, e.g., Adams v. Laird, 420 F.2d 230 (D.C. Cir. 1969), cert. denied, 397 U.S. 1039 (1970); Schlegel v. United States, 416 F.2d 1372 (Ct. Cl. 1969), cert. denied, 397 U.S. 1039 (1970); Wentworth v. Laird, 348 F. Supp. 1153 (D.D.C. 1972); Gayer v. Laird, 332 F. Supp. 169 (D.D.C. 1971).

[356] See, e.g., Velez-Lozano v. Immigration & Naturalization Serv., 463 F.2d 1305 (D.C. Cir. 1972); In re Labady, 326 F. Supp. 924 (S.D.N.Y. 1971); Note, Naturalization and the Adjudication of Good Moral Character: An Exercise in Judicial Uncertainty, 47 N.Y.U.L. Rev. 545, 560-62, 565-70 (1972).

licenses,[357] admission to a state bar association,[358] approval of a group's incorporation certificate,[359] and honorable discharges from the armed forces,[360] all on the ground of immorality. Not surprisingly, the brunt of the government's concern with immorality has fallen upon homosexuals.

If private sexual behavior is constitutionally protected by the right of privacy, then denying various governmental benefits to homosexuals or others on the basis of their private sexual behavior could be viewed as conditioning the receipt of a governmental benefit upon the relinquishment of a constitutional right.[361] Government then would be required to justify all actions disfavoring homosexuals, since such discriminations would act as penalties imposed for the exercise of a constitutional right.[362] Thus, the numerous challenges to government practices involving employment, security clearances, etc., brought by homosexuals and others provided another context in which courts could examine the argument that private sexual behavior is protected by the right of privacy.

Conclusions about the constitutionality of laws criminalizing private sexual behavior do not necessarily dictate results in this area. A court deciding that private sexual behavior is constitutionally protected might hold a sex law unconstitutional but condone discriminatory hiring practices, or vice versa, because different ranges of governmental interests are involved. The court might find, for example, that there is a legitimate and sufficient state interest in promoting marriage or discouraging immorality to justify a law criminalizing private sexual behavior. But if that court viewed a refusal to hire a homosexual as nothing but a punishment for the same behavior, the court might conclude that the civil disability was not sufficiently related to the state's goal, since that goal is adequately and more directly served by the criminal law. Conversely, the court might hold the criminal law unconstitutional as not sufficiently related to any legitimate state interest but condone a refusal to hire a homosexual as a teacher, since the state's interest in the latter context could be viewed as permissible and more substantial.

As with challenges to criminal sex laws, however, most courts never confronted the privacy argument. Rather, they attempted to analyze the nature of the state's interest first. The catchword for this approach has been "nexus," denoting the courts' efforts to find some

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357 See, e.g., Inman v. City of Miami, 197 So. 2d 50 (Fla. 1967), cert. denied, 389 U.S. 1048 (1968); One Eleven W. & L., Inc. v. Division of Alcoholic Beverage Control, 50 N.J. 329, 235 A.2d 12 (1967).

358 See, e.g., In re Kimball, 33 N.Y.2d 586, 301 N.E.2d 436, 347 N.Y.S.2d 453 (1973); In re Fleckenstein, 27 App. Div. 2d 184, 277 N.Y.S.2d 830 (1st Dep't 1967).

359 See Gay Activists Alliance v. Lomenzo, 31 N.Y.2d 965, 293 N.E.2d 255, 341 N.Y.S.2d 108 (1973).

360 Weir v. United States, 474 F.2d 617 (Ct. Cl. 1973), cert. denied, 94 S. Ct. 574 (1973); see Note, Homosexuals in the Military, 37 Fordham L. Rev. 465 (1969).

361 See Keyishian v. Board of Regents, 385 U.S. 589, 605-06 (1967).

362 See Mindel v. United States Civil Serv. Comm'n, 312 F. Supp. 485, 488 (N.D. Cal. 1970).

rational connection between a legitimate governmental interest and the contested civil disability. Thus, where a homosexual had been denied public employment because of his homosexuality, the courts would require government to show that the applicant's homosexuality would have had some ascertainable deleterious effect on the conduct of the job.[363] Where a homosexual had been denied a security clearance, the courts would ask whether there was any reason to suspect that homosexuals would be security risks and endanger national security.[364] Where the court found the requisite nexus lacking, it could hold the government action arbitrary and a denial of due process or equal protection without reaching any broader privacy issues; where it found the applicant to be unfit in some tangible way, it could view the government action as not constituting a discrimination against homosexuals or a penalty imposed for engaging in private sexual behavior, and again circumvent the privacy analysis. No court finding a rational nexus then went on to inquire whether there was an important personal right involved which outweighed the governmental interest.

If denial of a government position or a security clearance to an individual who is "immoral" can be classified as arbitrary, then government must not have a legitimate interest in deterring immorality per se in these contexts. The search for nexus implies that most courts were not willing to concede that the state may punish or deter immorality by indirect, noncriminal sanctions. Yet the nexus approach often proved not to be an adequate alternative to a privacy analysis. Although many courts undertook the task of examining asserted connections seriously, others were willing to assume that homosexuals are likely to be unfit employees or poor security risks. Courts sometimes mouthed the conventional wisdoms that homosexuals are susceptible to blackmail and likely to be unstable personalities,[365] and sometimes simply perceived a direct, implicit nexus between immorality and inefficiency.[366] The Court of Appeals for the Eighth Circuit in *McConnell v. Anderson*[367] went so far as to proclaim a legitimate governmental interest—in not having homosexual employees—that is not even connected with unfit-

[363] Norton v. Macy, 417 F.2d 1161, 1165 (D.C. Cir. 1969); Scott v. Macy, 349 F.2d 182, 185 (D.C. Cir. 1965); Mindel v. United States Civil Serv. Comm'n, 312 F. Supp. 485, 487-88 (N.D. Cal. 1970); Brass v. Hoberman, 295 F. Supp. 358, 362-63 (S.D.N.Y. 1968); cf. Fisher v. Snyder, 476 F.2d 375, 377 (8th Cir. 1973).

[364] McKeand v. Laird, No. 71-2169 (9th Cir. Oct. 9, 1973); Wentworth v. Laird, 348 F. Supp. 1153, 1155 (D.D.C. 1972); Gayer v. Laird, 332 F. Supp. 169, 171 (D.D.C. 1971).

[365] Adams v. Laird, 420 F.2d 230, 240 (D.C. Cir. 1969), cert. denied, 397 U.S. 1039 (1970).

[366] Any schoolboy knows that a homosexual act is immoral, indecent, lewd, and obscene. Adult persons are even more conscious that this is true. If activities of this kind are allowed to be practiced in a government department, it is inevitable that the efficiency of the service will in time be adversely affected.

Schlegel v. United States, 416 F.2d 1372, 1378 (Ct. Cl. 1969), cert. denied, 397 U.S. 1039 (1970).

[367] 451 F.2d 193 (8th Cir. 1971), cert. denied, 405 U.S. 1046 (1972).

ness. Plaintiff was a self-professed, activist homosexual who had been fired from his position as librarian at a state university. The court reasoned that the dismissal was not arbitrary or attributable to discrimination against homosexuals because plaintiff, by publicizing his homosexuality, was attempting to "foist tacit approval of this socially repugnant concept upon his employer."[368] Thus, the state's desire to avoid being seen as condoning homosexuality was held to furnish another legitimate ground on which at least acknowledged homosexuals could be dismissed.

While few courts attempted to confront the privacy issue directly, the right of privacy did insinuate itself into some decisions in various guises. First, several courts thought that the requirements of procedural due process escalated where personal liberties, such as engaging in private sexual behavior, were implicated.[369] Several courts also focused on the nondisclosure aspects of privacy. "In normal circumstances, there is a right under the First Amendment for an individual to keep private the details of his sex life, and this applies to homosexuals, professed or otherwise."[370] These courts required the government to show some need for asking questions about the sex life of an applicant for a government position or a security clearance, in order to protect the applicant's right to keep such information to himself.[371] Protecting against forced disclosure and thus against potential consequences of engaging in private sexual behavior of course has the incidental effect of protecting the behavior itself.

Privacy issues also lurked in the background of decisions which dealt charily with "immorality" provisions of state civil law in order to avoid potential constitutional problems. In *Morrison v. State Board of Education*,[372] the California Supreme Court, suggesting that "an unqualified proscription against immoral conduct would raise serious constitutional problems,"[373] held that a teacher could be dismissed for immoral and unprofessional conduct only if such conduct were shown to render him unfit to teach.[374] Two judges, dissenting from a New York Appellate Division's decision that an individual could be denied admission to the state bar because he was a homosexual, suggested that even the fact that consensual homosexual practices are criminal under New York law could not be a ground for the denial, since they thought

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368 Id. at 196.

369 Norton v. Macy, 417 F.2d 1161, 1164 (D.C. Cir. 1969); Mindel v. United States Civil Serv. Comm'n, 312 F. Supp. 485, 487 (N.D. Cal. 1970); see Stanley v. Illinois, 405 U.S. 645, 651-52 (1972) (requirements of procedural due process held to be more stringent where the right of an unwed father to the custody of his child was at stake).

370 Gayer v. Laird, 332 F. Supp. 169, 171 (D.D.C. 1971); accord, Wentworth v. Laird, 348 F. Supp. 1153, 1156 (D.D.C. 1972).

371 Richardson v. Hampton, 345 F. Supp. 600, 608-09 (D.D.C. 1972).

372 1 Cal. 3d 214, 461 P.2d 375, 82 Cal. Rptr. 175 (1969).

373 Id. at 233, 461 P.2d at 390, 82 Cal. Rptr. at 190.

374 Id. at 229, 461 P.2d at 386, 82 Cal. Rptr. at 186.

the consensual sodomy law was probably unconstitutional.[375] One federal district court went so far as to hold that a provision of Oregon law authorizing dismissal of teachers for "immorality" was unconstitutionally vague.[376]

Several relatively daring courts did attack the privacy issue directly. Plaintiff in *Mindel v. United States Civil Service Commission*[377] was fired from his position in the post office when investigators discovered that he had lived with a woman who was not his wife. The court held that such "immoral" conduct bore no relationship to the responsibilities of Mindel's position.[378] It also held that private sexual behavior is constitutionally protected, so the Government could not invade the sanctity of Mindel's home without a compelling justification.[379] Since immorality would not have provided even a rational basis for firing an employee, the Government could not show any legitimate reason "to require Mindel to live according to its special moral code."[380]

The *Mindel* court did not specify why it thought *Griswold* required a compelling justification for the government's actions—whether it was the nature of the private sexual behavior involved, the fact that the activity took place in Mindel's home, or the fact that the Government could not discover the immorality without intrusive snooping. The holding is clear, however: government may not condition employment on a waiver of the right to engage in private sexual behavior, because this behavior is protected by the Constitution. This holding would logically require a compelling justification for any law penalizing private sexual behavior. Thus, the *Mindel* court took the step that most courts confronted with direct challenges to state sex laws were unwilling to take. Under this approach, the court would have to examine the state's interests in controlling extramarital or deviate sexual behavior in any context to see if these interests are compelling enough to justify the state's intrusion.

Several other courts have arrived at the conclusion that even a teacher's private sexual behavior is protected by the zone of privacy. In *Fisher v. Snyder*,[381] a Nebraska district court ordered the reinstatement of a teacher who had been fired for "conduct unbecoming a teacher." She had had a male guest stay overnight at her apartment. The court held that her right to have an overnight guest was protected by the right of privacy and freedom of association,[382] without worrying

[375] In re Kimball, 40 App. Div. 2d 252, 259, 339 N.Y.S.2d 302, 309 (2d Dep't) (dissenting opinion), rev'd per curiam, 33 N.Y.2d 586, 301 N.E.2d 436, 347 N.Y.S.2d 453 (1973).

[376] Burton v. Cascade School Dist. Union High School No. 5, 353 F. Supp. 254, 255 (D. Ore. 1973).

[377] 312 F. Supp. 485 (N.D. Cal. 1970).

[378] Id. at 487-88.

[379] Id. at 488.

[380] Id.

[381] 346 F. Supp. 396 (D. Neb. 1972), aff'd on other grounds, 476 F.2d 375 (8th Cir. 1973).

[382] Id. at 398-400.

about whether sexual conduct had been involved. Because Fisher had exercised a constitutional right, the state had to show a compelling interest to justify termination of her contract. Because the case was set in the context of a public school, the court applied the standard used by the Supreme Court in *Tinker v. Des Moines Independent School District*[383] to judge when a school's abridgement of a teacher's first amendment rights is justifiable: did the conduct "materially and substantially" disrupt the school? The court found that Fisher's extracurricular activities had no effect upon her teaching or her students.[384]

The court in *Acanfora v. Board of Education*[385] concluded in majestic style that "the time has come today for private, consenting, adult homosexuality to enter the sphere of constitutionally protected interests." Plaintiff was a homosexual who had been transferred from his teaching position when the school board learned of his homosexuality. The court's opinion traced the growth of the due process clause's protection of "individual pursuits, no matter how unorthodox or repulsive to the majority."[386] In concluding that homosexual behavior should be protected by the due process clause, the court noted that homosexuals are not dangerous, incapable of successful job performance, or threats to the survival of the species.[387] Additionally, the court held that homosexuality is a suspect classification for the purposes of equal protection analysis, because homosexuality is often a basis for imposition of disabilities but frequently bears no relation to an individual's ability to perform or contribute to society.[388] Thus, the court said that a school could not refuse to hire, and could not fire or transfer, an individual simply because he or she is a homosexual, since there is no compelling interest in excluding private homosexuals from teaching positions.[389]

The court in *In re Labady*[390] examined another area where the Government has traditionally asserted an interest in morality—naturalization. Petitioner had been denied naturalization on the ground that, as a homosexual, he lacked the requisite "good moral character."[391] In ruling that petitioner was of good moral character, Judge Mansfield combined a broad view of the zone of privacy with the nexus approach discussed

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383 393 U.S. 503, 509 (1969).

384 346 F. Supp. at 401.

385 359 F. Supp. 843, 851 (D. Md. 1973).

386 Id.

387 Id.

388 Id. at 852-53. The court was relying on the reasoning of Frontiero v. Richardson, 411 U.S. 677 (1973).

389 359 F. Supp. at 853. The court ultimately reversed the burden of proof it had established and, stating that plaintiff's publication of his homosexuality was not protectable, held that his transfer had not been arbitrary and was therefore permissible. Id. at 857. *Acanfora* is a peculiar amalgam of first amendment rights and privacy rights viewed in the unique context of the role of a public school teacher, and a complete discussion of the court's complicated reasoning would not be relevant here.

390 326 F. Supp. 924 (S.D.N.Y. 1971).

391 8 U.S.C. § 1427(a)(3) (1970).

above. He stated that the most important factor to be considered was whether the challenged conduct was public or private in nature:

> If it is public or if it involves a large number of other persons, it may pose a threat to the community. If, on the other hand, it is entirely private, the likelihood of harm to others is minimal and any effort to regulate or penalize the conduct may lead to an unjustified invasion of the individual's constitutional rights.[392]

Taken alone, Mansfield's concern about whether or not petitioner's behavior posed a threat to the community might be viewed as merely an attempt to limit the Government's power to deny citizenship to what the court viewed as the policy behind the good moral character requirement: to protect the community from harm. Immorality per se is no danger and thus may not be a basis for exclusion unless it causes harm or affects the "public morality."[393] But in stating that "it is now established that official inquiry into a person's private sexual habits does violence to his constitutionally protected zone of privacy,"[394] Mansfield adopted a broader privacy rationale. He implied that the Government may not exclude homosexual aliens because investigation and intrusion into a petitioner's private sexual life must be justified by a strong governmental interest. The Government's interest in protecting the community from potentially dangerous persons, or persons who might offend the public morality, could supply a sufficient justification for abridging the alien's constitutionally protected right. But the Government's interest in protecting the community from simply having a homosexual in its midst is not sufficient.

Under the approach in *Labady,* as in *Mindel, Fisher* and *Acanfora,* private sexual behavior is viewed as falling within the perimeters of the zone of privacy. The courts must then determine when government's interests justify an inquiry into a person's private sexual habits. Because such inquiry is identified as an abridgement of the right of privacy, the state must present a substantial justification for its inquiries and intrusions. *Labady* implies that a concern with the morality of the actor, or with the reaction homosexual conduct might engender in a community if it were discovered, is not sufficient.

3. *Is the Right to Engage in Private Sexual Behavior a Constitutionally Protected Right of Privacy?*

As has just been seen, most courts have been reluctant to confront this question, while others have foundered in the attempt. Yet the question must be faced. The overview of Supreme Court privacy doctrine provided in Parts II and III of this Note furnishes some basis for answering first, the question of whether or not private sexual behavior is eligible for any measure of constitutional protection and, second, whether it is a fundamental right and thus entitled to stringent pro-

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392 326 F. Supp. at 927.
393 Id. at 927-28.
394 Id. at 927.

tection. The first of these inquiries focuses on points of nexus between private sexual behavior and the rights endorsed in *Griswold, Roe* and earlier cases: rights pertaining to family, marriage, home, procreation and child-rearing. If the values the Court found worthy of protection in those cases inhere in the activity considered here, then private sexual behavior is a right of privacy, even if it is not later deemed to be fundamental, and thus would command some degree of constitutional protection.

Private sexual behavior does have much in common with the right protected in *Griswold*. First, the locus of such behavior is generally the home. Consensual sexual acts can only be discovered by invading the home. Justice Douglas' picture of the police invading the marital bedroom to search for contraceptives is no more repulsive than a picture of the police ferreting out acts of sodomy or fornication. *Stanley v. Georgia* reinforced the notion that the home is a sanctuary which may not be invaded unless the state has some justification more compelling than the desire to prevent immorality. The recent obscenity decisions reemphasize *Stanley*'s holding that activities within the home are uniquely private and therefore are to be protected.

According to Justice Douglas, the home became a protected area because of certain profound concerns underlying the third and fourth amendments. If these Bill of Rights provisions were implicated in *Griswold,* then they are also relevant where sexual activities in the home are under consideration. Similarly, if the first amendment penumbra protected the right of a man and a woman to form and maintain an intimate relationship in *Griswold,* then the relationship of consenting adults who associate to fulfill their sexual needs may also implicate first amendment values.

Further, natural notions of privacy adhere to sexual behavior, one of the most intimate of all human activities. The *Griswold* opinions relied on the expectation of our society that what happens within a marriage is not the law's business; the view that sexual activity is also "not the law's business"[395] is gaining increasing acceptance.[396] One commentator has even suggested that *Griswold* itself must ultimately be viewed as protecting not a right to decide when to have children, but the right of the married couple to engage in sexual intercourse.[397] The Connecticut anti-contraceptive law did not force a couple to have children—it merely forced them to abstain from sex if they did not wish to have children. At least one Justice has stated that *Griswold* may protect sexual activity of consenting adults.[398]

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395 Wolfenden Report, supra note 138.

396 For an extensive compilation of public opinion polls dealing with public views on homosexuality and other forms of consensual sexual behavior, see Barnett, supra note 305, at 124-28 n.46. See also A. Kinsey, W. Pomeroy & C. Martin, Sexual Behavior in the Human Male 392 (1948).

397 Barnett, supra note 305, at 97.

398 California v. LaRue, 409 U.S. 109, 132 n.10 (1972) (Marshall, J., dissent-

On the basis of these factors alone, it is possible to conclude that the right to engage in private sexual behavior is a privacy right. The more difficult question is whether that right is "fundamental" and thus entitled to the greater measure of constitutional protection afforded by *Roe v. Wade*. The first question to be asked in judging fundamentality centers on the importance of the right involved to the individual. The effect state regulation of sexual behavior has on an individual's life will vary according to the precise nature of the activity involved. Laws prohibiting all forms of sexual expression available to homosexuals or laws prohibiting cohabitation with a member of the opposite sex involve particularly serious intrusions because they criminalize a major choice of lifestyle. As H. L. A. Hart has pointed out, laws requiring complete repression of sexual impulses outside of marriage may affect the development or balance of the individual's emotional life, happiness and personality.[399] Sexual fulfillment is a basic human need. The arsenal of prohibitory state sex laws forces all who would fulfill that need to choose heterosexual marriage, despite the psychological anguish that choice might cause for homosexuals,[400] for persons who do not wish to be monogamous, or for the spouses of these persons. Thus, while some courts unquestionably would denigrate the importance of sexual expression, state regulation of sexual behavior involves prohibition of entire modes of life and thus may profoundly affect the individual. This factor may indeed constitute the primary distinction between sexual behavior and viewing obscenity, which the Court obviously does not regard as a fundamental right.[401]

The more general standard for judging the fundamentality of a right is derived from *Palko v. Connecticut*:[402] is the right "implicit in the concept of ordered liberty?" Another way to frame this inquiry is to ask whether allowing the state to regulate certain aspects of life seems totalitarian.[403] Such questions obviously do not engender objective, unanimous answers. The answer will often depend on how the question is approached.

The approach the Court seems to have selected to judge fundamentality relies on a somewhat objective referent—the traditions and collective conscience of Anglo-American society,[404] a test derived from *Snyder v. Massachusetts*.[405] Justice Blackmun's majority opinion in

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ing) ("I have serious doubts whether the State may constitutionally assert an interest in regulating any sexual act between consenting adults. [citing *Griswold*]").

399 H. Hart, Law, Liberty and Morality 22 (1963).

400 See A. Karlen, Sexuality and the Homosexual—A New View 408 (1971) (interview with W. Money); cf. State v. Lair, 62 N.J. 388, 398, 301 A.2d 748, 754 (1973) (Weintraub, C.J., concurring).

401 See Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973).

402 302 U.S. 319, 325 (1937).

403 See Griswold v. Connecticut, 381 U.S. 479, 497 (1965) (Goldberg, J., concurring); Poe v. Ullman, 367 U.S. 497, 522 (1961) (Douglas, J., dissenting).

404 Griswold v. Connecticut, 381 U.S. 479, 493 (1965) (Goldberg, J., concurring).

405 291 U.S. 97, 105 (1934).

Roe v. Wade went to great lengths to show that state regulation of abortion is a fairly recent phenomenon.[406] Implicitly, therefore, regulation of abortion was not traditional and could be disallowed. By contrast, sodomy and other forms of sexual behavior have been forbidden by religious and secular authorities since biblical times. Thus, if tradidition is to be the yardstick, it may be "rooted in our collective conscience" that the state may regulate deviate and extramarital sex. Justice Harlan took the view that tradition alone may provide a sufficient basis for refusing to accord protection to certain forms of behavior.[407] He suggested that laws forbidding adultery, fornication and homosexual practices "form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis."[408]

Answering the difficult question of fundamentality by resorting to tradition does provide a clear and simple answer to the question of whether sexual behavior is a fundamental right. But so literal a reading of the *Snyder* standard may not give sufficient consideration and flexibility to general constitutional principles. First, to say that the state may regulate sexual behavior because it has consistently done so in the past begs the question of whether it is constitutional for a majority to impose its moral code on the community. Even if there has always been a consensus that traditional marriage is a more moral lifestyle than homosexuality, such a consensus may not be sufficient excuse for depriving the homosexual minority of the right to make an unorthodox choice. The essence of constitutional democracy is that it protects minorities whose rights would be ignored by a ruling majority in a pure democracy.

Second, a tradition-bound standard does not allow for changing mores. It may be, as Justice Harlan said, that if a society holds unanimous views on a certain aspect of morality, constitutional doctrines should not attempt to challenge that consensus. Perhaps, as Lord Devlin has argued, certain shared moral precepts are necessary to any stable society.[409] Yet once a substantial minority begins to question a formerly unassailable moral premise, both the consensus and the reason for honoring the consensus are destroyed. A simple majority view of morality, as opposed to a universal belief, may not provide a sufficient excuse for refusing to extend constitutional protection to the activities of a minority.[410]

Tradition is inadequate as a standard for judging fundamentality because it ultimately relies on the traditional majority view of morality.

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406 410 U.S. at 129-41.

407 Poe v. Ullman, 367 U.S. 497, 553 (1961) (dissenting opinion).

408 Id. at 546. In Harlan's view, marital intimacies are protected because the state has acknowledged, fostered and condoned the institution of marriage. Id. at 553. Thus, constitutional protection is derived from a notion of estoppel.

409 P. Devlin, The Enforcement of Morals 9-13 (1965).

410 See Barnett, supra note 305, at 107; Hughes, Morals and the Criminal Law, 71 Yale L.J. 662, 673 (1962); Schwartz, Morals Offenses and the Model Penal Code, 63 Colum. L. Rev. 669, 672 (1963).

Griswold, Eisenstadt and *Roe* all stand for the proposition that a majority view that a certain practice is immoral does not dispose of the issue of whether state regulation of that practice is constitutional. Thus, if the *Snyder* standard is to be used to judge the extent to which private sexual behavior may command constitutional protection, it should be read more broadly. Perhaps most rooted in the traditions and collective conscience of our society are certain general constitutional principles: the principle of protection for minority rights, the principle that the sphere of government should be limited and the sphere of personal liberty relatively unlimited. Judged by these standards, the right to engage in private sexual behavior could be found fundamental, especially if the often profound human relationship involved were the focus of the inquiry.

By implication, a court could also reasonably conclude that the right to engage in private sexual behavior is not fundamental or implicit in the concept of ordered liberty. The ambiguity of this fundamentality standard, and the room it leaves for subjective judgments, would pose a grave dilemma under the rigid two-tier test, for a court's decision about the fundamentality of a right would be totally outcome-determinative. The knowledge that calling a right fundamental would implicate a compelling state interest test and thus almost automatically divest the states of a great body of law must color a judge's decision and deter serious consideration of the right involved. Calling a right nonfundamental, on the other hand, would obviate any examination of the state interests involved. An asserted state interest, however vague, in fostering and encouraging the institution of marriage, or even, according to Justice Harlan, a desire to promote "moral soundness" among the populace,[411] could be held to justify all state sex laws.

The middle-level test, discussed above,[412] is particularly appropriate for application in this context, and necessary to encourage fair consideration of both the right and the state interests involved. Fundamental or not, sexual behavior is certainly a private sphere of activity and of substantial significance to the actor. Adopting a middle ground of analysis would open a range of options to a court judging the constitutionality of a state sex law. The court might demand a "fair and substantial relation"[413] between a state law limiting personal freedom and a legitimate state goal. Under this test, the court would first look at the interests the state proffers to justify its sex laws. The state might assert, for example, that these laws encourage marriage and the formation of traditional family units. The state might more bluntly assert an interest in morality. Such state interests might be difficult to balance against personal liberties, but the court could avoid that task. The court could determine whether, in light of general constitutional principles, the state's alleged interests are legitimate. Encouraging marriage

411 Poe v. Ullman, 367 U.S. 497, 545-46 (1961) (Harlan, J., dissenting).
412 See text accompanying note 219 supra.
413 Reed v. Reed, 404 U.S. 71, 76 (1971) (citation omitted).

may be inimical to the Supreme Court's conclusion[414] that marriage is a fundamental civil right, or choice. A right to marry may include an antithetical right not to marry. Thus it might not be permissible for the state to place burdens and incentives so as to load a constitutionally protected choice. An asserted interest in morality per se might be found too vague and potentially sweeping. Each statute might present a different range of state interests. Adultery statutes implicate the same interests as do fornication statutes, but with the additional concern for protecting the spouse of the adulterer. Open and notorious cohabitation may impinge upon public sensibilities in a way in which private, sporadic sexual acts do not. At least the interests would be identified and considered, even if the court were not willing to engage in the difficult process of balancing.

The second prong of the suggested test focuses on the relation between the asserted interests and the challenged laws. The fact that state sex laws are rarely enforced[415] suggests that, whatever the state's interests in these laws might be, the laws do not play a crucial role in promoting those interests. The court might question the means the state has chosen to implement its goals. Thus, if the state asserted that its interest in sodomy laws is simply to curtail extramarital sexual behavior, the court might find a sodomy statute overbroad if it prohibited the deviate sexual behavior of a married couple.[416] Alternatively, if that state had no law prohibiting fornication, the court might find that the sodomy law discriminated against homosexuals,[417] or that it was not sufficiently related to the state's goal.[418] These inquiries would remove challenges to sex laws from the plane of vague, subliminally considered justifications while avoiding the task of weighing the state's interests.

4. Conclusion

If the right to engage in private sexual behavior is found to be within the zone of privacy, some substantial governmental interest must

414 Loving v. Virginia, 388 U.S. 1, 12 (1967).

415 See text accompanying note 311 supra.

416 See Cotner v. Henry, 394 F.2d 873 (7th Cir.), cert. denied, 393 U.S. 847 (1968); Buchanan v. Batchelor, 308 F. Supp. 729 (N.D. Tex. 1970) (three-judge court), vacated and remanded sub nom. Wade v. Buchanan, 401 U.S. 989 (1971).

417 Cf. State v. Fields, 13 Crim. L. Rptr. 2376 (D. Alas. June 27, 1973) (holding state prostitution statute discriminates against women); State v. Kueny, 12 Crim. L. Rptr. 2401 (Iowa Mun. Ct. 1972) (holding that state cohabitation statute not punishing homosexual cohabitation discriminates against heterosexuals).

418 In Eisenstadt v. Baird, 405 U.S. 438, 449-50 (1972), the Court found that the Massachusetts law forbidding distribution of contraceptives to unmarried individuals was not sufficiently related to the goal of deterring extramarital sex, since fornication was a misdemeanor punishable by a maximum sentence of $30 or three months in prison, while violating the contraception statute was a felony, punishable by up to five years imprisonment. Such disparities in penalties are commonplace in the realm of state regulation of sexual behavior. In Rhode Island, for example, consensual sodomy is punishable by imprisonment of seven to 20 years, R. I. Gen. Laws Ann. § 11-10-1 (1970), while fornication is punishable by a maximum of a $10 fine, id. § 11-6-3.

be shown to justify state laws or governmental actions abridging or burdening that right. The knowledge that recognizing sexual behavior as an aspect of privacy would trigger a compelling state interest test and thus virtually necessitate extirpating all state sex laws seems to have inhibited most courts from engaging in any sort of meaningful analysis. Declaring that sexual behavior is not within the zone of privacy obviated the need for a serious examination of the state's interest in private sexual behavior. Yet, as some courts recognized, private sexual behavior certainly is an intimate and often important phase of human activity. Some less stringent, more realistic level of scrutiny might encourage serious consideration of the grave intrusions engendered by state regulation of sex.

It would be disingenuous to claim that the courts may comfortably divest the states of the large body of law which has grown around the regulation of immorality. While many sex laws are rarely enforced, it cannot be said that they are vestigial. The fact that a vast majority of the states has fiercely resisted abandoning or even liberalizing laws relating to sodomy, adultery and fornication, and the fact that stringent penalties for sodomy are the rule rather than the exception indicate that these laws reflect some deeply felt notions of morality. *Griswold* did not, as one prominent observer suggested, "eliminat[e] some of the last vestiges of Comstockery"[419] in our laws. It merely laid a foundation for doing so.

C. The Family

In constructing the zone of privacy, the Supreme Court has relied heavily on cases suggesting that family life is a uniquely private enclave to be scrupulously protected against governmental intrusion.[420] A number of the Court's conclusions about the nature of constitutional privacy may be traced to the concern with protecting family life. Decisions about procreation are traditionally within the province of the family, as are decisions about the rearing and education of children. The Court has referred to marriage as a "basic civil right of man."[421] Justice Harlan suggested that the home "derives its pre-eminence as the seat of family life," and is jealously guarded for that reason.[422]

Many lower courts have welcomed the idea that family rights are protected by the zone of privacy, and have rendered decisions making these rights more secure.[423] A more difficult question, on which the

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[419] Mosk, Foreword, U.C.L.A. Project, supra note 309, at 645.

[420] Roe v. Wade, 410 U.S. 113, 152-53 (1973); Griswold v. Connecticut, 381 U.S. 479, 482-83 (1965); id. at 488, 495 (Goldberg, J., concurring); id. at 502 (White, J., concurring). These cases include: Loving v. Virginia, 388 U.S. 1 (1967) (marriage); Prince v. Massachusetts, 321 U.S. 158 (1944) (child-rearing); Skinner v. Oklahoma, 316 U.S. 535 (1942) (procreation); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (educating children); Meyer v. Nebraska, 262 U.S. 390 (1923) (educating children).

[421] Loving v. Virginia, 388 U.S. 1, 12 (1967).

[422] Poe v. Ullman, 367 U.S. 497, 551 (1961) (dissenting opinion).

[423] See text accompanying notes 427-52, 510-25 infra.

lower courts have split, is what this category of family rights includes. Would it, for example, guarantee a right not to marry, or a right to adopt a nontraditional lifestyle, such as communal living, homosexual marriage, heterosexual or homosexual cohabitation without marriage? Alternative lifestyles, in many cases, have all of the characteristics that can be presumed to make the traditional family unit constitutionally protectable: they involve basic decisions which determine the character of a person's life; they are of the same uniquely personal nature; they often implicate profound human relationships; they generally center around the home. From the perspective of participants, the only difference may be expressed in one word: tradition. In this key word lies the point at which the logic of the zone of privacy may diverge from the personal beliefs of judges.

The privacy rights Justice Blackmun lists in *Roe v. Wade*[424] give content to the American Dream. From a traditional, conservative viewpoint, the unimpeded right to marry, establish a home and raise children is essential to the pursuit of happiness. Perhaps this is the true, underlying reason for the special status the Court has afforded these rights. To decide that alternative lifestyles are not protected by the right of privacy would be to decide that no one has a right to pursue happiness in a way that is alien to our traditions and thus to the Justices of the Supreme Court.

For purposes of constitutional adjudication, the only difference between traditional and nontraditional "families" is a difference in the state interests in fostering the one and discouraging the other. That is the plane on which the inquiry should take place. If the right of privacy protects traditional families and lifestyles, it must also require the courts to give fairly strict scrutiny to state laws and actions foreclosing nontraditional lifestyles. If these rights are fundamental, the state would have to show a compelling interest to justify any intrusion. A lesser standard of review, requiring some substantial relationship between the state's regulations and goals, should be applied to nonfundamental lifestyle rights.

The state's interest in fostering marriage as a device for record-keeping and for establishing and enforcing domestic and financial responsibilities is not insignificant. The interest in preserving the traditional family unit as the basic functioning unit of our society has also been lauded,[425] although the legitimacy of this goal may be ques-

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424 410 U.S. at 152-53.

425 The institution of marriage "is the foundation of the family and of society, without which there would be neither civilization nor progress." Maynard v. Hill, 125 U.S. 190, 211 (1888). "[T]he power to make rules to establish, protect, and strengthen family life... is committed... to the... State." Labine v. Vincent, 401 U.S. 532, 538 (1971). "Society—American society, indeed American constitutional society—is commited to the existence of some institutions, the stability of which is deemed essential for a healthy existence as a nation. The home-family is such an institution." Murphy v. Houma Well Serv., 413 F.2d 509, 512 (5th Cir. 1969); see P. Devlin, The Enforcement of Morals 9-13 (1965).

tioned.[426] It may be that certain methods the state adopts to accomplish these goals are overbroad or impermissible. Only by seriously examining the state's interest in specific contexts can such determinations be made.

1. The Traditional Family

While most courts examining claims of family privacy have only used *Griswold* as a tool to protect the traditional marital relationship, there have been extensions wrought in the protection offered by the right of privacy. Recent cases have protected primarily two categories of persons from state interference with their marital relations—high school students and welfare recipients.

The court in *Holt v. Shelton*[427] held that a high school's action in temporarily suspending a student and permanently curtailing her right to participate in extracurricular activities because she had married was unconstitutional in that it infringed upon her fundamental right to marry[428] by limiting her right to an education.[429] Because the court thought that both of these rights were protected by the Constitution, it applied a compelling state interest test, but claimed to be unable to find *any* legitimate state interest in the suspension.[430] The court's opinion was regrettably brief in arriving at these potentially sweeping conclusions.

The court in *Davis v. Meek*,[431] on the other hand, did not think that there is a fundamental right to marry. The court explained that marriage is a local matter which the state may regulate as it sees fit.[432] However, once a person has married without violating any state law, the penumbral right of marital privacy, derived from *Griswold*, attaches.[433] Thus, the state may not put "what may be an unendurable strain"[434] upon a marriage, because causing dissension in and possible dissolution of a marriage is a violation of the right of marital privacy. The strain to which the court referred in this case was the school's ruling that plaintiff could not engage in extracurricular activities because he had gotten married.[435] The school board claimed that the purpose of

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426 The Second Circuit has held that

> the interest of the local community in the protection and maintenance of the prevailing traditional family pattern ... fails to fall within the proper exercise of state police power.... Such social preferences ... have no relevance to public health, safety or welfare.

Boraas v. Village of Belle Terre, 476 F.2d 806, 815 (2d Cir. 1973), prob. juris. noted, 42 U.S.L.W. 3226 (U.S. Oct. 15, 1973) (No. 73-191).

427 341 F. Supp. 821 (M.D. Tenn. 1972).

428 Id. at 822-23, citing Loving v. Virginia, 388 U.S. 1 (1967).

429 341 F. Supp. at 822-23 & n.3, citing Brown v. Board of Educ., 347 U.S. 483 (1954).

430 341 F. Supp. at 823.

431 344 F. Supp. 298, 299-301 (N.D. Ohio 1972).

432 Id. at 300.

433 Id.

434 Id. at 302.

435 Perhaps Albert Davis would have abandoned his marriage to play on the

this regulation was to discourage students from marrying so that they would not drop out of school. Unlike the court in *Holt*, Judge Young thought this purpose legitimate and commendable.[436] However, since the school's action infringed a constitutionally protected right, a rational, commendable purpose was not sufficient, and plaintiff was held to have a constitutional right to play on the baseball team.

Despite their differences as to when the right of marital privacy begins, both *Holt* and *Davis* turn on an idea of marital autonomy, rather than privacy in a nondisclosure sense. In neither case was there any question of prying into the marital bedroom—the school regulations took effect simply because the plaintiffs were married. The message of the cases is that the state may not undermine a lawful marriage, even for a laudable and permissible purpose, because the decision to marry or at least to stay married is fundamental to the individual.[437]

Given the states' predilection for the institution of marriage, such subversion of marital relationships is rare. One of the few other contexts in which the state does attempt to insinuate itself into a marriage in potentially destructive ways is in setting up rules for the receipt of welfare. Wisconsin, for example, established eligibility rules for Aid to Families with Dependent Children (AFDC)[438] which required a mother to take steps to terminate her marriage or to prosecute her husband for nonsupport in order to receive aid.[439] The court in *Doe v. Schmidt*[440] ruled that plaintiff's claim that these regulations violated her right of privacy was not insubstantial, but did not rule on the merits.

> Although courts may differ as to its precise constitutional contours, it is clear that one of the fundamental freedoms protected and secured by the constitution is the right of privacy, and, more specifically, after [*Griswold*], it is clear that *marital privacy* is a right enjoying constitutional protection.... In our view, one need not go beyond the realm of common human experience to take cognizance of the fact that the con-

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baseball team, but it seems that the court was exaggerating in claiming that the school's action might have destroyed the plaintiff's marriage. Id. It would further seem that any potentially disruptive governmental interference with a marriage would be a sufficiently "unendurable strain" to invoke constitutional protection under the *Davis* approach.

436 Id. at 300, 302.

437 In Moran v. School Dist. No. 7, 350 F. Supp. 1180 (D. Mont. 1972), the court enjoined the enforcement of a school regulation prohibiting married students from participating in extracurricular activities on the basis of a right to marry and a right to education derived from state law. The court did not reach any constitutional issues. On the subject of married students' rights in general, see Comment, 22 Buffalo L. Rev. 634 (1972).

438 See 42 U.S.C. §§ 601-10 (1970).

439 Wis. Stat. Ann. § 49.19(4)(d) (1957). Any mother or stepmother who had a husband could qualify only if: (1) she had been divorced or legally separated and was unable to compel her husband to support the children through provisions of law, or (2) she had commenced an action for divorce or separation and had obtained a temporary support order that was insufficient or unenforceable, or (3) she had obtained a civil order to compel support that was insufficient or unenforceable, or (4) she had legally charged her husband with failure to support or abandonment.

440 330 F. Supp. 159 (E.D. Wis. 1971) (three-judge court).

> ditioning of the receipt of public assistance upon a mother commencing divorce, separation, or other legal action against her husband is likely to involve serious intrusions upon the right of marital privacy.[441]

The Wisconsin rule was a flagrant example of state action tending to destroy a marriage. The court in *Doe* recognized this state action as infringing the right of marital privacy, again interpreted as a right of autonomy—a right to stay married.

When *Griswold* has been viewed as creating a limitation on disclosure of personal information rather than a right of autonomy, constitutional protection has been less extensive. In one unusual situation where government shielded individuals from investigation, nondisclosure aspects of privacy provided an additional basis for sustaining the state's action. *Murphy v. Houma Well Service*[442] held Louisiana's presumption of paternity to be justifiable as protective of family stability. In the context of a Jones Act[443] death action, plaintiff was attempting to show that a claimant born to decedent's wife was not decedent's child. The court upheld the presumption on the ground that the state "undoubtedly has an interest in protecting the intimate family relationship from divisive and destructive attacks by those seeking to challenge the legitimacy of children born during wedlock."[444] The court viewed the legitimacy of children born during wedlock as an area "so private as to command constitutional protection, see *Griswold*."[445] As in *Davis* and *Doe*, the underlying concern was with protecting the stability of traditional marital and family relationships.

When an inquiry into paternity involved a nontraditional family and cast the state into an inquisitorial rather than a protective role, the balance of interests shifted. The plaintiff in *Saiz v. Goodwin*[446] challenged the requirement that applicants for AFDC furnish information on which the state could base an evaluation of the paternity of allegedly illegitimate children. The district judge hearing the case refused to convene a three-judge court, finding plaintiff's equal protection and privacy claims insubstantial. He thought *Griswold* inapposite[447] and declared that under *Wyman v. James*[448] a reasonable administrative tool that serves a valid and proper administrative purpose in dispensing AFDC is not an unwarranted invasion of personal privacy.[449]

Nondisclosure aspects of privacy substantially overlap autonomy

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441 Id. at 163.

442 413 F.2d 509 (5th Cir. 1969).

443 46 U.S.C. § 688 (1970). The act gives a right of action for the injury or death of a seaman in the course of his employment.

444 413 F.2d at 512.

445 Id.

446 325 F. Supp. 23 (D.N.M.), vacated and remanded, 450 F.2d 788 (10th Cir. 1971).

447 Id. at 26.

448 400 U.S. 309 (1971) (search warrants held not required for home visits to welfare recipients).

449 325 F. Supp. at 25; see Doe v. Norton, 365 F. Supp. 65, 77-78 (D. Conn. 1973).

interests where forced disclosure is an integral element of a governmental scheme which threatens family stability. In such a context, a court's choice to frame an issue as one of nondisclosure privacy may prevent analysis of the more significant autonomy right at stake. *Lewis v. Stark*,[450] for example, involved a challenge to California's "man-in-the-house" rule which obligates a man assuming the role of spouse to support the children in his home. The court agreed that under *Griswold* the marital relationship is protected from "certain intrusions," but explained that "plaintiffs have failed to demonstrate that the practices of the state would be shown at trial to resemble the methods necessary to prove use of contraceptives, which methods were firmly rejected as 'repulsive' by the Supreme Court."[451] Because proving that an intimate relationship existed in this case would not require repulsive investigative techniques, the court thought that *Griswold* was distinguishable, thus ignoring the underlying autonomy issue.

On the whole, most courts examining claims involving married couples and traditional families have interpreted *Griswold* as guaranteeing a right of autonomy, usually in the context of a right to stay married. The most difficult questions about the right to marry have not yet been laid before the courts. For example, if there is a right to marry, must and can the state show compelling justifications for such infringements on that right as age requirements, blood test requirements, etc.? Does the right to establish a marriage imply a concomitant right to dissolve that marriage? If so, the general view that the state is a party to all divorces and must consent to the dissolution of a marriage[452] would be highly questionable. If the right to marry is fundamental, is the right not to marry equally fundamental? If it is, the state might be prevented from favoring married persons in such a way as to exert pressure on an individual's fundamental, personal decision whether to marry.

There are still many grave and difficult questions left open in this area; but, because of the courts' genuine solicitude for traditional family relationships, the right of privacy may play a prominent role in limiting the state's ability to intrude upon this phase of personal life.

2. *The Nontraditional Family*

The state and federal governments have numerous tools for preventing and discouraging alternate lifestyles: procedures for obtaining divorces; laws prohibiting cohabitation, sodomy and fornication;[453] laws governing custody of children;[454] laws and practices disadvantaging

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450 312 F. Supp. 197 (N.D. Cal. 1968) (three-judge court), rev'd sub nom. Lewis v. Martin, 397 U.S. 552 (1970).

451 Id. at 206.

452 See H. Clark, Law of Domestic Relations 302-03 (1968).

453 See text accompanying note 305 supra.

454 See Stanley v. Illinois, 405 U.S. 645 (1972).

illegitimate children;[455] laws governing the distribution of welfare,[456] public housing[457] and food stamps;[458] and zoning ordinances.[459] If the individual has a fundamental right to structure his own home life and decide with whom he wishes to live, such laws and practices can only be justified if they are necessary to promote a compelling state interest. Only one court has adopted this analysis, in a decision which was subsequently limited by the Supreme Court.[460] The approaches of other courts have been highly disparate, ranging from thinly disguised disgust with pariahs[461] to a creative stab at a new theoretical framework in the context of an equal protection challenge.[462]

a. Homosexual Marriage——The court in *Baker v. Nelson*[463] thought that the tradition behind the conventional marriage relationship was ample justification for a state's denial of a marriage license to two persons of the same sex. Two homosexuals sought a mandamus to compel the issuance of a marriage license, claiming that they were being denied due process and equal protection and that the state statute, as construed, violated the first, eighth and ninth amendments. The court disposed of most of these claims in a footnote.[464] The only claim examined was that the plaintiffs were being prevented from exercising a fundamental right. Since the court did not feel that the right to marry was constitutionally protected, only a rational basis for the statute's discrimination was required.[465] Tradition supplied this rational basis.

> The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis.... This historic institution manifestly is more deeply founded than the asserted contemporary concept of marriage and societal interests for which petitioners contend.[466]

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455 See, e.g., Labine v. Vincent, 401 U.S. 532 (1971). Louisiana even has a law making it a crime for a man or woman to have two or more illegitimate children. La. Rev. Stat. § 14:79.2 (Supp. 1973).

456 See. e.g., Doe v. Schmidt, 330 F. Supp. 159 (E.D. Wis. 1971) (three-judge court).

457 See Federal Low Rent Housing Act, 42 U.S.C. §§ 1401-02 (1970), as amended, 42 U.S.C. §§ 1401-02 (Supp. 1972).

458 See Moreno v. Department of Agriculture, 345 F. Supp. 310 (D.D.C. 1972) (three-judge court), aff'd, 413 U.S. 528 (1973).

459 Boraas v. Village of Belle Terre, 476 F.2d 806 (2d Cir. 1973), prob. juris. noted, 42 U.S.L.W. 3226 (U.S. Oct. 15, 1973) (No. 73-191); Palo Alto Tenants Union v. Morgan, 321 F. Supp. 908 (N.D. Cal. 1970), aff'd per curiam, 487 F.2d 883 (9th Cir. 1973).

460 Moreno v. Department of Agriculture, 345 F. Supp. 310, 314 (D.D.C. 1972) (three-judge court), aff'd on other grounds, 413 U.S. 528 (1973).

461 See, e.g., McConnell v. Anderson, 451 F.2d 193, 196 (8th Cir. 1971), cert. denied, 405 U.S. 1046 (1972); Schlegel v. United States, 416 F.2d 1372, 1378 (Ct. Cl. 1969), cert. denied, 397 U.S. 1039 (1970).

462 Boraas v. Village of Belle Terre, 476 F.2d 806 (2d Cir. 1973), prob. juris. noted, 42 U.S.L.W. 3226 (U.S. Oct. 15, 1973) (No. 73-191).

463 291 Minn. 310, 191 N.W.2d 185 (1971) (en banc), appeal dismissed, 409 U.S. 810 (1972).

464 Id. at 312 n.2, 191 N.W.2d at 186 n.2.

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

466 Id. at 312, 191 N.W.2d at 186.

The court relied on the language in *Griswold* describing marriage as an old and fundamental institution, and on Justice Harlan's view that it was only because the state had sanctioned the marriage relationship with its concomitant intimacies that it could not then intrude upon that relationship.[467]

Perhaps the state's refusal to grant a marriage license does not in itself abridge personal liberty. Marriage is a legal relationship created by the state and subject to local regulation.[468] If the two homosexuals were allowed to live together as a couple and structure their relationships as they wished, perhaps there would be no abridgement of liberty in their being denied the state's blessing. It is the possibility of prosecution under sodomy laws[469] that interferes with the plaintiffs' decision about the conduct of their lives. Their desire to be legally married might only be cognizable in the context of an equal protection challenge, since the state has foreclosed all legal avenues of homosexual sexual expression.[470]

b. The Commune: Blood, Marriage or Adoption——It is difficult to guess whether the average community would be more appalled by the prospect of a homosexual marriage or by the prospect of being overrun by communes. Most states provide criminal laws which communities can use to rid themselves of cohabiting homosexuals or heterosexuals.[471] The most typical self-protective device adopted by communities to weed out other unorthodox family units is the zoning ordinance. The municipal entity can zone itself,[472] or some specific area within it, for one-family housing and then can define a family as consisting of persons related by blood, marriage or adoption.[473] In seeking to preserve the residential, familial character of the neighborhood, these communities zone out not only communes, student groups and boarding houses, but also any other group of unrelated individuals, including a family with a foster child.[474] These ordinances sometimes proliferate throughout entire regions,[475] creating large enclaves of traditional families.

When these ordinances have been challenged, communities have proffered all conceivable justifications, claiming that such ordinances

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467 Id; see text accompanying notes 407-08 supra.

468 See Labine v. Vincent, 401 U.S. 532, 538 (1971).

469 The issuance of a marriage license might have brought plaintiffs within the holding of Cotner v. Henry, 394 F.2d 873 (7th Cir.), cert. denied, 393 U.S. 847 (1968) (sodomy statutes may not constitutionally be enforced against married couples).

470 See State v. Lair, 62 N.J. 388, 398, 301 A.2d 748, 754 (1973) (concurring opinion).

471 See text accompanying notes 303-94 supra.

472 The zoning power is delegated to municipalities. E.g., N.Y. Village Law § 7-700 (McKinney 1973).

473 Typical ordinances are set out in Boraas v. Village of Belle Terre, 476 F.2d 806, 809 (2d Cir. 1973), prob. juris. noted, 42 U.S.L.W. 3226 (U.S. Oct. 15, 1973) (No. 73-191), and in Palo Alto Tenants Union v. Morgan, 321 F. Supp. 908, 909 (N.D. Cal. 1970), aff'd per curiam, 487 F.2d 883 (9th Cir. 1973).

474 Newark v. Johnson, 70 N.J. Super. 381, 175 A.2d 500 (County Ct. 1961).

475 See Boraas v. Village of Belle Terre, 476 F.2d 806, 818 n.9 (2d Cir. 1973), prob. juris. noted, 42 U.S.L.W. 3226 (U.S. Oct. 15, 1973) (No. 73-191).

control population density,[476] prevent noise and disturbance,[477] prevent traffic and parking problems,[478] and preserve the rent structure of the community.[479] Unless a court found that the ordinances abridged a constitutionally protected right, these excuses could pass constitutional muster and the ordinances would survive without any attention being given to their real purpose and effect. The two main constitutional grounds for challenging the ordinances, privacy and equal protection, both reduce to the same question. Under the now faltering dichotomy the Supreme Court constructed for viewing equal protection claims, the ordinance would only receive serious scrutiny if it were premised on a suspect classification, or if it infringed a fundamental or constitutional right. The argument that it is suspect to discriminate against unrelated persons did not receive much serious judicial attention.[480] Thus, the threshold question in a privacy or an equal protection claim is the same: is there a constitutional right to live with persons to whom one is not related? The first two federal courts to consider the constitutionality of these ordinances managed to avoid that question, and held the ordinances valid.

The plaintiffs in *Palo Alto Tenants Union v. Morgan*[481] were members of a commune living in an area of the city that was zoned for single-family housing. A family was defined by the ordinance as consisting of no more than four persons unrelated by blood, marriage

[476] Palo Alto Tenants Union v. Morgan, 321 F. Supp. 908, 912 (N.D. Cal. 1970), aff'd per curiam, 487 F.2d 883 (9th Cir. 1973). The argument is that the traditional family is "self-limiting" in size, while a "voluntary family" might consist of any number of persons.

[477] Id.; Kirsch Holding Co. v. Borough of Manasquan, 59 N.J. 241, 245, 281 A.2d 513, 515 (1971).

[478] Palo Alto Tenants Union v. Morgan, 321 F. Supp. 908, 912 (N.D. Cal. 1970), aff'd per curiam, 487 F.2d 883 (9th Cir. 1973).

[479] Id. at 912-13.

[480] See, e.g., Boraas v. Village of Belle Terre, 476 F.2d 806, 814 (2d Cir. 1973), prob. juris noted, 42 U.S.L.W. 3226 (U.S. Oct. 15, 1973) (No. 73-191). The only sign of judicial acceptance of the idea that such classifications might be suspect was in Parr v. Municipal Court, 3 Cal. 3d 861, 479 P.2d 353, 92 Cal. Rptr. 153 (1971), cert. denied, 404 U.S. 869 (1972). The California Supreme Court gave strict scrutiny to a city ordinance prohibiting sitting or lying on the grass in public parks, on the ground that the ordinance discriminated against hippies. In ruling that the ordinance, while not discriminatory on its face, denied equal protection to hippies, the court said:

> [W]e cannot be oblivious to the transparent, indeed the avowed, purpose and the inevitable effect of the ordinance in question: to discriminate against an ill-defined social caste whose members are deemed pariahs by the city fathers. This court has been consistently vigilant to protect racial groups from the effects of official prejudice, and we can be no less concerned because the human beings currently in disfavor are identifiable by dress and attitudes rather than by color.

Id. at 870, 479 P.2d at 360, 92 Cal. Rptr. at 160; see Note, *All* in the "Family:" Legal Problems of Communes, 7 Harv. Civ. Rights—Civ. Lib. L. Rev. 393, 396-400 (1972) [hereinafter Note, Communes].

[481] 321 F. Supp. 908 (N.D. Cal. 1970), aff'd per curiam, 487 F.2d 883 1973).

or adoption.[482] An affirmative suit was brought to enjoin defendant city officials from harassing the commune under the guise of enforcing the ordinance, and to obtain a declaratory judgment that the ordinance was unconstitutional as a denial of equal protection. The court accepted the dual-level equal protection model and agreed that the state would have to demonstrate a compelling state interest to justify the ordinance if a constitutional right had been abridged.[483] The court stated that although the right to form a group or commune might be protected by first amendment freedom of association, that right (accepted arguendo) had not been abridged. Plaintiffs were not being denied the right to live together—they were only being denied the right to live together as a group in certain sections of the city.[484] The court was careful to point out that there were other sections of the city where plaintiffs could live together legally. Once it was determined that no constitutional or fundamental right had been abridged, the court found it easy to hold that the state interests noted above provided a sufficient rational basis for the ordinance.[485]

The finding that the right had not been sufficiently abridged to present a case of unconstitutional state action is certainly subject to criticism. First, the state need not totally vitiate a right to run afoul of the Constitution. Imposing a penalty on the exercise of a constitutional right, or forcing a choice between two constitutional rights, is also unconstitutional.[486] The *Palo Alto* court's standard is also difficult to apply. How many communities, or how many square feet, must be closed to communes before the members' rights have been abridged?

In a more recent challenge, the district court in *Boraas v. Village of Belle Terre*[487] also accepted the proposition that the decision of a group of unrelated individuals to live together is constitutionally protected, and also upheld the constitutionality of a more stringent ordinance. Plaintiffs were a group of six college students and their landlords. The Village of Belle Terre had zoned itself as one single-family residential zone and defined a family as a group of persons functioning as a single housekeeping unit not comprising more than two persons unrelated by blood, marriage or adoption. Thus, the situation *Palo Alto* distinguished existed here—a group was zoned out of an entire community.

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482 Id. at 909.

483 Id. at 910-11.

484 The ordinance only affected two zones of the city. "The right to form [communal living groups] may be constitutionally protected, but the right to insist that these groups live under the same roof, in any part of the city they choose, is not." Id. at 911-12.

485 Id. at 912.

486 Dunn v. Blumstein, 405 U.S. 330, 339-42 (1972); Cole v. Housing Authority, 435 F.2d 807, 810-11 (1st Cir. 1970).

487 Civil No. 72C-1030 (E.D.N.Y. Sept. 20, 1972), rev'd and remanded, 476 F.2d 806 (2d Cir. 1973), prob. juris. noted, 42 U.S.L.W. 3226 (U.S. Oct. 15, 1973) (No. 73-191).

Like the court in *Palo Alto*, the district judge concluded that if plaintiff students had been denied their "unquestionable right" to live together, the case would present no problem.[488] However, rather than concluding that the recognized constitutional right had not been abridged and that the ordinance could therefore be upheld on the rational basis of the state's interest in controlling population density, etc., the court seemed to conclude that the right had been partially abridged and thus required a more substantial justification for the ordinance.[489] Analogizing the desire of families to live in a community with other families to the desire of plaintiff students to live together, the court found what amounted to a countervailing right of privacy and freedom of association.[490] This right was held to justify the ordinance, although it would not have justified a total abrogation of the plaintiffs' right to live together.[491] Thus, while the opinion did manage to extricate analysis from the spurious grounds of decision in *Palo Alto* and face the real issue, the district court's holding was essentially the same as that of the *Palo Alto* court: the plaintiffs' rights had not been sufficiently abridged to render the ordinance unconstitutional. The most significant aspect of the district court's opinion was its holding that the state has a substantial, legitimate interest in creating and protecting enclaves for traditional family units.[492]

On appeal, the Second Circuit Court of Appeals reversed.[493] Even more significant than the result, however, is the creative approach adopted by the court in analyzing the equal protection issues raised. The usual equal protection double standard had been presented to the court but, following the more and more noticeable striving of the Supreme Court for a middle ground, Judge Mansfield, writing the opinion of the court, rejected the two-tiered framework as outmoded and overly rigid.[494]

The court articulated a new set of standards and a new test to be used in what it viewed as a more equitable and flexible approach. Factors relevant to the decision include evidence as to the nature of the unequal classification under attack, the nature of the rights adversely affected, and the governmental interests urged in support of the classification.[495] The classification must be shown to have a substantial relationship to a lawful objective. Additionally, the classification must

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488 Id. at 25.

489 Id. at 30, 38.

490 Id. at 24-25, 27.

491 Id. at 35.

492 A one-family dwelling zoning district... needs no apologia. Such zoning is simply another of countless statutes of bounty and protection with which the states, and all of them, and the Federal government alike aggressively surround the traditional family....

Id. at 31.

493 Boraas v. Village of Belle Terre, 476 F.2d 806, 816-17 (2d Cir. 1973), prob. juris. noted, 42 U.S.L.W. 3226 (U.S. Oct. 15, 1973) (No. 73-191).

494 Id. at 814.

495 Id.

not be void for other reasons such as overbreadth or vagueness.[496] Mansfield explained that this new test looks more to the effect of a law than to hypothetical justifications.[497]

In the case at bar, the court found that the effect of the challenged ordinance was to exclude unrelated groups from the community, with no rational basis. The rights claimed by plaintiff were described as "important" and "certainly more personal and basic than those of commercial interests." Mansfield gave short shrift to the justification for infringing these rights that the district court had found persuasive. Creating enclaves for traditional families was held not to be a proper zoning objective, because fostering traditional families was declared to be irrelevant to the public health, safety and welfare.[498] As to the more conventional state interests purportedly served, the court felt constrained to adhere to the district court's observation that "Such a restricted zoning district might well be all but impossible to justify if it had to be strictly justified by its service of... familiar zoning objectives."[499] Further, Mansfield stated that even if the ordinance could be held to bear some relationship to these goals, the classification could still be found overbroad.[500] Less onerous alternatives would have been required: if the community's worry was rent inflation, a rent control law would be a more appropriate solution; if the worry was increased demand for parking, a regulation of the number of cars allowed per dwelling could solve the problem more directly.

The Second Circuit did not give much credence to the theory that no right had been abridged because the plaintiffs could have gone elsewhere. The fact that plaintiff students might have lived in the university dormitory, or in another community, was held to be no defense to the charge that the ordinance was not substantially related to legitimate governmental ends.[501]

As Judge Mansfield pointed out, this new approach allows judicial intervention in cases which could not have been seriously scrutinized under the outmoded "new" equal protection, which reached only the most egregious inequities.[502] A similar approach could be adopted in privacy challenges brought in a substantive due process context as well. The two-tiered structure created by *Roe v. Wade* is likely to be as stultifying as the equal protection dichotomy. The Second Circuit had little trouble recognizing the right to live in a group as a phase of personal liberty, and admitted relief at not having to confront the question of whether or not that right is a fundamental right of privacy.[503] In

496 Id. at 814-15, 817.
497 Id. at 815.
498 Id. at 815.
499 Id. at 816.
500 Id. at 817.
501 Id. at 817-18. The court recognized the problems inherent in the theory that no right has been abridged as long as there is somewhere else a group may live. Id.
502 Id. at 815.
503 Id. at 814.

this way, obviating the necessity for a strict test could form a basis for greater protection of personal liberty.

While the Second Circuit's renovated equal protection model is helpful in protecting rights, it is not a sine qua non. Rights may still be found to be fundamental, in which case the compelling state interest test would still be applicable. Viewing the same right to live in groups which was the center of the *Belle Terre* controversy, the three-judge court in *Moreno v. Department of Agriculture*[504] made exactly the decision the Second Circuit eschewed: the right to live in a group is protected by a fundamental right of privacy and freedom of association. The case involved a challenge to an amendment of the Federal Food Stamp Act[505] which limited distribution of food stamps to households comprised of related persons.[506] Since the regulation was nationwide, the *Palo Alto* rationale was unavailing—plaintiffs could not go elsewhere, so the right had clearly been abridged. In concluding that the classification denied equal protection, the court relied on the two-tiered equal protection model.[507] Since the right abridged was found to be guaranteed by the Constitution, the Government had to demonstrate a compelling interest in the classification. The court concluded that the classification was not even distantly related to any purpose of the Food Stamp Act, and that the only conceivable governmental interest was an attempt to regulate morality by discouraging unconventional living styles.[508] Judge McGowan, writing for a unanimous court, held that even if Congress might sometimes have the power to legislate in the name of morality, it could not do so where the right of privacy and freedom of association *in the home* was involved. The decision thus seems to follow the idea gleaned from *Stanley v. Georgia* that certain activities within the home are constitutionally protected, and that the government's interest in fostering morality per se is not a sufficient justification for intruding into the conduct of an individual's home life. On the whole, however, the opinion does seem to endorse a right of autonomy. The greatest deficiency of the *Moreno* opinion is its almost total lack of explanation or justification for the conclusion that the right alleged was a fundamental right of privacy.[509] Explicit standards are needed to test other purported rights, and also to prevent such adventurous decisions from seeming groundless.

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504 345 F. Supp. 310 (D.D.C. 1972) (three-judge court), aff'd, 413 U.S. 528 (1973).

505 7 U.S.C. § 2012(e) (1971).

506 7 C.F.R. §§ 270.2(jj), 271.3(a) (1971). The amendment was clearly aimed at hippie communes and student groups. See 116 Cong. Rec. 43,325-27, 44,430-32 (1970).

507 345 F. Supp. at 314.

508 Id.

509 On appeal, the Supreme Court held that the regulation was not rationally related to a legitimate governmental objective and thus did not reach the privacy issue. 413 U.S. 528 (1973). Only Justice Douglas was willing to declare that a fundamental constitutional right—freedom of association—was involved. Id. at 541-45 (concurring opinion).

3. The Right to Raise and Educate Children

Also included in *Roe v. Wade*'s general sketch of the zone of privacy[510] were rights derived from *Meyer v. Nebraska*[511] and *Pierce v. Society of Sisters*:[512] the right to raise and educate one's children. These parental rights should apply to traditional mothers and fathers as well as to parents who have chosen nontraditional lifestyles.

While these rights have not been a great source of contention recently, they have played a role in several contexts. School parietal rules, for example, involve state incursion upon two distinct ranges of privacy interests. Like the zoning ordinances and food stamp regulation discussed above, parietals implicate government in the individual's choice of where and with whom to live. Moreover, since the individuals concerned are frequently minors, the issue of parental rights to supervise children's education is also raised.

One recent decision, reminiscent of *Prince v. Massachusetts*,[513] held that the state's interest in children's education may outweigh a parent's right. In *Pratz v. Louisiana Polytechnic Institute*,[514] plaintiff students and parents challenged the school's parietal regulation which required all students, except married students living with their spouses, to live and eat in university facilities. The court was not sympathetic to the students' claim that the regulation infringed their right of privacy and freedom of association.[515] To the parents' claim of a right to decide where their children should live, the court responded that when students were away from home and not living with their families, "the family must defer to the wisdom of the educators at the particular institution the child is attending."[516] It is not clear whether the court meant to imply that the parents' rights had not been abridged, or that the state's justifications for abridging the parents' rights were sufficient. Judge Ainsworth, dissenting, thought that the right of privacy and freedom of association of those students over 21, and the rights of the parents of those students under 21, had been unjustifiably abridged.[517] He suggested that the decision as to whether to live on or off campus should belong to the student or the parent, not to the state.[518]

In a subsequent challenge to a similar regulation, *Cooper v. Nix*,[519] the same court adopted at least part of Ainsworth's conclusion. A Southeastern Louisiana University regulation required students to live in dormitories, but exempted students over 23. Judge Dawkins, the

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[510] 410 U.S. at 152-53.
[511] 262 U.S. 390 (1923).
[512] 268 U.S. 510 (1925).
[513] 321 U.S. 158 (1944); see note 194 supra.
[514] 316 F. Supp. 872 (W.D. La. 1970) (three-judge court), appeal dismissed, 401 U.S. 951, aff'd, 401 U.S. 1004 (1971).
[515] Id. at 884, 886.
[516] Id. at 885.
[517] Id. at 888.
[518] Id. at 889.
[519] 343 F. Supp. 1101 (W.D. La. 1972).

author of the opinion in *Pratz*, found this to be a denial of equal protection, and not reasonably related to the state's alleged interest in its "living and learning" program. Distinguishing *Pratz* on the ground that none of the plaintiffs there had been over 21, he concluded that the regulation was unreasonable as applied to persons of legal majority,[520] but did not relent in his determination that the rights of students under 21 and of their parents had not been contravened. Dawkins even suggested that the right of persons of legal majority to choose their own places of residence might be a fundamental right and thus subject to the compelling state interest test, but did not need to reach that issue.[521]

The parent's right to control children's education has also been asserted in challenges to school sex education programs.[522] Whether the sex education was compulsory or whether the parents could have their children excused was often the determinative factor in the court's decision as to whether a constitutional right was abridged.[523] In another case, parents and the Unitarian Church claimed the right to run a sex education program.[524] The court found that the parents had a constitutional right to shape their children's education,[525] and thus enjoined the defendant district attorney from prosecuting the parents and the church under a state obscenity law.

D. Home and Autonomy

After *Roe*'s implicit rejection of the notion that privacy rights are limited to the marital association, the nature of *Griswold* privacy can be separated into two overlapping components: a right to engage in certain activities within the confines of one's home; and a right to personal liberty, in particular to autonomous decisionmaking. Issues arising from state interference with family planning decisions, consensual sexual conduct and the activities of nonconventional family groupings may be seen as having a fairly direct and obvious connection with both strands of *Griswold*.

On the other hand, in some lower court cases, individuals attempting to anchor an interest to the Constitution through *Griswold* tended to rely primarily on one strand or the other of the decision. Thus, parties who saw *Griswold* as mainly concerned with the home or another private place have argued that *Griswold* augments the fourth amendment[526] or

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520 Id. at 1110-11.

521 Id. at 1110.

522 See, e.g., Hopkins v. Hamden Bd. of Educ., 29 Conn. Supp. 397, 289 A.2d 914 (1971).

523 See Medeiros v. Kiyosaki, 52 Hawaii 436, 440, 478 P.2d 314, 317 (1970).

524 Unitarian Church W. v. McConnell, 337 F. Supp. 1252 (E.D. Wis. 1972), aff'd, 474 F.2d 1351 (7th Cir. 1973).

525 Id. at 1258.

526 See United States v. Baker, 262 F. Supp. 657, 666 (D.D.C. 1966); United States v. Kahn, 251 F. Supp. 702, 707 (S.D.N.Y.), aff'd, 366 F.2d 259 (2d Cir.), cert. denied, 385 U.S. 948 (1966); State v. Schaffel, 4 Conn. Cir. Ct. 234, 246, 229 A.2d 552, 561 (1966). See also State v. Kabayama, 94 N.J. Super. 78, 82, 226 A.2d 760, 763, aff'd, 98 N.J. Super. 85, 236 A.2d 164 (1967), aff'd per curiam, 52 N.J. 507,

reinforces the right to peace and quiet recognized in *Breard v. City of Alexandria*,[527] which acts as a counterpoise to freedom of speech.[528] Parties viewing *Griswold* as primarily concerned with autonomy or liberty in a broad sense raised a variety of claims that bore no relation to the home-seclusion-repose aspect of the case. Generally, these litigants protested against some sort of governmental restraint on their physical activities. For example, arguments based on *Griswold* were made by draftees,[529] drivers of motorcycles who did not want to wear helmets,[530] and persons who wanted to "be present" at a cockfight.[531] One plaintiff argued unsuccessfully that a no fault insurance law deprived him of the opportunity to have his constitutional right to "personal security and bodily integrity" protected by negligence law.[532] Another argued that state unfair trade practice statutes prohibiting certain business structures violated his constitutional right to invest his money as he pleased, a claim the court termed "breathtakingly imaginative" before turning it down.[533] This case represents the only attempt to use *Griswold* to establish constitutional protection for *Lochner*-type economic rights.[534]

In few of these miscellaneous cases was a privacy claim successfully advanced. In each instance, some element was missing, although the courts could not always determine what that element was. One is drawn to the conclusion that a persuasive privacy argument must derive some content from both of the themes of *Griswold*. Nevertheless, there are interests that rely predominantly on one theme or the other, which seem to compel attention. This Note will now consider two such interests, the "right" to smoke marijuana in one's home and the "right" to wear one's hair as one pleases.

1. Marijuana

The right to possess and use marijuana in one's home is not in itself comparable to the rights protected in some privacy decisions. It

246 A.2d 714 (1968); In re Kauffman, 215 Pa. Super. 110, 112, 257 A.2d 313, 314 (1969) (per curiam).

527 341 U.S. 622 (1951).

528 See People v. Doorley, 338 F. Supp. 574, 577 (D.R.I.), rev'd on other grounds, 468 F.2d 1143 (1st Cir. 1972); Dietemann v. Time, Inc., 284 F. Supp. 925, 929 (C.D. Cal. 1968), aff'd, 449 F.2d 245 (9th Cir. 1971).

529 See, e.g., United States v. Dorris, 319 F. Supp. 1306, 1307 (W.D. Pa. 1970); United States v. Cook, 311 F. Supp. 618, 619-20 (W.D. Pa. 1970); Katz v. United States, 287 F. Supp. 29, 32-33 (S.D.N.Y. 1966).

530 See, e.g., American Motorcycle Ass'n v. State Police, 11 Mich. App. 351, 359, 158 N.W.2d 72, 76 (1968); State v. Fetterly, 254 Ore. 47, 50, 456 P.2d 996, 999 (1969); Note, Motorcycle Helmets and the Constitutionality of Self-Protective Legislation, 30 Ohio St. L.J. 355, 361-63 (1969).

531 See State v. Abellano, 50 Hawaii 384, 386-96, 441 P.2d 333, 335-40 (1968) (concurring opinion).

532 See Pinnick v. Cleary, 271 N.E.2d 592, 600 (Mass. 1971).

533 See HM Distrib. of Milwaukee, Inc. v. Department of Agriculture, 55 Wis. 2d 261, 272, 198 N.W.2d 598, 604 (1972).

534 See note 70 supra.

does not affect one's life as fundamentally as the decision to bear a child. Furthermore, the ability to get high viewed as a primary right can scarcely be said to be "implicit in the concept of ordered liberty"[535] or "rooted in our collective conscience." Nevertheless, it resembles protected privacy rights in several particulars.

If an individual uses marijuana in his own home, his activity closely resembles the conduct protected in *Stanley v. Georgia*.[536] Although he cannot be said to be informing himself in the same way that a viewer of obscenity informs himself, the Supreme Court has asserted that *Stanley* had nothing to do with the first amendment.[537] *Stanley* must now be viewed as a supplement to the fourth amendment, giving added protection to the values of seclusion and repose centered about the home. Like a viewer of obscenity, a marijuana smoker has no right of access to the object of his indulgence through public channels. Nevertheless, if *Stanley* now protects a limited right to engage legally in one's home in conduct that would be illegal if performed elsewhere,[538] the right to use marijuana would be one candidate for protection.[539] If an individual can write salacious books in his attic and read them in his living room,[540] perhaps he can grow marijuana in his window box and smoke it in his den.

This conclusion is made more persuasive because of other similarities to privacy rights. While marijuana use does not seem on its face to be connected to notions of family planning and home life, it is intimately connected—albeit in a minor way—with the ability to set one's own lifestyle. Furthermore, when a "consenting adult" uses marijuana

535 At least one court has distinguished the issue of marijuana use from that of privacy on these grounds. See Commonwealth v. Leis, 355 Mass. 189, 195, 243 N.E.2d 898, 903-04 (1969).

536 394 U.S. 557 (1969).

537 See United States v. 12 200-Ft. Reels of Super 8MM. Film, 413 U.S. 123, 126 (1973); text accompanying note 148 supra.

538 See text accompanying notes 148-59 supra.

539 In *Stanley*, the Court stated that its decision was not to be taken as a limitation on the state's ability to make possession of "narcotics, firearms, or stolen goods" a crime. 394 U.S. at 568 n.11 (1969). A few courts have relied on this footnote to distinguish away claims that marijuana possession is protected under *Stanley*. E.g., United States v. Drotar, 416 F.2d 914, 917 (5th Cir. 1969). However, the classification of marijuana as a "narcotic" is questionable. The federal government classifies marijuana and narcotics separately. Controlled Substances Act of 1970, 21 U.S.C. §§ 802(15)-(16) (1970). Only two states continue to classify marijuana as a narcotic. Colo. Rev. Stat. Ann. § 48-5-1(14)(a) (1963); R.I. Gen. Laws Ann. § 21-28-2(15) (1968); see National Organization for the Reform of Marijuana Laws, The Criminal Penalties Under the Current Marijuana Laws 2-3 (1973). Furthermore, the President's National Commission on Marihuana and Drug Use (the National Commission) recently reported its findings that the drug had none of the harmful properties of narcotic drugs. National Commission on Marihuana and Drug Abuse, Marihuana: A Signal of Misunderstanding 104-10 (New Am. Lib. ed. 1972) [hereinafter Marihuana Comm'n Rep.]. This would suggest that the reasons for controlling marijuana use should differ from the reasons for controlling narcotics.

540 See United States v. Thirty-Seven (37) Photographs, 402 U.S. 363, 382 (1971) (Black, J., dissenting).

only to alter his own consciousness and does not engage in antisocial behavior, he indulges in autonomous conduct that does not affect others. In such a situation, attention should at least be paid to the state's interest in interfering with his conduct, to see if it is rationally related in fact to a valid public purpose.[541]

To date, detailed inquiry into the state's interest has not been made in the courts. The presumption of constitutionality given to state enactments has enabled courts to avoid consideration of the underlying rationality of legislative restrictions on marijuana use.[542] Courts have held that the legislature could validly assume that these restrictions promote public safety by preventing antisocial conduct[543] and protect public health by preventing the actor from harming himself either directly[544] or indirectly by predisposing himself to use of more dangerous drugs.[545] No factual support for these contentions has been asked of the state and factual refutation by defendants has been unavailing.[546]

In an attempt to overcome this presumption, defendants have argued unsuccessfully that marijuana legislation violates the first amendment right of free exercise of religion[547] and the eighth amendment prohibition of cruel and unusual punishment.[548] They have also argued that the classification of marijuana as a narcotic is irrational and violates the equal protection clause.[549] Privacy claims have been equally un-

[541] See text accompanying and following notes 219-20 supra.

[542] Bonnie & Whitebread, The Forbidden Fruit and the Tree of Knowledge: An Inquiry Into the Legal History of American Marijuana Prohibition, 56 Va. L. Rev. 971, 1126-27 (1970).

[543] See, e.g., People v. Aguiar, 257 Cal. App. 2d 597, 602-03, 65 Cal. Rptr. 171, 174-75, cert. denied, 393 U.S. 970 (1968); Commonwealth v. Leis, 355 Mass. 189, 193-95, 243 N.E.2d 898, 902-03 (1969); Bonnie & Whitebread, supra note 542, at 1131-32.

[544] See, e.g., People v. Aguiar, 257 Cal. App. 2d 597, 602-03, 65 Cal. Rptr. 171, 174-75, cert. denied, 393 U.S. 970 (1968); Commonwealth v. Leis, 355 Mass. 189, 193-94, 243 N.E.2d 898, 902-03 (1969).

[545] See, e.g., People v. Aguiar, 257 Cal. App. 2d 597, 602-03, 65 Cal. Rptr. 171, 174-75, cert. denied, 393 U.S. 970 (1968); Commonwealth v. Leis, 355 Mass. 189, 193-94, 243 N.E.2d 898, 902-03 (1969).

[546] See, e.g., United States v. Drotar, 416 F.2d 914, 916 (5th Cir. 1969), vacated on other grounds, 402 U.S. 939 (1970); People v. Aguiar, 257 Cal. App. 2d 597, 602-03, 65 Cal. Rptr. 171, 174-75, cert. denied, 393 U.S. 970 (1968); Commonwealth v. Leis, 355 Mass. 189, 193-94, 243 N.E.2d 898, 902-03 (1969).

[547] E.g., United States v. Kuch, 288 F. Supp. 439 (D.D.C. 1968); Gaskin v. State,—Tenn.—, 490 S.W.2d 521, 523-24 (1973), appeal dismissed, 94 S. Ct. 221 (1973); Bonnie & Whitebread, supra note 542, at 1142-45. Commentators have suggested that a first amendment claim based on symbolic self-expression might also be raised by marijuana users. Weiss & Wizner, Pot, Prayer, Politics and Privacy: The Right to Cut Your Own Throat in Your Own Way, 54 Ia. L. Rev. 709, 718-23 (1969); Note, The California Marijuana Possession Statute, 19 Hastings L. J. 758, 770 (1968) [hereinafter Note, Marijuana Possession].

[548] E.g., United States v. Drotar, 416 F.2d 914, 915-17 (5th Cir, 1969), vacated on other grounds, 402 U.S. 939 (1970); United States v. Ward, 387 F.2d 843, 845 (8th Cir. 1967); Gaskin v. State,—Tenn.—, 490 S.W.2d 521, 524 (1973), appeal dismissed, 94 S. Ct. 221 (1973); Bonnie & Whitebread, supra note 542, at 1133-40.

[549] E.g., English v. Virginia Probation & Parole Bd., 481 F.2d 188, 191-92

availing. Courts generally treat such arguments in a paragraph or less, distinguishing *Griswold,* for example, as concerned with "regulation of birth control activities," a "personal" rather than a "public health" matter.[550]

Only one court has come close to giving the issue thoughtful treatment. In *State v. Kantner,*[551] the Hawaii Supreme Court held that a legislative classification of marijuana as a "narcotic" was rational and did not violate equal protection standards.[552] Two justices, however, wrote lengthy opinions which implied that a privacy claim might have been more successful. Justice Abe asserted that a person does have a right to smoke marijuana, derived from the "fundamental right of liberty to make a fool of himself." Accepting the pure autonomy theory, he conceded that marijuana might be harmful to the user but concluded that the state could not prohibit its use without showing harm to the general public.[553] Justice Levinson maintained that enjoyment of marijuana was an aspect of the "right to be let alone,"[554] protected under both federal and state constitutions.[555] The right partook of both autonomy and locus-of-privacy concepts.[556] He did not directly challenge the state's interest in the health of its citizens, but stated that, under prior case law, such an interest had to be both compelling and demonstrated. There had been no showing of actual harm to the user or to society.[557]

The autonomy rationale used by two judges in *Kantner* presents

(4th Cir. 1973); Scott v. United States, 395 F.2d 619, 620 (D.C. Cir.), (per curiam), cert. denied, 393 U.S. 986 (1968); Bonnie & Whitebread, supra note 542, 1128-33.

550 State ex. rel. Scott v. Conaty,—W.Va. —, 187 S.E.2d 119, 123 (1972); see People v. Aguiar, 257 Cal. App. 2d 597, 605, 65 Cal. Rptr. 171, 176, cert. denied, 393 U.S. 970 (1968); Commonwealth v. Leis, 355 Mass. 189, 195, 243 N.E.2d 898, 903-04 (1969); Gaskin v. State,—Tenn. —, 490 S.W.2d 521, 524 (1973), appeal dismissed, 94 S. Ct. 221 (1973); Miller v. State, 458 S.W.2d 680, 684 (Tex. Crim. App. 1970).

551 53 Hawaii 327, 493 P.2d 306, cert. denied, 409 U.S. 948 (1972).

552 Id. at 330-33, 493 P.2d at 308-10. The court distinguished *Griswold* by relying on Justice Douglas' penumbral theory. Since use of marijuana was not "peripheral" in the sense of being "essential" to the exercise of an enumerated right, it was not protected. The court did not explain to what enumerated right the use of contraceptives had been essential.

553 Id. at 336-39, 493 P.2d at 312-13 (concurring opinion). Abe concurred because, in his view, appellants had not raised the issue correctly on appeal. For a point of view similar to Justice Abe's, see People v. Sinclair, 387 Mich. 91, 131-34, 194 N.W.2d 878, 895-96 (1972) (Kavanagh, J., concurring).

554 53 Hawaii at 340, 493 P.2d at 313 (dissenting opinion). In quoting Brandeis' phrase, Levinson emphasized the words "beliefs," "thoughts," "emotions" and "sensations." He later suggested that use of marijuana affected all but the first. Id. at 342, 493 P.2d at 315.

555 Id. at 339-47, 493 P.2d at 313-17. Hawaii amended its constitution in 1968 to include an express right to privacy. Hawaii Const. art I, § 5; see 53 Hawaii at 341 n.4, 493 P.2d at 314 n.4.

556 Levinson emphasized personal autonomy, 53 Hawaii at 340, 342, 493 P.2d at 313-14, 315, but also separated "private" and "public" conduct, id. at 346-47, 493 P.2d at 317.

557 Id. at 343-45, 493 P.2d at 315-16.

one focal point for analysis. When combined with *Stanley* and *Paris Adult Theatre,* the argument becomes quite a bit stronger. If one accepts the notion expressed in those cases that activity conducted in the home is likely to be constitutionally protected for that reason alone,[558] one can at least demand that the state have a perceptible and demonstrable interest before intruding upon that private sphere. To measure the individual right against the state interest in a marijuana case, a court could use either of two tests. Since the privacy of the home has been termed "fundamental,"[559] the state may have to demonstrate a compelling interest before it can enter the home to prevent marijuana use.[560] But even if a court does not deem the right so basic, this type of case might compel somewhat closer judicial scrutiny of legislative means and goals than that used in traditional rational basis analysis. The Supreme Court has used an intermediate means-oriented standard in analyzing equal protection claims involving important personal interests.[561] It may well be proper for courts to use an intermediate standard in due process litigation when personal liberties are at stake. Since a personal liberty of some dimension is involved in marijuana cases, such an analysis should be employed to determine whether articulated, permissible state goals are clearly furthered by laws prohibiting private possession of marijuana.

To be permissible, the state interest must be more substantial than prevention of activity that would be illegal if performed elsewhere. One has no right to view obscenity in a theatre because of a perceived danger to the public. One does have this right in one's home because the danger to the public is reduced, the danger to the individual is not substantial, and the values associated with the seclusion of the home merit exclusion of the police absent such dangers. Similarly, a state interest in invading the home to prevent use of marijuana must be motivated by some perceptible need to protect the public at large, or to protect the individual user against a genuine threat to his health and welfare.

If a means-related test is employed, those challenging marijuana laws would be allowed to show[562] that legislative goals are not always furthered by restrictive laws.[563] For example, in terms of public safety, they could challenge the dubious contention that marijuana use causes antisocial behavior.[564] In terms of public health, advocates of marijuana

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558 See text accompanying notes 148-59 supra.

559 Stanley v. Georgia, 394 U.S. 557, 564 (1969) ("For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy.").

560 See Roe v. Wade, 410 U.S. 113, 155 (1973).

561 See Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Eisenstadt v. Baird, 405 U.S. 438 (1972); Reed v. Reed, 404 U.S. 71 (1971); Gunther, supra note 178.

562 If a compelling state interest test is used, the state would bear the burden of proving that its laws in fact promote definite and important state interests. See Roe v. Wade, 410 U.S. 113, 156 (1973).

563 See Bonnie & Whitebread, supra note 542, at 1149-53.

564 The report of the National Commission states that "the weight of the

use should be allowed to demonstrate that marijuana is not addictive and does not produce a tendency to use more dangerous, addictive drugs.[565] Such a showing would tend to prove that marijuana users are unlikely to require public assistance or become a burden on society.[566] In terms of individual health, marijuana users should be allowed to show that marijuana is not harmful to the individual.[567] Although a person may not have a privacy right to control of his body,[568] cases have shown that he does have a protectable interest in his physical integrity.[569] The state may interfere with his use of his body in some circumstances to promote viable public goals such as prevention of epidemics[570] and of crime.[571] When the state's interest is not focused on the health or safety of the public at large, but on the health of a single individual, that individual's interest should at least be such that the state must show a certain and perceptible impairment derived from his conduct.[572]

There are a few signs that courts may be willing in the future to recognize a privacy right in marijuana cases. In one recent decision, police

evidence is that marihuana does not cause violent or aggressive behavior; if anything, marihuana generally serves to inhibit the expression of such behavior." Marihuana Comm'n Rep., supra note 539, at 91; see id. at 88-94. See also Note, Marijuana Possession, supra note 547, at 776-78.

565 The National Commission found that marijuana was not addictive and that use did not lead inevitably to experimentation with narcotics. Marihuana Comm'n Rep., supra note 539, at 108-10.

566 The National Commission found that extensive use of marijuana may cause psychological dependence in a small minority—perhaps 2%—of those who use it, so that they cease to function as actively contributing members of society. Id. at 75, 79-81, 107-13, 184-86. The Commission found that this aspect of marijuana use could pose a public health problem if distribution were legalized, although it does not at present. Id. at 110-13, 184-86. The Commission thus proposed decriminalization of private possession, but continued prohibition of distribution. Id. at 188-209. In describing the effects of psychological dependence, the Commission stressed loss of motivation and lack of interest in job and social interaction, id. at 75, 107-08, but it did not state whether heavy users become dependent on public economic or health assistance. If heavy use does not result in such dependence, the state may not have the right to prevent such use. The question would be whether society can insist that "dropping out"—whether because of drug use or simple lack of interest—is not a permissible form of behavior.

567 Aside from its conclusion that marijuana use was not addictive and did not lead to experimentation with narcotics, the National Commission found that marijuana use had little if any adverse effect on bodily processes and did not produce genetic defects. Id. at 69-70, 73-77, 104-06. There was some evidence of minor adverse psychological effect on predisposed individuals. Id. at 78-79, 105-07.

568 See Roe v. Wade, 410 U.S. 113, 154 (1973).

569 E.g., Rochin v. California, 342 U.S. 165, 172-73 (1952); Union Pac. R.R. v. Botsford, 141 U.S. 250, 251 (1891).

570 See Jacobson v. Massachusetts, 197 U.S. 11, 25-30 (1905).

571 See, e.g., Breithaupt v. Abram, 352 U.S. 432, 435-37 (1957).

572 Some commentators have argued a personal "right to be self-destructive." Weiss & Wizner, supra note 547, at 723-32. This Note does not adopt this extreme position, but rather recognizes a valid state interest in the physical health of its citizens. However, the state should not be able to limit personal activity without showing a basis in fact for its belief that certain conduct will be harmful to a person's health. Such an interest was demonstrated, for example, in Roe v. Wade, 410 U.S. 113, 149-50 (1973).

had entered a family home with a valid search warrant and had discovered the defendant's teenaged children smoking marijuana. The New York Court of Appeals narrowly construed a statute prohibiting maintaining a place where drugs are unlawfully used, finding the defendant innocent.[573] Although the court did not use a privacy rationale, it was clearly concerned with the values underlying the concept of privacy of the home.[574] In two other recent cases, defendants charged with possession and sale of large quantities of marijuana have claimed that the statutes under which they were charged were overbroad because they failed to distinguish possession for private use from possession for commercial distribution. Rather than dismissing such arguments out of hand, the courts found that although there might be a right to private possession, the defendants could not raise it since they were clearly commercial distributors.[575] This issue will soon be raised by the proper parties: private users have recently filed suit in the District of Columbia for a declaratory judgment that federal laws making the private possession and use of marijuana illegal are unconstitutional.[576]

If private users succeed in persuading a court that a privacy claim is viable and that state interests must be carefully scrutinized, some of the underlying issues involved in the question of marijuana use may finally be aired. As with many areas of privacy litigation, the underlying purpose of state restrictions on marijuana use may have more to do with controlling morality and discouraging nonconventional lifestyles than with public health or safety. To some extent, marijuana laws may be seen as an attempt by an established, older majority to impose lifestyle restrictions on a sizable, younger minority.[577] The states have chosen the most onerous means possible to implement these goals by imposing harsh criminal penalties[578] on those who engage in conduct that is not noticeably damaging to society at large. It may be that the ultimate solution, as proposed by the National Commission on Marihuana and Drug Abuse, is to decriminalize private possession and use, but also to

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573 People v. Fiedler, 31 N.Y.2d 176, 286 N.E.2d 878, 335 N.Y.S.2d 377 (1972).

574 The court stated: "It was never contemplated that criminal taint would attach to a family home should members of the family on one occasion smoke marijuana or hashish there." Id. at 180, 286 N.E.2d at 879, 335 N.Y.S.2d at 379.

575 United States v. Kiffer, 477 F.2d 349, 352 (2d Cir.), cert. denied, 94 S. Ct. 165 (1973); United States v. Maiden, 355 F. Supp. 743, 746-47 (D. Conn. 1973).

576 NORML v. Wilson, Civil Action No. 1897-73 (D.D.C., filed Oct. 10, 1973).

577 The National Commission noted this aspect of the marijuana problem. See Marihuana Comm'n Rep., supra note 539, at 10-11, 114-17. At least 24 million Americans, about half of them between 16 and 25 years of age, have used marijuana at least once. Id. at 38-39. Of all those arrested for possession alone (93% of all arrests), 88% are under 26 years old and 58% are under 21. Id. at 138-39.

578 The penalties for possession by first offenders are generally less than one year and might not be considered harsh. See, e.g., Ala. Code tit. 22, § 258(47)(a) (Supp. 1971). Penalties for second offenders can be substantial. See, e.g., id. (two to 15 years); Ariz. Rev. Stat. Ann. § 36-1002(B) (Supp. 1973) (two to 20 years); Colo. Rev. Stat. Ann. §§ 48-5-2 (1963), 48-5-20(2)(b) (Supp. 1971) (five to 20 years); R.I. Gen. Laws Ann. § 21-28-31 (Supp. 1972) (zero to 20 years).

attempt to control distribution of the drug.[579] This course resembles the remedy proposed by the Supreme Court for regulation of obscenity.[580] As in the case of obscenity, this solution protects the privacy of the home but leaves broader issues unsettled. The approach is ultimately based on a moral judgment about acceptable behavior and creates an out-group which must employ illegal methods to obtain the means by which to indulge in legal activity. Alternatively, a society that allows its citizens some freedom to pursue sensual happiness with minor harm to themselves might choose a regulatory scheme similar to that used for control of alcohol.[581] The preferable solution is no doubt legislative and there are some signs that reform is coming.[582] But until that time, closer judicial scrutiny of existing laws might at least afford some protection to what many agree is a protectable interest: the right of an individual, in the privacy of his home, to indulge in conduct that is harmful, if at all, only to himself.[583]

2. Hair

One of the most extensively litigated issues of the past few years has concerned the state's power to restrict the ability of an individual to determine the length of his hair.[584] The issue has arisen in several contexts, notably in public employment,[585] in the military,[586] in prisons,[587] and in public high schools[588] and colleges.[589] Opinions about the im-

[579] Marihuana Comm'n Rep., supra note 539, at 190-202. The National Commission based its recommendation in part on the conclusion that marijuana might become a public health problem if use were encouraged by legalization of distribution. See note 566 supra.

[580] See text accompanying notes 141-59 supra.

[581] Colorado recently considered a bill that would legalize sale of marijuana through liquor outlets. A tax on the sale would provide revenue for the state's old age pension fund. The Leaflet, July-Sept. 1973, at 5-6 (publication of the National Organization for the Reform of Marijuana Laws).

[582] Oregon has recently decriminalized private possession and use of marijuana; such conduct is now a violation, subject to a $100 fine. Id. at 1-2. The American Bar Association recently recommended decriminalization of marijuana possession. 13 Crim. L. Rptr. 2436-38 (Aug. 15, 1973). The National Commission has recommended decriminalization of possession in the home and of less than one ounce in public. Casual, private, nonprofit transfers would be noncriminal, but commercial distribution would remain prohibited. Marihuana Comm'n Rep., supra note 539, at 190-202. Two members of the Commission, Senators Javits and Hughes, have criticized the intricacy of some of the recommendations. See 118 Cong. Rec. S 4527 (daily ed. Mar. 22, 1972) (appendix to remarks of Senator Javits).

[583] Although the National Commission did not endorse the view that no private behavior can be criminalized, it did find that criminalization of private possession of marijuana is "constitutionally suspect." Marihuana Comm'n Rep., supra note 539, at 175-79.

[584] Over 100 hair length opinions have been written by federal and state court judges.

[585] E.g., Dwen v. Barry, 483 F.2d 1126 (2d Cir. 1973).

[586] E.g., Agrati v. Laird, 440 F.2d 683 (9th Cir. 1971).

[587] E.g., Smith v. Sampson, 349 F. Supp. 268 (D.N.H. 1972).

[588] E.g., Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970).

[589] E.g., Lansdale v. Tyler Junior College, 470 F.2d 659 (5th Cir. 1972), cert. denied, 411 U.S. 986 (1973).

portance of the issue have been mixed. It has aroused federal judges to essays on liberty,[590] outrage at being forced to consider such triviality,[591] attempts at humor,[592] opulent prose,[593] and references to Albert Einstein,[594] George III[595] and the Boston Bruins.[596] It is not difficult to recognize why the matter has been so controversial. Although not of world-shaking importance in any particular instance, the issue does present in microcosmic version some venerable human themes: the relationship of citizen to state; the tension between order and liberty; the conflict between majority and minority.

The right to wear one's hair as one pleases can best be considered as an aspect of personal liberty analogous to a privacy right. It derives little or no content from the notion of the home as a sphere of intimate activity. A person does not value the seclusion of his home because it will enable him to wear his hair long. If anything, because of an element of self-expression, hair style is more important to the individual as he moves about in public. The right bears some similarity to the right of personal autonomy recognized in *Roe v. Wade.* In part, the connection between hair length and abortion cases rests on the notion present in each of control over one's body. Although the Supreme Court played down this aspect in *Roe,* at least in terms of privacy,[597] there is no doubt that an individual feels a strong and legitimate interest in his person and that the state must have good reason to interfere with it.[598] But the connection with *Roe* goes beyond the element of physical integrity.

On the one hand, the decision to cut or grow one's hair is not so fundamental as the decision to bear or not to bear a child. It does not have a major impact on one's life. The state's interference is temporary: hair grows back. In terms of comparability to the enumerated rights of the first eight amendments, the right does not loom large, aside from its status as an aspect of daily personal liberty. It is loosely tied to the peripheries of the first amendment, because of the element of expres-

590 See Karr v. Schmidt, 460 F.2d 609, 619-21 (5th Cir.) (Wisdom, J., dissenting), cert. denied, 409 U.S. 989 (1972); Watson v. Thompson, 321 F. Supp. 394, 399-402 (E.D. Tex. 1971), vacated per curiam, 458 F.2d 1361 (5th Cir. 1972).

591 See Stevenson v. Wheeler County Bd. of Educ., 306 F. Supp. 97, 98 (S.D. Ga. 1969), aff'd, 426 F.2d 1154 (5th Cir.), cert. denied, 400 U.S. 957 (1970).

592 See Cordova v. Chonko, 315 F. Supp. 953, 954 (N.D. Ohio 1970).

593 See Lovelace v. Leechburg Area School Dist., 310 F. Supp. 579 (W.D. Pa. 1970).

594 See Richards v. Thurston, 304 F. Supp. 449, 451 (D. Mass. 1969), aff'd, 424 F.2d 1281 (1st Cir. 1970).

595 See Watson v. Thompson, 321 F. Supp. 394, 401 n. (E.D. Tex. 1971), vacated per curiam, 458 F.2d 1361 (5th Cir. 1972).

596 See Bishop v. Colaw, 450 F.2d 1069, 1077 (8th Cir. 1971) (Aldrich, J., concurring).

597 See Roe v. Wade, 410 U.S. 113, 154 (1973).

598 See Rochin v. California, 342 U.S. 165, 172-73 (1952); Jacobson v. Massachusetts, 197 U.S. 11, 25-27 (1905); Union Pac. R.R. v. Botsford, 141 U.S. 250, 251 (1891).

sion.[599] It also bears some relation to the fourth amendment right to security of person and, more broadly viewed, to the idea of exclusion of government from areas of individual concern which underlies the third, fourth and fifth amendments. One's choice of hair style is connected in a small way to the development of a separate personality, and to a sense of personal freedom. In this regard, concern with hair style is similar to—although less important than—the concern with personal beliefs, thoughts, emotions and sensations that moved Justice Brandeis to posit a "right to be let alone."[600]

There is no doubt that any particular haircut is a minor event in one's life; yet it derives its importance in this context from that very fact. By concerning itself with the more trivial aspects of personal life, particularly when they are important to the individual, government may be more intrusive than when it concerns itself with life's major events. Should the state tell its citizens what clothes to wear, when to have dinner, with whom to talk, what games to play and what toothpaste to use? Such actions would seem totalitarian. This is not to say that government may not interfere with lesser liberties when it has in fact a definite and valid public reason for doing so. But too often the reasons advanced by governmental units to justify hair length regulations are vague and unsupportable. In the last analysis, they have less to do with public health, safety and welfare than with attempts to control the lifestyles, personalities and attitudes of those subject to them.[601]

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[599] This element of self-expression has not been sufficient to give rise to first amendment protection in the vast majority of cases, even when a court reacted favorably to other claims. See, e.g., Bishop v. Colaw, 450 F.2d 1069, 1074 (8th Cir. 1971); Richards v. Thurston, 424 F.2d 1281, 1283 (1st Cir. 1970); Miller v. Gillis, 315 F. Supp. 94, 99-100 (N.D. Ill. 1969). But see Calbillo v. San Jacinto Junior College, 305 F. Supp. 857, 862 (S.D. Tex. 1969), rev'd, 434 F.2d 609 (5th Cir. 1970). An exception has occasionally been made when the student viewed his hair length as a form of political expression. E.g., Church v. Board of Educ., 339 F. Supp. 538, 541-42 (E.D. Mich. 1972).

[600] See Olmstead v. United States, 277 U.S. 438, 478 (1928) (dissenting opinion).

[601] This attempt is part of a long tradition. On November 3, 1675, what must be the first hair length regulation in an American jurisdiction was promulgated:

> Whereas there is manifest pride openly appearing amongst us in that long haire, like weomens haire, is worne by some men, either their oune or others haire made into perewigs, and by some weomens wearing borders of haire, and theire cutting, curling, & imodest laying out theire haire, which practise doeth prevayle and increase, especially amongst the younger sort,—
>
> This Court doeth declare against this ill custome as offenciue to them, and diuers sober christians amongst us, and therefore doe hereby exhort and advise all persons to vse moderation in this respect; and further, doe impower all grand jurjes to present to the County Court such persons, whither male or female, whom they shall judge to exceede in the premisses; and the County Courts are hereby authorized to proceed against such delinquents either by admonition, fine, or correction, according to theire good discretion.

5 Records of the Governor and Company of the Massachusetts Bay in New England 59 (N. Shurtleff ed. 1854).

A few modern courts have found that the mere offensiveness to the established majority of long hair worn by males is sufficient reason to justify regulation. See,

Although many courts faced with hair length questions have considered *Griswold* relevant to their inquiry, the right to wear one's hair as one pleases has been treated as a right of privacy by very few of them.[602] Some courts have held that hair length cases present no constitutional issue, presuming the state's regulation valid if it appears to serve a valid purpose.[603] Privacy cases have been distinguished as involving questions of the marital relationship,[604] or questions of private, not public, behavior,[605] or simply as different.[606]

Nevertheless, many courts have found that the two rights are similar in nature as aspects of personal liberty and are grounded in similar constitutional roots.[607] Some courts viewed the right broadly, finding that hair length regulations invade a "sphere of personal liberty"[608] or the right to develop one's personality,[609] or a similar, generally conceived right of autonomy.[610] Others perceived a narrower right

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e.g., Brownlee v. Bradley County Bd. of Educ., 311 F. Supp. 1360, 1367 (E.D. Tenn. 1970). The predominant view is that administrative revulsion does not justify the regulation. See, e.g., Bishop v. Colaw, 450 F.2d 1069, 1076-77 (8th Cir. 1971); Crews v. Cloncs, 432 F.2d 1259, 1265 (7th Cir. 1970); Richards v. Thurston, 424 F.2d 1281, 1286 (1st Cir. 1970).

602 See Axtell v. LaPenna, 323 F. Supp. 1077, 1082 (W.D. Pa. 1971); Black v. Cothren, 316 F. Supp. 468, 471 (D. Neb. 1970); Farrell v. Smith, 310 F. Supp. 732, 736 (D. Me. 1970); Crossen v. Fatsi, 309 F. Supp. 114, 117-18 (D. Conn. 1970).

603 E.g., Freeman v. Flake, 448 F.2d 258, 259, 261 (10th Cir. 1971), cert. denied, 405 U.S. 1032 (1972); King v. Saddleback Junior College Dist., 445 F.2d 932, 939 (9th Cir.), cert. denied, 404 U.S. 979 (1971); Jackson v. Dorrier, 424 F.2d 213, 217-19 (6th Cir.), cert. denied, 400 U.S. 850 (1970).

604 See Freeman v. Flake, 448 F.2d 258, 261 (10th Cir. 1971), cert. denied, 405 U.S. 1032 (1972); Jeffers v. Yuba City Unified School Dist., 319 F. Supp. 368, 371 (E.D. Cal. 1970); Crews v. Cloncs, 303 F. Supp. 1370, 1376-77 (S.D. Ind. 1969), rev'd, 432 F.2d 1259 (7th Cir. 1970).

605 See, e.g., Freeman v. Flake, 448 F.2d 258, 261 (10th Cir. 1971), cert. denied, 405 U.S. 1032 (1972); King v. Saddleback Junior College Dist., 445 F.2d 932, 938 (9th Cir.), cert. denied, 404 U.S. 979 (1971); Richards v. Thurston, 424 F.2d 1281, 1283 (1st Cir. 1970). Courts that have held for the students, however, reason that unlike other restrictions on public behavior, such as dress codes, hair length restrictions necessarily impinge on a student's private life outside of school. See, e.g., Crews v. Cloncs, 432 F.2d 1259, 1264 (7th Cir. 1970); Martin v. Davison, 322 F. Supp. 318, 325 (W.D. Pa. 1971); Westley v. Rossi, 305 F. Supp. 706, 713 (D. Minn. 1969).

606 See Rumler v. Board of School Trustees, 327 F. Supp. 729, 742-43 (D.S.C. 1971); cf. Bannister v. Paradis, 316 F. Supp. 185, 187 (D.N.H. 1970) (dress code).

607 See, e.g., Bishop v. Colaw, 450 F.2d 1069, 1075 (8th Cir. 1971); Crews v. Cloncs, 432 F.2d 1259, 1263-64 (7th Cir. 1970); Watson v. Thompson, 321 F. Supp. 394, 399 (E.D. Tex. 1971), vacated per curiam, 458 F.2d 1361 (5th Cir. 1972); Griffin v. Tatum, 300 F. Supp. 60, 62 (M.D. Ala. 1969), modified, 425 F.2d 201 (5th Cir. 1970); Finot v. Pasadena City Bd. of Educ., 250 Cal. App. 2d 189, 197-98, 58 Cal. Rptr. 520, 526-27 (1967) (beard).

608 Richards v. Thurston, 424 F.2d 1281, 1284 (1st Cir. 1970); see Breen v. Kahl, 419 F.2d 1034, 1036 (7th Cir. 1969), cert. denied, 398 U.S. 937 (1970) ("an ingredient of personal freedom").

609 See Black v. Cothren, 316 F. Supp. 468, 471 (D. Neb. 1970).

610 See Stull v. School Bd., 459 F.2d 339, 344-45 (3d Cir. 1972); Seal v. Mertz, 338 F. Supp. 945, 951 (M.D. Pa. 1972); Griffin v. Tatum, 300 F. Supp. 60, 62 (M.D.

to govern one's appearance[611] or to present oneself to the world in a given manner[612] or to control one's body.[613] For some courts, this right is as fundamental as enumerated constitutional rights;[614] for others it is of an inferior order, but protectable nonetheless, unless the state can show that infringement serves a valid, public purpose.[615] *Griswold* has often been used by these courts to establish the principle that unenumerated personal liberties merit constitutional protection through the fourteenth amendment due process clause.[616]

By far the largest number of the hair length cases have involved the hair and dress codes of public high schools. In this context, much has depended on the court's perception of the student's personal interest.[617] Courts that found no individual liberty implicated applied a traditional rational basis test and held the state's power to regulate public education sufficient to justify any nondiscriminatory regulation.[618] Other courts applied a slightly more inquisitive version of the

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Ala. 1969), modified, 425 F.2d 201 (5th Cir. 1970) ("the right to some breathing space for the individual").

611 See Bishop v. Colaw, 450 F.2d 1069, 1075 (8th Cir. 1971); Martin v. Davison, 322 F. Supp. 318, 322 (W.D. Pa. 1971).

612 See Bishop v. Colaw, 450 F.2d 1069, 1078 (8th Cir. 1971) (concurring opinion) ("the freedom to caricature one's own image"); Miller v. Gillis, 315 F. Supp. 94, 101 (N.D. Ill. 1969); Breen v. Kahl, 296 F. Supp. 702, 706 (W.D. Wis.), aff'd, 419 F.2d 1034 (7th Cir. 1969), cert. denied, 398 U.S. 937 (1970).

613 See Dwen v. Barry, 483 F.2d 1126, 1130 (2d Cir. 1973); Crews v. Cloncs, 432 F.2d 1259, 1264 (7th Cir. 1970); Seal v. Mertz, 338 F. Supp. 945, 951 (M.D. Pa. 1972); Axtell v. LaPenna, 323 F. Supp. 1077, 1080 (W.D. Pa. 1971).

614 See, e.g., Breen v. Kahl, 419 F.2d 1034, 1036 (7th Cir. 1969), cert denied, 398 U.S. 937 (1970); Dunham v. Pulsifer, 312 Supp. 411, 418 (D. Vt. 1970) (equal protection analysis).

615 See, e.g., Richards v. Thurston, 424 F.2d 1281, 1284-86 (1st Cir. 1970); Parker v. Fry, 323 F. Supp. 728, 732-33 (E.D. Ark. 1971).

616 See Bishop v. Colaw, 450 F.2d 1069, 1075 (8th Cir. 1971); Parker v. Fry, 323 F. Supp. 728, 731-33 (E.D. Ark. 1971); Breen v. Kahl, 296 F. Supp. 702, 706 (W.D. Wis.), aff'd, 419 F.2d 1034, 1036 (7th Cir. 1969), cert. denied, 398 U.S. 937 (1970).

617 The hair length issue is complicated in the school context because those asserting a right are minors. A few courts have denied them a constitutional right on that basis. See, e.g., Lovelace v. Leechburg Area School Dist., 310 F. Supp. 579, 587 (W.D. Pa. 1970). Others have asserted that minors have the same rights as adults. E.g., Miller v. Gillis, 315 F. Supp. 94, 99 (N.D. Ill. 1969). Some have found that the minor's rights are merely less substantial than those of adults. E.g., Gere v. Stanley, 320 F. Supp. 852, 855 (M.D. Pa. 1970), aff'd, 453 F.2d 205 (3d Cir. 1971); Cordova v. Chonko, 315 F. Supp. 953, 959-60 (N.D. Ohio 1970). Much of the reasoning on this point was derived from Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969). Courts favorable to the students cite passages asserting that mere fear of disruption does not justify limiting constitutional rights. See, e.g., Martin v. Davison, 322 F. Supp. 318, 323-24 (W.D. Pa. 1971). Courts favorable to the administrators quote the Supreme Court's caveat that they were, in *Tinker*, considering only speech and not hair length. See, e.g., Freeman v. Flake, 448 F.2d 258, 260 (10th Cir. 1971), cert. denied, 405 U.S. 1032 (1972); King v. Saddleback Junior College Dist., 445 F.2d 932, 937 (9th Cir.), cert. denied, 404 U.S. 979 (1971).

618 E.g., King v. Saddleback Junior College Dist., 445 F.2d 932, 939 (9th Cir.), cert. denied, 404 U.S. 979 (1971); Jackson v. Dorrier, 424 F.2d 213, 218

same test, asking that the state advance some reasons for the rule. Generally, a suggestion that the rule might promote discipline or reduce disruption has been sufficient.[619] On the other hand, courts acknowledging a right of constitutional dimension—whether "fundamental" or of lesser proportion—have subjected the state's rationale to closer scrutiny. In some instances, they have demanded that the state show a compelling[620] or substantial[621] interest before infringing the student's right. More interestingly, several courts, notably four of the five circuits that have upheld the student's interest, have applied an intermediate test somewhat less rigorous than a substantial interest test and more rigorous than a rational basis test.[622] Recognizing both a personal liberty and the state's interest in orderly education, these courts have demanded that the state show that a student's long hair has caused genuine interference with the educational process.[623] Since this showing can rarely be made, these courts have ended up with the same result reached by courts employing a substantial interest test. The result has been that courts recognizing a constitutional right of any dimension have taken a significantly different approach to the weighing of interests involved from the approach taken by courts that do not recognize such an interest.

For example, courts finding for school boards have argued that a certain amount of discipline is necessary if school officials are to maintain their authority and if students are to become good members of society.[624] Countering this rationale, student-oriented courts have maintained that it is bootstrapping to charge students with bad behavior

(6th Cir.), cert. denied, 400 U.S. 850 (1970). See also Freeman v. Flake, 448 F.2d 258, 261 (10th Cir. 1971), cert. denied, 405 U.S. 1032 (1972).

619 See, e.g., Brownlee v. Bradley County Bd. of Educ., 311 F. Supp. 1360, 1366-67 (E.D. Tenn. 1970); Stevenson v. Wheeler County Bd. of Educ., 306 F. Supp. 97, 101 (S.D. Ga. 1969), aff'd, 426 F.2d 1154 (5th Cir. 1970); Ferrell v. Dallas Indep. School Dist., 261 F. Supp. 545, 551-52 (N.D. Tex. 1966), aff'd, 392 F.2d 697 (5th Cir.), cert. denied, 393 U.S. 856 (1968).

620 See Watson v. Thompson, 321 F. Supp. 394, 403 (E.D. Tex. 1971), rev'd per curiam, 458 F.2d 1361 (5th Cir. 1972).

621 See, e.g., Breen v. Kahl, 419 F.2d 1034, 1036 (7th Cir. 1969), cert. denied, 398 U.S. 937 (1970); Martin v. Davison, 322 F. Supp. 318, 325 (W.D. Pa. 1971).

622 The leading case applying such a test is Richards v. Thurston, 424 F.2d 1281, 1284-85 (1st Cir. 1970). For other opinions either following *Richards* or adopting a similar test, see, e.g., Stull v. School Bd., 459 F.2d 339, 347 (3d Cir. 1972); Massie v. Henry, 455 F.2d 779, 782-83 (4th Cir. 1972); Bishop v. Colaw, 450 F.2d 1069, 1075-76 (8th Cir. 1971); Parker v. Fry, 323 F. Supp. 728, 731 (E.D. Ark. 1971); Miller v. Gillis, 315 F. Supp. 94, 100-01 (N.D. Ill. 1969). The Second Circuit has adopted a similar test in a case involving a hair code for a police department. Dwen v. Barry, 483 F.2d 1126, 1129-30 (2d Cir. 1973).

623 See, e.g., Massie v. Henry, 455 F.2d 779, 783 (4th Cir. 1972); Bishop v. Colaw, 450 F.2d 1069, 1076 (8th Cir. 1971).

624 See, e.g., Jackson v. Dorrier, 424 F.2d 213, 216-17 (6th Cir.), cert. denied, 400 U.S. 850 (1970); Freeman v. Flake, 320 F. Supp. 531, 534 (D. Utah 1970), aff'd, 448 F.2d 258 (10th Cir. 1971), cert. denied, 405 U.S. 1032 (1972); Brownlee v. Bradley County Bd. of Educ., 311 F. Supp. 1360, 1363 (E.D. Tenn. 1970); Ferrell v. Dallas Indep. School Dist., 261 F. Supp. 545, 551-52 (N.D. Tex. 1966), aff'd, 392 F.2d 697 (5th Cir.), cert. denied, 393 U.S. 856 (1968).

for failure to follow a poor and arbitrary rule; that there is no value in discipline or conformity for its own sake;[625] or that, in fact, such a policy might lead to disrespect for more sensible rules.[626] Courts that have held for school boards have tended to accept arguments that hair length indicates bad attitude or correlates with poor performance.[627] Courts on the other side have noted that proof of correlation is usually inadequate[628] and that, in any case, cutting a recalcitrant student's hair would not make him cooperative and industrious.[629]

The main controversy has centered around the idea that the state has an interest in preventing significant disturbance that might interfere with the educational process.[630] Several opinions have suggested that the fact of disturbance has been the major difference between courts finding for the authorities and those finding for the students.[631] To some extent, this evaluation is borne out:[632] in the few instances

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625 See, e.g., Breen v. Kahl, 419 F.2d 1034, 1038 (7th Cir. 1969), cert. denied, 398 U.S. 937 (1970); Parker v. Fry, 323 F. Supp. 728, 738-39 (E.D. Ark. 1971); Turley v. Adel Community School Dist., 322 F. Supp. 402, 405-06 (S.D. Iowa 1971); Dunham v. Pulsifer, 312 F. Supp. 411, 415, 419 (D. Vt. 1970).

626 See Dawson v. Hillsborough County School Bd., 322 F. Supp. 286, 301 (M.D. Fla.), aff'd per curiam, 445 F.2d 308 (5th Cir. 1971).

627 See, e.g., Jeffers v. Yuba City Unified School Dist., 319 F. Supp. 368, 373 (E.D. Cal. 1970); Bishop v. Colaw, 316 F. Supp. 445, 448 (E.D. Mo. 1970), rev'd, 450 F.2d 1069 (8th Cir. 1971); Pritchard v. Spring Branch Indep. School Dist., 308 F. Supp. 570, 573 (S.D. Tex. 1970).

628 See, e.g., Berryman v. Hein, 329 F. Supp. 616, 619 (D. Idaho 1971); Turley v. Adel Community School Dist., 322 F. Supp. 402, 406-08 (S.D. Iowa 1971); Reichenberg v. Nelson, 310 F. Supp. 248, 253 (D. Neb. 1970).

629 See, e.g., Bishop v. Colaw, 450 F.2d 1069, 1077 (8th Cir. 1971) (Aldrich, J., concurring); Black v. Cothren, 316 F. Supp. 468, 472 (D. Neb. 1970).

630 This point was derived from dictum in Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 505 (1969), in which the Supreme Court stated that significant disturbance would justify restriction of students' first amendment rights, approving a distinction made by the Fifth Circuit in Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966).

631 See, e.g., Stull v. School Bd., 459 F.2d 339, 347 (3d Cir. 1972); Turley v. Adel Community School Dist., 322 F. Supp. 402, 405 (S.D. Iowa 1971); Martin v. Davison, 322 F. Supp. 318, 324 (W.D. Pa. 1971).

632 At least three circuits have handed down decisions on both sides of the hair length controversy, and, in one instance, the split clearly rested on the issue of disruption. In its initial decision, the Third Circuit held that a student whose major disruptive act was to dip his hair in his food and fling it over his shoulder at other students would have to abide by a hair length regulation. Gere v. Stanley, 453 F.2d 205, 209-10 (3d Cir. 1971). The Third Circuit has recently held that hair length regulations are unconstitutional without such a showing of actual disruption. Stull v. School Bd., 459 F.2d 339 (3d Cir. 1972).

In 1971, the Fourth Circuit affirmed a lower court's denial of plaintiff's motion for a preliminary injunction against enforcement of a hair length regulation, noting that the record was insufficient to allow them to dispose of the constitutional issue. Rumler v. Board of School Trustees, 437 F.2d 953, 954 (4th Cir. 1971) (per curiam). The circuit has recently adopted the rule that hair length regulations are unconstitutional without a showing of disruption. Massie v. Henry, 455 F.2d 779, 783 (4th Cir. 1972).

The Fifth Circuit has adopted a per se rule for high school cases, upholding the power of the school board to issue hair length regulations. Karr v. Schmidt, 460

involving actual physical violence or extreme verbal altercation, the courts usually found that the school board was justified in enforcing a hair length regulation to reduce dissension.[633] However, since violence was generally caused by the intemperate reaction of other students to long-haired students, courts that recognized a constitutional right often suggested that the authorities deal with those whose lack of tolerance caused the problem.[634] One judge implied that even if disruption were caused by a long-haired student's aggressive conduct, the matter could be dealt with by less restrictive disciplinary alternatives which would not infringe his right to personal liberty.[635] More commonly, no actual disturbance occurred. In such an instance, the disruption issue became a matter of judicial inclination. Courts favoring the school boards were willing to accept opinion testimony of principals and teachers that hair length might cause fights and distractions.[636] Courts favoring students were not satisfied by such proof and demanded a showing of actual disturbances.[637]

F.2d 609 (5th Cir.), cert. denied, 409 U.S. 989 (1972). Earlier, the circuit had upheld decisions going both ways. Compare Ferrell v. Dallas Indep. School Dist., 392 F.2d 697 (5th Cir.), cert. denied, 393 U.S. 856 (1968), with Dawson v. Hillsborough County School Bd., 322 F. Supp. 286 (M.D. Fla.), aff'd per curiam, 445 F.2d 308 (5th Cir. 1971). The Fifth Circuit has adopted a different rule for college students, affirming their right to fashion their own hair style. Lansdale v. Tyler Junior College, 470 F.2d 659 (5th Cir. 1972), cert. denied, 411 U.S. 986 (1973).

[633] See Rumler v. Board of School Trustees, 327 F. Supp. 729, 734-35 (D.S.C. 1971); Jeffers v. Yuba City Unified School Dist., 319 F. Supp. 368, 373 (E.D. Cal. 1970); Pritchard v. Spring Branch Indep. School Dist., 308 F. Supp. 570, 579 (S.D. Tex. 1970); Giangreco v. Center School Dist., 313 F. Supp. 776, 778-79 (W.D. Mo. 1969); Brick v. Board of Educ., 305 F. Supp. 1316, 1319 (D. Colo. 1969).

As one author has noted, minor disruptions are fairly common in schools and courts that wish to use them as an excuse for upholding regulation can usually find some support. But only major disturbance should lead to infringement of rights. See Goldstein, Reflections on Developing Trends in the Law of Student Rights, 118 U. Pa. L. Rev. 612, 618-19 (1970).

[634] See Massie v. Henry, 455 F.2d 779, 783 (4th Cir. 1972); Bishop v. Colaw, 450 F.2d 1069, 1077 (8th Cir. 1971); Crews v. Cloncs, 432 F.2d 1259, 1265 (7th Cir. 1970); Turley v. Adel Community School Dist., 322 F. Supp. 402, 408, 410 (S.D. Iowa 1971).

[635] See Watson v. Thompson, 321 F. Supp. 394, 406 (E.D. Tex. 1971), vacated per curiam, 458 F.2d 1361 (5th Cir. 1972).

The "less restrictive alternative" concept has been used by several courts in response to the argument that long hair presents health and safety problems in certain situations. See Bishop v. Colaw, 450 F.2d 1069, 1077 (8th Cir. 1971); Crews v. Cloncs, 432 F.2d 1259, 1266 (7th Cir. 1970); Berryman v. Hein, 329 F. Supp. 616, 619 (D. Idaho 1971).

[636] See, e.g., King v. Saddleback Junior College Dist., 445 F.2d 932, 939-40 (9th Cir. 1971); Jackson v. Dorrier, 424 F.2d 213, 216 (6th Cir.), cert. denied, 400 U.S. 850 (1970); Corley v. Daunhauer, 312 F. Supp. 811, 816 (E.D. Ark. 1970); Brownlee v. Bradley County Bd. of Educ., 311 F. Supp. 1360, 1366-67 (E.D. Tenn. 1970); Wood v. Alamo Heights Indep. School Dist., 308 F. Supp. 551, 553-54 (W.D. Tex. 1970).

[637] See, e.g., Stull v. School Bd., 459 F.2d 339, 347 (3d Cir. 1972); Massie v. Henry, 455 F.2d 779, 783 (4th Cir. 1972); Berryman v. Hein, 329 F. Supp. 616, 619 (D. Idaho 1971); Martin v. Davison, 322 F. Supp. 318, 323 (W.D. Pa. 1971); Dawson v. Hillsborough County School Bd., 322 F. Supp. 286, 298-99

It is difficult to determine whether there would be a difference in result between courts that recognize a "fundamental" constitutional right and those that recognize a lesser protectable right if genuine and significant disruption were caused by a student's long hair. Both types of courts have found that a showing of minor dissension will not justify the regulation.[638] Whether there is any point on a scale of disruption at which the two types of courts would part company remains problematical. The effect of either test is to shift to the state the burden of justifying the rule with a factual showing of reasonableness. The advantage of the lesser test is that it theoretically enables the state to meet this burden when it has good reasons in fact without demonstrating "compelling" purpose. The state's basic difficulty in the school context may be that in the vast majority of cases it has no factual basis for fearing disruption. Yet, the theoretical difference might be important in other contexts, when the state interest is stronger or when the interests on both sides of the controversy are different.

Such a conclusion is borne out in part by consideration of other hair length litigation, in which use of an intermediate test may also be perceived.[639] The courts in these cases have begun to focus on the particular interests involved in each situation, asking that the state justify regulation, but recognizing valid interests when they are advanced. For example, the Army's power to prescribe the hair length of its members to promote discipline has been traditionally recognized by the judiciary.[640] Yet at least three courts have held that in the case of reservists, who spend only a small part of their time on active duty, the Army must at least make a showing that a reservist's wearing a wig would impair the Army's efficiency.[641]

In another group of cases, policemen or firemen have objected to hair length regulations on constitutional grounds. Some courts have adhered to the traditional view that police and fire departments are "quasi-military" organizations in which discipline may be promoted for

(M.D. Fla.), aff'd, 445 F.2d 308 (5th Cir. 1971); Westley v. Rossi, 305 F. Supp. 706, 711 (D. Minn. 1969).

638 See Bishop v. Colaw, 450 F.2d 1069, 1075-76 (8th Cir. 1971) (lesser right); Crews v. Cloncs, 432 F.2d 1259, 1265 (7th Cir. 1970) (fundamental right implied by use of more rigorous test).

639 At least one court has noted the confusion that surrounds the question of what test to use. Black v. Rizzo, 360 F. Supp. 648, 651-52 n.2 (E.D. Pa. 1973). In considering a hair length regulation for a fire department, the court found that since a constitutional right of some dimension had been infringed, the state regulation "at a minimum" had to "bear a reasonable relation to a legitimate state interest." Id. The court then applied a medium level test. Id. at 652-53.

640 See, e.g., Anderson v. Laird, 437 F.2d 912 (7th Cir.), cert. denied, 404 U.S. 865 (1971); Raderman v. Kaine, 411 F.2d 1102 (2d Cir.), cert. denied, 396 U.S. 976 (1969).

641 Friedman v. Froehlke, 470 F.2d 1351 (1st Cir. 1972); Schreiber v. Wick, 362 F. Supp. 193, 194 (N.D. Ill. 1973); see Etheridge v. Schlesinger, 362 F. Supp. 198, 203-04 (E.D. Va. 1973) (equal protection analysis); Harris v. Kaine, 352 F. Supp. 769 (S.D.N.Y. 1972). But see McWhirter v. Froehlke, 351 F. Supp. 1098 (D.S.C. 1972) (National Guard).

its own sake.[642] Yet the Second Circuit has recently held that the police are more like civil servants than like soldiers and that promotion of discipline per se is not a sufficient reason to curtail personal liberty.[643] The court found that the individual's interest in his own "physical integrity" was a nonfundamental liberty that merited protection from "arbitrary government interference," but stated the police department should be allowed to show that its regulation in fact promoted a valid purpose.[644] Finally, in a few recent cases, prisoners have asserted a right to control the length of their hair. This right has been upheld as against the state's interest in discipline and health in the case of pretrial detainees.[645] In the case of convicts, the argument has been unsuccessful.[646] A few courts have recognized a personal interest of potential constitutional dimension, but have found it less substantial because of the context and outweighed by state interests in efficient administration and in preventing prisoners from hiding contraband.[647]

It is significant that the lower federal courts, faced with a claim that clearly involves some element of personal liberty, have been evolving an intermediate due process test that enables them to weigh the individual and public interests involved. By doing so, they ensure that the liberty is not infringed without good reason, but still give cognizance to valid, noncompelling state interests. As an additional safeguard, the test can be supplemented by the use of an overbreadth or means-related rationale. Thus, even if the state has a valid goal in mind when it limits personal freedom, it may be able to achieve its goal by measures that do not intrude upon the personal right. For example, if the state's purpose is to promote health and safety by assuring that long hair does not get caught in machinery, an individual may be ordered to wear a hair net when working with dangerous equipment.[648]

This general approach seems to be the most effective way to deal with the hair length issue. Furthermore, the use of an intermediate test should be extended to cover other instances in which lesser personal

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642 See Stradley v. Andersen, 478 F.2d 188, 190-91 (8th Cir. 1973); Yarbrough v. City of Jacksonville, 363 F. Supp. 1176, 1179 (M.D. Fla. 1973); Greenwald v. Frank, 70 Misc. 2d 632, 334 N.Y.S.2d 680 (Sup. Ct. 1972).

643 Dwen v. Barry, 483 F.2d 1126, 1128-29 (2d Cir. 1973); see Black v. Rizzo, 360 F. Supp. 648, 652-53 (E.D. Pa. 1973).

644 Dwen v. Barry, 483 F.2d 1126, 1130-31 (2d Cir. 1973); see Black v. Rizzo, 360 F. Supp. 648, 651 (E.D. Pa. 1973); Hunt v. Board of Fire Comm'rs, 68 Misc. 2d 261, 327 N.Y.S.2d 36 (Sup. Ct. 1971).

645 See Smith v. Sampson, 349 F. Supp. 268 (D.N.H. 1972); Christman v. Skinner, 323 N.Y.S.2d 767 (Sup. Ct. 1971). See also Palma v. Treuchtlinger, 12 Crim. L. Rptr. 2551 (S.D.N.Y. Mar. 5, 1973) (case summary).

646 See Brooks v. Wainwright, 428 F.2d 652 (5th Cir. 1970); Rinehart v. Brewer, 360 F. Supp. 105 (S.D. Iowa 1973); Howard v. Warden, 348 F. Supp. 1204 (E.D. Va. 1972). See also Geraci v. Treuchtlinger, 13 Crim. L. Rptr. 2062 (E.D.N.Y. Mar. 20, 1973) (case summary) (equal protection analysis), appeal dismissed as moot, 487 F.2d 590 (2d Cir. 1973).

647 See Rinehart v. Brewer, 360 F. Supp. 105, 112-13 (S.D. Iowa 1973); Howard v. Warden, 348 F. Supp. 1204, 1205-06 (E.D. Va. 1972).

648 See, e.g., Bishop v. Colaw, 450 F.2d 1069, 1077 (8th Cir. 1971).

liberties are infringed. A multitude of human activities are lodged "within the commodious concept of liberty."[649] Only a few are so "fundamental" that the state should have to demonstrate a "compelling" interest in order to impose upon them. Yet, many are sufficiently important to merit allowing the affected individual to question the state's reasons for intruding. In such instances, the state should have a basis in fact for its action, beyond the appearance of rationality. Furthermore, if the ends of both individual and state may be served without conflict and without excessive burden on public resources, there is good reason to ask that the state accommodate the individual. An intermediate due process test can and should be used to promote a readjustment of the balance between order and liberty.

E. When is Privacy not Privacy? Disclosure of Personal Information

One of the more interesting aspects of the constitutional right of privacy is that it provides little or no protection for what one observer has termed privacy in its "primary or strong sense"—the ability to keep secret personal information about oneself.[650] For the most part, the individual's control over facts about his personal life is protected by tort law.[651] When the party acquiring or disclosing such information is the government, the individual's power to restrict state activity depends on the availability of a statutory cause of action.[652] Generally, courts have found no constitutional interest involved when personal information is gathered by government for a valid purpose,[653] even if it is later disclosed to members of the public.[654]

Distinctions can be drawn among the ability to maintain secrecy about one's personal life, the ability to make decisions as to how one will conduct one's personal life, and the ability to be free from governmental intrusion in the places where one's personal life is conducted. So

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649 Richards v. Thurston, 424 F.2d 1281, 1285 (1st Cir. 1970).

650 Gross, supra note 84, at 35-37; see Fried, Privacy, 77 Yale L.J. 475, 482-83 (1968).

651 See, e.g., Galella v. Onassis, Civil Nos. 71-1902, 72-1993, 72-2312, at 5168-69 n.12 (2d Cir. Sept. 13, 1973); Nader v. General Motors Corp., 25 N.Y.2d 560, 255 N.E.2d 765, 307 N.Y.S.2d 647 (1970). See also Bloustein, Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser, 39 N.Y.U.L. Rev. 962 (1964); Prosser, Privacy, 48 Calif. L. Rev. 383 (1960); Warren & Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890); Comment, 83 Harv. L. Rev. 1923 (1970).

652 See, e.g., Coalition of Black Leadership v. Doorley, 349 F. Supp. 127 (D.R.I. 1972).

653 See, e.g., Cantor v. Supreme Court, 353 F. Supp. 1307, 1321-22 (E.D. Pa. 1973); Thom v. New York Stock Exch., 306 F. Supp. 1002 (S.D.N.Y. 1969), aff'd per curiam sub nom. Miller v. New York Stock Exch., 425 F.2d 1074 (2d Cir.), cert. denied, 398 U.S. 905 (1970).

654 See, e.g., Tosh v. Buddies Supermarkets, Inc., 482 F.2d 329 (5th Cir. 1973); Rosenberg v. Martin, 478 F.2d 520, 524-25 (2d Cir. 1973); Lamont v. Commissioner of Motor Vehicles, 269 F. Supp. 880 (S.D.N.Y.), aff'd per curiam, 386 F.2d 449 (2d Cir. 1967), cert. denied, 391 U.S. 915 (1968). See also Doe v. McMillan, 459 F.2d 1307, 1311-12 (D.C. Cir. 1972), rev'd in part on other grounds, 412 U.S. 306 (1973); Travers v. Paton, 261 F. Supp. 110 (D. Conn. 1966).

far, only the two latter interests are subsumed within the constitutional right of privacy. Nevertheless, because of the close relationship of all three concepts,[655] a few courts have used the right of privacy to raise the right to control personal information to a constitutional level.

In *Schulman v. New York City Health & Hospitals Corp.*,[656] the court held that a Department of Health regulation that required disclosure to government on "fetal death certificates" of the names and addresses of women who had had abortions constituted an invasion of constitutional privacy. The court reasoned that while a woman had a fundamental right to decide to have an abortion, a social stigma would attach to single women who had abortions; both a single and a married woman had a right to conceal the fact of their having had an abortion from the state.[657] The court found none of the governmental purposes —such as protecting the health of women who had undergone multiple abortions—compelling enough to override the right.

Because of the abortion context, the *Schulman* court's inability to distinguish a concern with autonomous decision from a concern with secrecy is understandable. Other decisions are less easily explained. The Second Circuit recently remanded a case for consideration by a three-judge court on the grounds that the disclosure of personal information mandated by the New York State Controlled Substances Act presented a substantial constitutional question of invasion of privacy.[658] Several other courts have used *Griswold*, without detailed analysis of its precise meaning, to establish a right of privacy that is infringed by the state's retention of arrest records when a subject is later acquitted or charges are dropped.[659]

In such instances, the impulse to protect the individual from governmental intrusion appears justifiably strong. Moreover, the details of activities protected by the constitutional right of privacy—the choice to use contraceptives, to have an abortion, to be sterilized, to make decisions about family life, and to engage in consensual sexual acts—are of the sort that one often would like to keep secret from government and from other members of the public. Nevertheless, use of the constitutional right of privacy to protect the individual when the question is secrecy

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655 See Gross, supra note 84, at 35-40.

656 70 Misc. 2d 1093, 335 N.Y.S.2d 343 (Sup. Ct. 1972), vacated and remanded, 41 App. Div. 2d 714, 341 N.Y.S.2d 242 (1st Dep't.), judgment reinstated,—Misc. 2d—, 346 N.Y.S.2d 920 (Sup. Ct. 1973).

657 Id. at 1095-97, 335 N.Y.S.2d at 346-47.

658 Roe v. Ingraham, 480 F.2d 102, 107-08 (2d Cir. 1973), preliminary injunction denied, 364 F. Supp. 536, 542-46 (S.D.N.Y. 1973) (three-judge court). See also Merriken v. Cressman, 364 F. Supp. 913 (E.D. Pa. 1973) (testing program invades privacy of students).

659 See Davidson v. Dill,—Colo.—, 503 P.2d 157 (1972); Eddy v. Moore, 5 Wash. App. 334, 487 P.2d 211 (1971). Other courts have accomplished the same goal without resort to constitutional privacy decisions on the grounds that the state has no valid purpose for retaining the records. See, e.g., United States v. Kalish, 271 F. Supp. 968 (D.P.R. 1967). See also Menard v. Mitchell, 430 F.2d 486 (D.C. Cir. 1970).

and control over information rather than a right of autonomous decision serves only to confuse the issue and to make the "right of privacy" more amorphous than it already is. Whatever the merits of using the term "privacy" to denominate what is essentially a limited right of autonomy, the courts would be well advised to treat various kinds of "private" interests differently and to use *Griswold* and *Roe* only when autonomy is involved. Until and unless the Supreme Court demonstrates an inclination to extend constitutional protection to the qualitatively different forms of "privacy" involved in disclosure cases, the two issues should be kept clearly separated by lower courts.[660]

V

CONCLUSION

The Supreme Court's recognition in *Griswold* and *Roe* that individuals must be allowed to make certain decisions about the conduct of their personal lives will surely play a role in future litigation in areas other than contraception and abortion. The majority opinions in *Roe v. Wade* and *Paris Adult Theatre I v. Slaton* have already depicted a zone of privacy generally protecting rights pertaining to home, family, family planning and the rearing and education of children. This Note has attempted to explore that zone, first, by discussing possible techniques for analyzing purported rights of privacy and, second, by examining some specific interests which might arguably receive protection as aspects of privacy. The interests discussed do not exhaust the list of possible privacy rights. They are simply areas which thus far have spurred most of the privacy litigation in the lower courts, and areas which bear certain resemblances to the rights protected in *Griswold* and *Roe*.

We have not attempted to locate the precise boundaries of the zone of privacy or to determine which potential privacy rights should be ranked as "fundamental." Rather, our concern has been with the methodology of privacy decisions. Analysis has been the ingredient most often lacking in lower court privacy opinions. It is also the element most necessary if the emerging right of privacy is to become a viable

[660] One possible approach that a litigant might take would be to claim that the power to control access to personal information about oneself and one's family is a substantive liberty protected by the due process clause. In view of the Court's partial return to substantive due process in *Roe*, this claim would not be altogether frivolous. An individual who is required to disclose information to government could argue that a more rigorous scrutiny should be applied to his claim than is normally applied when nonfundamental rights are involved—in short, that disclosure must in fact serve a valid governmental purpose and that all of the information requested must be relevant to the accomplishment of that purpose. In many contexts, for example, census-taking, taxation and crime-prevention, government will be able to demonstrate such a purpose. On the other hand, there may be no valid reason for government to pass such information on to other members of the public. Recognition that the personal interest involved at least merits some showing that the public interest will be served by state action would enable affected individuals to obtain some control over information about themselves.

doctrine for the protection of certain personal liberties rather than the harbinger of another *Lochner* era.

ADDENDUM

As this Note goes to press, the Supreme Court has handed down an opinion that bears upon the future of privacy litigation. In Cleveland Board of Education v. LaFleur, 42 U.S.L.W. 4186 (U.S. Jan. 21, 1974), the Court declared that state regulations requiring pregnant schoolteachers to take mandatory maternity leaves after five months of pregnancy were unconstitutional. See text accompanying notes 290-302 supra. For our purposes in this Note, Justice Stewart's opinion is significant in two major ways. First, although the doctrinal basis of the decision is substantive due process and almost all of the principal privacy cases are cited as precedent, the word "privacy" is not mentioned. Second, the test against which the regulations are measured is an intermediate, means-oriented rational basis test, previously used only in equal protection analysis. See text accompanying notes 219-20 supra.