AMERICAN COURTS
AND
PRIVACY OF THE BODY

THESIS

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The right to be let alone has been developing throughout history to offset the seemingly relentless encroachments by government in efforts to regulate "morality," and by governmental and/or business uses of technological advancements to control the individuals privacy. Thus, the espoused constitutional right of privacy has come to be the way for individuals (and groups) to stave off society's attempts to control or divert the individual from his right to be let alone.

This work examines both state and federal court cases in an attempt to show that privacy has come to be a basic, constitutional right to be used against society's intrusions in areas of personal and sexual privacy.

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CHAPTER I

INTRODUCTION

American Courts and Privacy of the Body

The right of privacy has only been an explicitly recognized independent constitutional right in the last ten to fifteen years, but it has become so ingrained in our society that it is one of the most cherished and espoused rights today. But, as Alan F. Westin pointed out, "Few values so fundamental to society as privacy have been left so undefined in social theory or have been the subject of such vague and confused writing by social scientists."[1]

In fact, there appears to be no concurrence as to what privacy means. Richard B. Parker surveyed the situation and found many different definitions of the right. For some, privacy is a psychological circumstance, a situation of "being-apart-from others" similar to alienation. For Van Den Haag, an important part of privacy is the independence not to share in the activities of others. For Fried and Gross, privacy is a type of power, "the control we have over information about ourselves," or "the condition under which there is control over acquaintance with one's personal

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[1]Alan F. Westin, Privacy and Freedom (New York, 1970), p. 7.

affairs by the one enjoying it."[2] For Arthur B. Miller privacy is "the individual's ability to control the circulation of information relating to him."[3] Westin defines privacy as "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others."[4] It should be certain that the cleared the comprehension of what privacy is, the more perceptive the judgments will be regarding when to guard it and when to relinquish it.

As there is no agreement as to what privacy means, there is no agreement as to the historical origins of the term. Some scholars trace the concept of privacy from the "politics of participation" of the Greeks in which privacy was relegated to an inferior position behind "civic virtue," to the rugged American individualism of the frontier times in which the folkways commanded that a person's past be left alone.[5] Other scholars claim that the legal right originated in Anglo-Saxon law as far back as the 15th century. This

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[2]Richard B. Parker, "A Definition of Privacy," Rutgers Law Review, XXVII (Winter, 1974), 272-276; citing Van Den Haag, "On Privacy," in Privacy, Nomos XIII (1971), 161, Fried, An Anatomy of Values, (1970), 140; Gross, "Privacy and Autonomy," in Privacy, Nomos XIII (1971), 169. (None of which is available in this library.)

[3]Arthur B. Miller, The Assault on Privacy (New York, 1971), p. 25.

[4]Westin, Privacy and Freedom, p. 7.

[5]Ibid., p. 22.

"right" culminated in the 18th century with William Pitt declaring "a man's house is his castle" which lead to the common law tenet: "The common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments and emotions shall be communicated to others."[6] Still others would point to Judge Cooley as a beginning point with his definition that "the right to one's person may be said to be a right of complete immunity: to be let alone."[7]

Most scholars, however, agree that the first time privacy was espoused in the Anglo-American writing as a legal term (the right "to be left alone") was in the Samuel Warren and Louis Brandeis' article "The Right to Privacy" in 1890. This classic report began with the common law as the system that developed progressively, by judicial determination, from safeguards of the physical person and tangible property to protection of man's "sensations, emotions, and spiritual nature." Warren and Brandeis felt that the principal threat was press invasion of privacy through publication of personal information and gossip, a trend which was disturbing the "solitude and privacy men

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[6]Samuel Warren and Louis Brandeis, "The right to privacy," Harvard Law Review IV (1890), 193. See also G. Russell Pipe, "Restriction on Government Inquiry," American University Law Review, XVIII (1969), 521.

[7]Westin, Privacy and Freedom, p. 344; citing Cooley on Torts (author not given) (New York, 1888), p. 29. (This work is not available in this library.)

required in advancing civilization." They also felt that the common law "secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments and emotions shall be communicated to others." In fact, they stated that the right of privacy was a broad right to "an inviolate personality."[8]

From 1890 to 1950 there were over 300 decisions on privacy (and that figure encompasses only appellate rulings) and a preponderance of the states embraced the common-law doctrine of "an individual right of privacy." Between the 1880's and 1937 the courts' laissez-faire economic outlook and their disapproval of governmental interference in business led to the "propertied privacy" outlook of the judiciary.[9] During these years the cases concerning privacy were of two main types. One type was with torts which were largely dependant upon the particular judge or judges involved. In this vein, one of the most outstanding statements for a right of privacy was by Judge Cobb when he declared:

> An individual has a right to enjoy life in any way that may be most agreeable and pleasant to him, according to his temperament and nature, provided that in such enjoyment he does not invade the rights of his neighbor or violate public law or policy. The right of personal security is not fully accorded

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[8]Warren and Brandeis, "The Right to Privacy," 193-205.

[9]Westin, Privacy and Freedom, pp. 339, 346.

> by allowing an individual to go through his life in possession of all his members and his body unmarred; nor is his right to personal liberty fully accorded by merely allowing him to remain out of jail or free from other physical restraints. . . .
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> Liberty includes the right to live as one will, so long as that will does not interfere with the rights of another or of the public. One may desire to live a life of seclusion; another may desire to live a life of publicity; still another may wish to live a life of privacy as to certain matters and of publicity as to others. . . . Each is entitled to a liberty of choice as to his manner of life, and neither an individual nor the public has a right to arbitrarily take away from him his liberty.[10]

The second type of privacy case involved governmental intrusions into the solitude of an individual by eavesdropping and wiretapping primarily, with the courts normally not recognizing a constitutional right of privacy when the government was involved and especially when crime was involved.[11]

Since the time of the Warren-Brandeis article a variety of kinds of privacy have been examined by the American courts. They include[12]: wiretapping and

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[10]Pavesich v. New England Mutual Life Insurance Company, 50 Southeastern Reporter, 68, 70 (1905).

[11]Westin, Privacy and Freedom, pp. 330-346 (for a historical account).

[12]Robert G. Dixon, Jr., "The Griswold Penumbra: Constitutional Charter for an expanded law of privacy?," Michigan Law Review, LXIV (1965), 201-202. This article provides an analysis of the different definitions of privacy. See also Roe v. Wade, 93 S. Ct. 705, at 726-727(1973) for a chronology of relevant cases.

eavesdropping,[13] investigations by legislatures,[14] associations,[15] liberty of the 14th Amendment,[16] rights deemed "fundamental" or "implicit in the concept of ordered liberty,"[17] political or social beliefs,[18] non-Communist and general oaths,[19] anonymity in disseminating ideas and being a member of an organization,[20] remaining silent,[21] employees responsibilities,[22] statutes protecting the public from canvassers,[23] denying the existence of a common

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[13] Roberson v. Rochester Folding Box Company, 64 Northeastern Reporter, 442 (1902).

[14] Wilkinson v. U.S., 365 U.S., 399 (1961); Braden v. U.S., 365 U.S., 431 (1961); Sweezy v. New Hampshire, 354 U.S., 234 (1957); Barenblatt v. U.S., 360 U.S., 109 (1959); Deutsch v. U.S., 367 U.S., 456 (1961).

[15] N.A.A.C.P. v. Alabama, 357 U.S., 449 (1958).

[16] Meyer v. Nebraska, 262 U.S., 390 (1923).

[17] Palko v. Connecticut, 302 U.S., 319 (1937).

[18] Gibson v. Florida Legislative Investigation, 372 U. S., 539 (1963).

[19] Bagget v. Bullit, 377 U.S., 360 (1964); Cramp v. Board of Public Instruction, 368 U.S., 278 (1961); Torcaso v. Watkins, 367 U.S., 488 (1961); Wieman v. Updegraff, 344 U.S. 183 (1952).

[20] Talley v. California, 362 U.S., 60 (1960); Bates v. Little Rock, 361 U.S., 516 (1960).

[21] Watkins v. U.S., 354 U.S., 178 (1957).

[22] Beilan v. Board of Public Education, 357 U.S., 399 (1958); Lerner v. Casey, 357 U.S., 468 (1958); Slochower v. Board of Higher Education, 350 U.S., 551 (1956).

[23] Breard v. Alexandria, 341 U.S., 622 (1951).

law right of privacy,[24] denying a blood test to prove adultery,[25] intrusions by governmental agencies,[26] family relationships,[27] child rearing and education,[28] guaranteeing a zone or area of privacy,[29] a right to be left alone,[30] and the right premised upon the individual's right to the pursuit of happiness.[31]

An interesting legal problem was posed by these privacy cases. The fact is, the word privacy does not appear in the Bill of Rights in the Constitution, nor in the Fourteenth Amendment. The Bill of Rights has always been a protection of the individual against actions of the national government only, while the Fourteenth Amendment denies any state the

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[24] Roberson v. Rochester Folding Box Company, 64 Northeastern Reporter, 442 (1902).

[25] Bednarik v. Bednarik, 16 Atlantic Reporter, 2nd ed., 80 (1940).

[26] Frank v. Maryland, 359 U.S., 360 (1959); Monroe v. Pape, 365 U.S., 167 (1961); Ohio ex. rel. Eaton v. Price, 364 U.S., 263 (1960).

[27] Prince v. Massachusetts, 321 U.S., 158 (1944).

[28] Pierce v. Society of Sisters, 268 U.S., 510 (1925).

[29] Union Pacific R. Co. v. Botsford, 141 U.S., 250 (1891).

[30] Banks v. King Features Syndicate, 30 Federal Supplement, 352 (1939); Brents v. Morgan, 299 Southwestern Reporter, 967 (1927); Jones v. Herald Post Co., 182 Southwestern Reporter, 2nd ed., 972 (1929); Holloman v. Life Ins. Co. of Va., 127 American Law Reports, 110 (1940).

[31] Barsky v. U.S., 70 S. Ct., 1001 (1947).

right to deprive persons of "life, liberty, or property" without due process of law. The Court, early in the Twentieth Century, began to define "due process" as that process which was "fundamentally fair," or not contrary to the cannons of decency expected in any democratic concept of "ordered liberty." Over a long period of time the emergent rule from this was that those concepts and propositions enumerated in the Bill of Rights which were "fundamental" were automatically among those "liberties" which a state could not deny a person without violating the due process clause of the Fourteenth Amendment. Among the Bill of Rights "liberties" protected against state action were the First Amendment freedoms of speech, press, religion, and association, the Fourth Amendment protections against unreasonable searches and seizures of persons, papers, and effects, the Fifth Amendment guarantees against double jeopardy, and self incrimination, the Sixth Amendment guarantees of trial by jury, an impartial jury, confrontation of witnesses, and counsel for defense. The Eight Amendment prohibition against cruel and unusual punishment concludes the list of specific Bill of Rights protections now held to be protected against state as well as national action, but it should be noted that the Ninth Amendment, a "pandora's box" of potential rights which says "The enumeration in the Constitution, of certain rights, shall not be construed to

deny or disparage others retained by the people," has been mentioned as an additional source of protection of persons against state action.

And so the courts have had to create a "right to privacy," by using other enumerated rights, and construing those rights in such manner as to find the inference that the framers intended to protect privacy. And because of the nature of modern mass society, with its very real inter-dependencies between individuals, groups, and formal governmental institutions, the courts have shifted their emphasis from the "propertied" right to privacy, to a "personal liberty" foundation.[32] Therefore, privacy as a "cultural norm" serves as a "rallying point" for the affected individual who is fearful of the intrusions by mass society and feels that its efficacy is in "galvanizing the legal system into recognizing and contesting specific threats to freedom . . . deep intrusions on human dignity by those in possession of economic or governmental power."[33]

In light of this rallying point, one author suggested that the right of privacy has become

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[32]Westin, Privacy and Freedom, p. 355.

[33]Clark C. Havighurst, "Forward," Law and Contemporary Problems, XXX (Spring, 1966), 251-252.

> A modern demand, growing out of the conditions of life in the crowded communities of today, and presents difficult problems. The interest is clear. Such publicity with respect to private matters of purely personal concern is an injury to personality. It impairs the mental peace and comfort of the individual and may produce suffering much more acute than that produced by a mere bodily injury.[34]

There appears then to be "inseparability of privacy and culture."[35] Thus, privacy has become an almost inherent right, and the government (especially the courts) have the job of making sure that the "inalienable rights must exist in spite of the Constitution - not merely because of its language."[36] Privacy then is a cherished right that is "so prized that its loss is a prerequisite for a violation of most of one's other basic rights and freedoms."[37]

Since the right of privacy first emerged as tort relief, it has progressed to a constitutional right for protection against zealous individuals, and governmental intrusions on individuals' right to be left alone. As Supreme Court Justice Felix Frankfurter observed, "the

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[34]Roscoe Pound, "Interests of Personality," Harvard Law Review, XXVIII (1915), 362-363.

[35]John P. Sisk, "In praise of Privacy," Harpers' Magazine, (February, 1975), 100.

[36]Jordon J. Paust, "Human Rights and the Ninth Amendment: A new form of Guarantee," Cornell Law Review, LX (January, 1975), 254.

[37]Parker, "A Definition of Privacy," 287.

security of one's privacy against arbitrary intrusions by the police - which is at the core of the Fourth Amendment - is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' . . .".[38] Hence, as Henry Kissinger said, one must remember that "a government that tramples on the rights of its citizens denies the purpose of its existence."[39] Consequently, a free society should allow the predilection to the individual - to decide, with only extraordinary "compelling state interest" exceptions, when and how his actions will be publicly revealed.

The "penumbras" from the amendments function as the foundation for the constitutional tenet of a right of privacy for the individual. With the other branches of government intruding more and more into an individual's privacy, the courts have come to be the defender of a person's right in his "private enclave where he may lead a private life."[40] Among these issues relative to "privacy of the body" that have been taken into the realm of privacy and adjudication are these: cases challenging abortion laws, homosexual laws (and sodomy laws), fornication laws, cohabitation

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[38] Wolf v. Colorado, 338 U.S., 25 (1949).

[39] Henry Kissinger, The Dallas Morning News, June 11, 1976, Sec. A, p. 2.

[40] Edwin W. Tucker, Adjudication of Social Issues: Text, Cases and Problems (St. Paul, 1971), pp. 116-118.

laws, anti-contraceptive laws, miscegenation laws, and even regulations concerning the length of a male's hair.

The purpose of this thesis is to examine the court's development of the doctrine or concept of the right of privacy. A number of other issues such as wiretapping and computer invasions could be examined in the realm of privacy. But for the purpose of limitation, this work will deal only with those cases where the court has already clearly recognized or intimated a right of privacy.

CHAPTER II

PRIVACY OF THE INDIVIDUAL

The Griswold Case

The first case in which a majority of the Supreme Court for the first time explicitly acknowledge an independent constitutional right of (or to) privacy to preserve the private relations between husband and wife was in 1965 in Griswold v. Connecticut.[1] But the Court had come very close to declaring such a right in a series of cases preceeding Griswold.

In 1949, in Wolf v. Colorado,[2] the Supreme Court decided that evidence that was introduced in a state trial that was obtained "under circumstances which would have rendered it inadmissible" in a prosecution for violation of a federal law in a federal court would not be admissible in a state court. The Court reasoned that an infraction of the Fourth Amendment was part of "one's privacy against arbitrary intrusions by the police" and enforceable against the States through the Due Process Clause.[3] Then, in 1952 the Supreme Court received a case in which police went to

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[1] Griswold v. Connecticut, 381 U.S., 479, 85 S. Ct., 1678, 14 Law Edition 2nd, 510 (1965).

[2] Wolf v. Colorado, 338 U.S. 25 (1949).

[3] Wolf, pp. 25-27 (Justice Frankfurter).

the home of a suspected narcotics seller, and upon finding the suspect in his room with some capsules, the police attempted to seize the capsules. The suspect swallowed the pills and was then arrested and taken to a hospital to have his "stomach pumped." The pumping produced matter that contained morphine, and the suspect was arrested, tried and convicted of drug possession. In Rochin v. California[4] Justice Frankfurter, for a majority of the Court, found that the police conduct was such that it "shocked the conscience," and that their methods too closely resembled "the rack and the screw."[5] But, when the Court majority used this "invasion of the body" test to find no violation of a suspect's rights when the police gained evidence by repeated illegal invasions of the suspects home, Justice Frankfurter made it clear he believed the test far too narrow. In dissent, he said, "Surely the Court does not propose to announce a new absolute, namely that even the most reprehensible means for securing a conviction will not taint a verdict so long as the body of the accused was not touched by state officials."[6] Then in 1957, in Breithaupt v. Abram,[7] the Court affirmed the conviction of a defendant

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[4]Rochin v. California, 342 U.S., 165 (1952).

[5]Rochin v. California, p. 172.

[6]Irvine v. California, 347 U.S., 146 (1954).

[7]Breithaupt v. Abram, 352 U.S., 432 (1957).

who had been involved in a fatal automobile accident and had had police take blood samples from his unconscious person (which proved his intoxication). Chief Justice Warren in dissent said,

> The Court's opinion suggests that an invasion is 'brutal' or 'offensive' only if the police use force to overcome a suspect's resistance. . . . I cannot accept an analysis that would make physical resistance by a prisoner a prerequisite to the existence of his constitutional rights. . . .[8]

Justice Douglas, also in dissent, said,

> If the decencies of a civilized state are the test, it is repulsive to me for the police to insert needles into an unconscious person in order to get the evidence necessary to convict him, whether they find the person unconscious, give him a pill which puts him to sleep, or use force to subdue him.[9]

Then, in 1965, the Supreme Court heard the Griswold case. This case involved a Connecticut statute concerning contraceptives used by married couples (which was not enforced by the police) and clinics prescribing contraceptives (which was enforced). The statute (sections 53-32 and 54-196 of the General Statutes of Connecticut, 1958 rev.) forbade the use of "any drug, medicinal article, or instrument for the purpose of preventing conception" and assisting or giving advice to anyone to perpetrate such an offense.[10] In 1961, the Supreme Court, over Justices Harlan, Douglas, Black, and Stewart's dissent had dismissed hearing a case

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[8] Breithaupt v. Abram, p. 441.

[9] Breithaupt v. Abram, p. 444.

[10] Griswold, p. 512.

over precisely this same statute. At that time Justice Harlan said,

> . . . the most substantial claim which these married persons press is their right to enjoy the privacy of their marital relations free of the enquiry of the criminal law, whether it be in a prosecution of them or of a doctor whom they have consulted. And I cannot agree that their enjoyment of this privacy is not substantially impinged upon, when they are told that if they use contraceptives, indeed whether they do so or not, the only thing which stands between them and being forced to render criminal account of their marital privacy is the whim of the prosecutor. . . .[11]

But in Griswold, a divided (7-2) Court reversed the conviction (of Griswold) and declared the Connecticut statute to be unconstitutional. Justice Douglas, in an opinion in which only three of his colleagues joined, said that

> First Amendment has a penumbra where privacy is protected from governmental intrusion . . . (and) specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. . . . (and these) various guarantees create zones of privacy. . . . (which are) older than the Bill of Rights . . . political parties and the school system.[12]

He went on to base his conclusion on the Third, Fourth, Fifth and Ninth Amendments.[13] Justice Goldberg (joined by Warren and Brennan) invoked the Ninth Amendment to explain his reason for declaring the statute unconstitutional for obtruding upon the "right of marital privacy," and

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[11] Poe v. Ullman, 367 U.S., 497, 521 (1961).

[12] Griswold, pp. 514-516.

[13] Griswold, pp. 514-515.

> . . . to hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitutions is to ignore the Ninth Amendment and to give it no effect whatsoever. Moreover, a judicial construction that this fundamental right is not protected by the Constitution because it is not mentioned in explicit terms . . . would violate the Ninth Amendment.[14]

The reason only Justices Warren, Goldberg, and Brennan signed Douglas' opinion was because it relied solely on the Bill of Rights, rather than on the "liberty" concept of the Fourteenth Amendment. Justice Harlan agreed that the statute was unconstitutional, but used the due process clause of the Fourteenth Amendment as his basis for striking down the law.[15] Justice White also employed the due process clause to protect the freedoms and liberties married persons were likely to be deprived of.[16] In dissent, Justice Black said, "I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision."[17] At this point Justice Black and Justice Brandeis differ. Black said that government is able to do

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[14] Griswold, p. 519.

[15] Griswold, p. 524.

[16] Griswold, p. 526.

[17] Griswold, pp. 530-531. Black went on to say that the right of privacy was "wholly a common law tort or statutory right in states that specifically protected the right and could only be relieved by a tort proceeding."

anything that is not specifically forbidden by exact words in the Bill of Rights; on the other hand, Brandeis favored both "restriction on, and powers of government as subject to continued reinterpretation and changing application."[18] Also in dissent, Justice Stewart said that the statute in question was "an uncommonly silly law . . . obviously unenforceable . . . but we are asked to hold that it violates the U.S. Constitution, and that I cannot do."[19] So the first eight amendments, the Ninth Amendment, or the Fourteenth Amendment (the due process clause) guard against invasion of private marital affairs. The essential point of this case as seen by one scholar is that the "key constitutional doctrine has been enunciated, and many forces in our society will press hard toward fuller realization of its great potential."[20] As another author has pointed out, this precedent has the possibility of being extended to every constitutionally enumerated right if privacy takes on the meaning of "integrity and freedom of the individual person and personality"; while the "Griswold principles

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[18] William M. Beaney, "The Right to Privacy and American Law," Law and Contemporary Problems, XXXI (1966), 260.

[19] Griswold, pp. 540-541.

[20] Thomas I. Emerson, "Nine Justices in search of a doctrine," Michigan Law Review, LXIX (1966), 234.

are virgin and subject to semination, the manner in which the seeds will germinate will depend upon judicial inclination."[21]

Abortions

With the Griswold decision as a precedent, abortion and contraceptive laws came to be scrutinized under the new aegis of a constitutional right of privacy. As a way of controlling one's own destiny and to stave off the governmental encroachments by imposing society's morality on the individual, the right of privacy became the rallying point for abortion advocates and the courts became the instrument through which the right would be furthered.

Abortions have been performed for centuries. Indeed, some observers believe that abortions were conducted "very generally in the Greco-Roman world." The first citation to abortion in the English criminal law came in 1640.[22] In the common law, women were allowed to have abortions in England from 1327 to 1803, and in America from 1607 in 1830. In fact, when the U.S. Constitution was written abortion was legal. In the U.S. some say the statutes that prohibited abortions were enacted in the 19th century to "protect the

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[21]Ernest Katin, "Griswold v. Connecticut: The Justices and Connecticut's 'Uncommonly silly law,'" Notre Dame Lawyer, XXXXII (1967), 706.

[22]John T. Noonan, The Morality of Abortion: Legal and Historical Perspectives, (Cambridge, 1970), pp. 6, 223.

woman's health and life," while others feel that they were enacted to control morality. The impetus for the idea that a woman has the right of privacy to regulate her own body came in Austria in the 1920's. In the 1920's the Russians allowed women to obtain abortions (although this "right" was rescinded in 1935 and later reinstituted in the 1950's). The movement in the U.S. began in 1959 and culminated in 1969 with the formation of the National Association for Repeal of Abortion Laws.[23] By June of 1972, a Gallup poll found that 64% of the American people thought that abortion should be a "decision solely for a woman and her doctor." By 1973 the argument that prohibiting abortions protected the woman's life and health was proven fallacious by a New York State study finding that more women died in childbirth than as a consequence of a legal abortion (within the first 24 weeks of pregnancy).[24] In American courts, however, the unborn child was dealt with and protected as a "human being." But with the Griswold case, a change took place with reference to the legality of abortions. As one author put it, "In America, as has been more than once observed, moral issues become legal issues, and legal issues become

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[23]"History of a Victory," Civil Liberties, edited for American Civil Liberties Union by Claire Cooper, March, 1973, 1-2.

[24]Arlie Schardt, "New Threats: Saving Abortion," Civil Liberties, edited for American Civil Liberties Union by Claire Cooper, September, 1973, 1-2.

constitutional issues. What is right must be legal, and what is wrong must be unconstitutional."[25]

Within a few years after Griswold, anti-abortion statutes were under attack in many states. In 1969 the California anti-abortion statute came under scrutiny for forbidding therapeutic abortions regardless of the harm to the health of the child or the mother. The California Supreme Court held the statute unconstitutional because it abridged the woman's "fundamental" right to have children, and pointed out that both the Supreme Court of the U.S. and the California Supreme Court had stated that in regards to the family or sexual matters there should be a right of freedom of privacy.[26] In Babbitz v. McCann[27] a three judge federal district court in Wisconsin held that the right of a woman to abnegate a pregnancy in its early stages could not be encroached on by the state without a pressing public need, and that the state's police power did not entitle it to deny a woman's basic right (under the Ninth Amendment) to decide if she will have a child or not. In 1970, a Louisiana physician sought an injunction against the State Board of Medical Examiners enforcing the Louisiana statute

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[25]Noonan, The Morality of Abortion, pp. IX, 221.

[26]California v. Belous, 458 Pacific Reporter, 2nd ed., 194 (1969); Cert. Den. 397 U.S., 915 (1970).

[27]Babbitz v. McCann, 310 Federal Supplement, 293 (1970), appeal dismissed 400 U.S. 1 (1971).

that enabled the Board to remove his certificate for securing, assisting, or abetting in obtaining an abortion except when the woman's life was in danger (consultation with another physician was necessary at that time). The three judge federal district court held that the woman's interest (except where her life was threatened) had to be subordinated to allow the "embryo or fetus opportunity to develop toward natural birth"; that the state had the power to "place such value upon prenatal life," that the statute "was necessary to accomplish such permissible state policy," and the suit seeking the injunction was dismissed.[28] In Keller v. Superior Court of Amador County,[29] Keller was charged with murder as a result of his "stomping" on the abdomen of his ex-wife who was pregnant in order to kill the fetus (which it did). The Supreme Court of California, per Justice Mosk, ruled that the "stomping" was not homicide because the "fetus did not have legal status till after birth."

In 1971 two cases continued the idea of a woman's right of privacy to control her body (though no specific right of privacy was mentioned). In Schattman v. Texas Employment Commission,[30] the federal district court concluded that

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[28] Rosen v. Louisiana State Board of Medical Examiners, 318 Federal Supplement, 1217 (1970), vacated on other grounds, 412 U.S., 902 (1973).

[29] Keller v. Superior Court of Amador County, 470 Pacific Reporter, 2nd ed., 617 (1970).

[30] 330 Federal Supplement, 328 (1971).

employees may device their own maternity leave policy with reference to the individual's medical situation and thus voided the state agency's policy of concluding employment of women employees two months preceeding expected delivery. In Ballard v. Anderson[31] the California state court held that the state abortion statute should be interpreted to allow minors to secure therapeutic abortions without parental approval.

Also in 1971 the Supreme Court heard arguments in the case of U.S. v. Viutch.[32] In this case the federal district court had held that "as a secular matter a woman's liberty and right of privacy extends to family, marriage, and sex matters and may well include the right to remove an unwanted child at least in early stages of pregnancy."[33] The Supreme Court, through Black, held that the burden of proof is on the prosecution under the statute to show that an abortion was not necessary to preserve the mother's life or health, but that the statute was valid and not unconstitutionally vague.

In 1967, William Baird gave a lecture on contraceptive devices at Boston University. After the address he allowed the audience to obtain any of the devices he spoke about

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[31] 484 Pacific Reporter, 2nd ed., 1345 (1971).

[32] U.S. v. Viutch, 402 U.S., 62 (1971).

[33] U.S. v. Viutch, 305 Federal Supplement, 1032 (1969).

at no charge and he was arrested for handing a contraceptive device to a young lady. He was convicted for the lecture and giving the devices away, but the State Supreme Judicial Court reversed the conviction for the lecture. The U.S. Supreme Court denied certiorari in January of 1970. The A.C.L.U., representing Baird, asserted that the statute (which permitted only doctors and pharmacists to prescribe and allot the devices) violated the "right of sexual privacy" in which the state has no interest, and it has the effect of placing individuals (married or single) in the situation of risking pregnancy, of abortion, or of abstaining from sex. They also contended that the state was passing judgment on contraception as being wrong and thereby delegating the state's judgment for the individual on a subject of private concern only. The federal district court heard the case on a writ of habeas corpus by Baird (who was in jail) and held that the "marital privacy" that Griswold spoke about was not involved in this case. The court also rejected the petitioner's contention that he was helping the individual to master the "most private bodily functions" by stating that although fornication, incest, and adultery involved these functions, it was a fact that "there never had been a constitutional right of privacy shielding these acts . . .

against intrusion by the state . . . nor was Baird's own right of privacy involved" and so he had no standing.[34]

Then in 1972 the Supreme Court heard the case of Eisenstadt v. Baird.[35] This case was brought about after Baird's prosecution for a second time for the lecture and distribution of contraceptives, this time to an unmarried person. He was charged with violation of a Massachusetts statute which was intended to be a deterrent to fornication and, aside from protecting the morality of the community, was intended to be an aid to maintaining the health of the community. Concerning the morality of contraceptives, the Court of Appeals held,

> To say that contraceptives are immoral as such, and are to be forbidden to unmarried persons who will nevertheless persist in having intercourse, means that such persons must risk for themselves an unwanted pregnancy, for the child, illegitimacy, and for society, a possible obligation of support. Such a view of morality is not only the very mirror image of sensible legislation; we consider that it conflicts with fundamental human rights. In the absence of demonstrated harm, we hold it is beyond the competency of the state.36

The Supreme Court decided that the individuals right to access to contraceptives must be the same for married and unmarried. As Justice Brennan stated,

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[34]Eisenstadt v. Baird, 247 Northeastern Reporter, 2nd ed., 544 (1969), certiorari denied 396 U.S., 1029 (1970), 310 Federal Supplement, 951, 957 (1970).

[35]92 S. Ct., 1029 (1972).

[36]429 Federal Reporter, 2nd ed., 1398, 1402 (1970).

> 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.37

The courts, using the right of privacy as the basis, could see that allowing unmarried people the right to contraceptives and disallowing unmarrieds the same privilege would be "invidious."

The problem then came to this idea: If privacy is a loss of regulating control over one's body, then to be forced "to go through pregnancy, childbirth, and especially raising a child is a severe loss of privacy which can last many years."[38]

And then in 1973, the Supreme Court made its historic and controversial decision in Roe v. Wade[39] and Doe v. Bolton.[40] Jane Roe was unmarried and pregnant. At the time that the case was instituted the State of Texas had a stringent anti-abortion law that allowed abortions only in the case of saving the woman's life. Jane Roe did not have the money to go to another state to obtain an abortion. The Does complained about the lack of accessibility of obtaining an abortion in Georgia and the deleterious effect that it was having upon "their marital relationship." Both husband

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[37] 92 S. Ct., 1029, 1038 (1972).

[38] Parker, "A Definition of Privacy," 290-291.

[39] 410 U.S., 113, 93 S. Ct., 705 (1973).

[40] 410 U.S., 179 (1973).

and wife were unemployed. May Doe had already had three children (two had been taken away because she was unable to care for them and one had been adopted after birth). She was denied an abortion at a public hospital and did not have the money necessary for a private hospital to obtain an abortion, nor to travel to another state. At the time that the case was instituted, Georgia would allow an abortion if there was a threat of damage to the woman's health or life, or if the child would be severely impaired, or the pregnancy was the result of rape or incest. The Supreme Court in a 7-2 majority said in Roe and Doe that the states involved had violated the women's right to privacy that was safeguarded by the due process clause of the 14th Amendment. The effect of the Roe decision was to nullify the stringent anti-abortion laws of 31 states, and the effect of Doe was to void another 15 states anti-abortion laws.[41] Justice Blackmun speaking for the majority began the opinion by quoting Justice Holmes,

> If (the Constitution) is made for people of fundatally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.[42]

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[41]"History of a Victory," 1-2.

[42]Lochner v. N. Y., 198 U.S., 45 (1905). (Justice Holmes in dissent.)

The Court then (in Roe) pointed out that a woman's right to conclude her pregnancy could be found in the "concept of personal 'liberty'" embodied in the 14th Amendment due process clause; or in personal,"marital privacy said to be protected by the Bill of Rights or its penumbras." The Court then stated that there is a "federal constitutional right of privacy" and it was violated by the Texas statute which swept far beyond any areas of compelling state interest.[43] The Court also struck a clause that prevented non-residents in Georgia from securing abortions in the state.[44] The Court concluded (in Roe) that "the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation." "Viability" was set at between 24 to 28 weeks and the word "person," as utilized in the 14th Amendment, "does not include the unborn."[45] Therefore, the Supreme Court declared "fundamental" the right to obtain an abortion before that 24 to 28 week period.

The reaction to the Roe decision was immediate. By September of 1973 at least 18 constitutional amendments were proposed, and at least 188 anti-abortion bills were introduced in 41 states.[46] Though the "Right to Life" people

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[43] Roe, pp. 715, 727-728.

[44] 410 U.S. 179, p. 200.

[45] Roe, pp. 727-730.

[46] Arlie Schardt, "New Threats: Saving Abortion," 1.

were adament, a majority of the American people and almost two-thirds of the doctors favored the Roe decision.[47] Through many abortion cases since Roe, the courts have consistently upheld and in some cases extended the right of privacy.

In 1973, two women who were allegedly pregnant and wanted abortions sought relief from the Rhode Island anti-abortion statute. The federal Court of Appeals ruled the law unconstitutional because of its contradiction with Roe and its definition that life began at the time of conception.[48] In Utah a pregnant woman brought suit saying that the state statute that regulated abortions violated her Ninth and Fourteenth Amendments' right of privacy and liberty. The federal district court, through Judge Ritter, declared that the state's new abortion law was unconstitutional because its purpose was to make the availability of an abortion "extremely burdensome or impossible" and the court went on to say,

> The right of the woman is one that the court has deemed to be fundamental, and lesser interests or rights themselves deemed fundamental in another context may not be allowed to interfere or impose an undue burden upon the women's right of privacy.[49]

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[47] New York Times, May 13, 1973, Sec. 1, p. 40.

[48] Doe v. Israel, 482 Federal Reporter, 2nd ed., 156 (1973).

[49] Doe v. Rampton, 366 Federal Supplement, 189 (1973).

In Florida, the state district court of appeals heard arguments from the potential putative father who sought to restrain the mother from obtaining an abortion. The court, through Mager, held that "the decision to abort is entirely that of the mother and her physician."[50]

When a California statute that prohibited mailing abortion information and unsolicited advertisements of birth control devices was challenged, federal district Judge Ferguson held that

> Individuals have a fundamental right of privacy and personal choice in matters of sex and family planning and such right encompasses decisions regarding whether and what methods of contraception and family planning may be used to prevent conception. Any governmental interest in preventing the corruption of public morals could not justify the infringement on freedom of speech and the right to privacy entailed by statutes proscribing the mailing of information concerning abortion and unsolicited advertisements of birth control devices.[51]

To expand on the right of privacy even more, Jane Doe and Sally Roe (among others) challenged the Illinois statute that prohibited abortions unless to preserve the woman's life. The Chief Justice of the federal district, Swygert, held that the statute

> . . . by forcing the birth of every fetus, no matter how defective or how intensely unwanted by future parents, displayed no legitimate compelling

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[50] Jones v. Smith, 278 Southern Reporter, 2nd ed., 339 (1973).

[51] Associated Students for the University of California at Riverside v. Attorney General of the U.S., 368 Federal Supplement, 11 (1973).

> state interest in fetal life, which would justify intrusions on the woman's privacy which is involved in forcing a woman to bear unwanted children; . . . and at least during the first trimester the state may not prohibit, restrict or otherwise limit women's access to abortion procedures.[52]

In Minnesota, the federal district court held that a municipal hospital could not constitutionally prohibit staff physicians from using the hospital to conduct abortions.[53]

In Florida, the federal district court ruled that the woman does not have to have the spouse's consent to obtain an abortion and that the Florida statute which required it was unconstitutional.[54] In Cleveland, the Board of Education's mandatory leave rule was challenged by a pregnant school teacher. The Supreme Court held that the five months pregnant mandatory leave rule was a denial of Due Process (applying the woman's right of privacy to control her body) and that the school rule did not have a valid relationship to a compelling state interest.[55] In Wisconsin the Milwaukee County General Hospital rule of prohibiting elective abortions in the hospital was ruled unconstitutional.

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[52] Doe v. Scott, 321 Federal Supplement, 1385 (1389); vacated on other grounds (in Hanraham v. Doe) 410 U.S., 950 (1973).

[53] Nyberg v. City of Virginia, Minn., 361 Federal Supplement, 932 (1973).

[54] Coe v. Gerstein, 376 Federal Supplement, 695 (1974).

[55] Cleveland Board of Education v. LaFleur, 414 U.S., 632 (1974). See also Cohen v. Chesterfield Co. School Board (same citation) in which mandatory school leaves were required after four months of pregnancy.

Chief Justice Reynolds went on to hold that a woman is entitled to an abortion in the first trimester and that the hospital should "provide its facilities to those staff personnel who have no conscientious objection to the performance of abortions for those women patients who have a right to them and who request them."[56] Similarly, in Massachusetts a federal district court held that a public hospital could not prohibit elective abortions while allowing therapeutic abortions because that violates those "fundamental rights which the Fourteenth Amendment guarantees."[57] In keeping with that idea, a survey of public hospitals in 1975 found that 85% had the equipment to execute abortions and 100% of those hospital perform abortions which are "medically necessary" but only 53% of those hospitals that were capable of performing abortions did so when the abortions were not "medically necessary."[58]

In 1975 the abortion issue and the woman's right of privacy continued to cause adjudications. In New York a distributor of contraceptives challenged the statute that prohibited distribution to minors under 16 and allowed people over 16 to obtain contraceptives only from a

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[56] Doe v. Mundy, 378 Federal Supplement, 731, 736 (1974).

[57] Doe v. Hale Hospital, 369 Federal Supplement, 970 (1974).

[58] Linda Goodnight and Judy Rutledge, "Abortion: 24 Weeks of Dependency," Baylor Law Review, XXVII (Winter, 1975), 129.

licensed pharmacist, and the ban on displaying and advertising contraceptives. The federal district court, per Justice Pierce, held that the statute infringed on the First Amendment freedoms and infringed on the constitutionally protected right to privacy.[59] In Pennsylvania the Abortion Control Act that required spousal and parental consent for an abortion for a minor, was invalidated by federal district Judge Green when he held that the statute infringed on the minor's fundamental right of privacy.[60] Along the same privacy lines, the Supreme Court of Washington heard a case in which a physician was convicted for performing an abortion on an unmarried minor without parental consent. The court held, for Justice Utter, that the requirement of parental consent was an "unwarranted intrusion on the minor's right of privacy."[61]

Similarly, the U.S. Court of Appeals (5th Circuit) heard a case in which a school district would not hire unwed parents as teachers' aides. Katie Mae Andrews and Lestine Rogers, two unwed mothers, sought relief. The court, through Judge Simpson, held that the school rule had no rational relation to the objectives of the school, and that the rule

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[59] Population Services International v. Wilson, 398 Federal Supplement, 321 (1975).

[60] Planned Parenthood Association v. Fitzpatrick, 401 Federal Supplement, 554 (1975).

[61] State v. Koome, 530 Pacific Reporter, 2nd ed., 260 (1975).

was "invidious discrimination," and, that the teachers constitutional rights of Due Process and Equal Protection of the laws had been violated by the school presuming "present immorality from the past fact of unwed parenthood."[62]

Then, in 1975, the Supreme Court ruled that the editor convicted of a misdemeanor offense for "selling or publicizing to encourage or prompt the procuring of an abortion" had had his First Amendment protections infringed upon by the unconstitutional statute.[63] Again, the right of privacy was confirmed under the aegis of the First Amendment protection.

The only real setback in the drive for privacy of the person occurred in 1975. In October of 1973, Dr. Kenneth Edelin, doctor of Obstetrics and Gynecology at Boston City Hospital, performed an abortion and delivered a fetus believed to be between 22 and 24 weeks old. In April of 1974 he was indicted for manslaughter. Similarly, two doctors in other parts of the United States were accused of having "aborted living fetuses" but neither was indicted.[64] In February of 1975 Edelin was convicted of manslaughter

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[62] Andrews v. Drew Municipal Separate School District, 507 Federal Reporter, 2nd ed., 611 (1975).

[63] Bigelow v. Commonwealth of Virginia, 95 S. Ct., 2222 (1975).

[64] "Abortion on Trial," Newsweek, January 27, 1975, p. 55.

and given a one year probated sentence (pending appeals).[65] Every year in the U.S. there are approximately 800,000 to 900,000 legal abortions and since about 90% of all abortions are in the first trimester of pregnancy the Edelin decision may have little effect.[66] On the other hand, the Boston decision may be an omen as to what will happen in the future. In other countries where abortion is legal "once the population growth gets to about zero second term abortions become illegal."[67]

The Edelin case points out two things: (1) there is not an absolute right of privacy - especially concerning abortion, and (2) there is a very vocal minority of Americans who feel that a right to privacy should not be extended to abortions (the Right-to-Life people). In 1976 all of the presidential candidates were asked their position on abortion, and one candidate is solely an anti-abortion candidate.[68] Still it appears that a majority of Americans favor the right to privacy with respect to

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[65] Dallas Morning News, February 16, 1975, Sec. A, p. 3; Denton Record Chronicle, February 19, 1975, Sec. B, p. 3.

[66] "Abortion: The Edelin shock wave," Time, March 3, 1975, 54.

[67] Denton Record Chronicle, February 15, 1975, Sec. B, p. 3.

[68] Ellen McCormack. See "1976's Sleeper Issue - Abortion," Newsweek, February 9, 1976, 21.

legalized abortions.[69] Thus the right of privacy has been set forth as an argument for abortions and has been accepted and acknowledged as a "fundamental" right.

On July 1, 1976, the Supreme Court held (6-3) that spouses or (5-4) parents do not have the right to prohibit an abortion sought by a child or wife.[70] The Court's decision made clear that during the first twelve weeks of pregnancy, the woman has the prerogative to exercise her right to have a child or obtain an abortion without interference from the state, spouses, or parents.

In sum, the right of privacy has been expanded almost completely to a woman's right of privacy. With Roe the court declared that a woman has a constitutional right - a fundamental right - to control her own body. One author intimates that the changing attitude towards abortion reflects the change in intended family size, ideas concerning "private morality," and the women's social role.[71] Whatever the reason, the right of privacy has been explicitly espoused with regards to abortions. And so the whole matter seems to boil down to the congent question that

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[69]John D. Rockefeller, "No retreat on abortion," Newsweek, June 21, 1976, 11.

[70]No citations were available at the writing of this work. A description of the case and the Court's decision may be found in The Dallas Morning News, July 2, 1976, Section 1, p. 1.

[71]Edwin Schur, "Abortion," The Annals of American Academy of Political and Social Science, CCCLXXVI (March, 1968) 145-147.

Justice Clark asked when he queried, "if an individual may prevent contraception [which the Griswold case affirmed as a constitutional right], why can that person not nullify that contraception when prevention has failed?"[72]

Sterilization

The right of privacy has also been extended to the realm of compulsory sterilizations by governmental agencies. The dangers involved in the idea of compulsory sterilization can be "the danger of confusing medical as opposed to sociological indications, and the potentiality for mis-use of the powers involved by unscrupulous persons."[73] The big problem then of compulsory sterilization is political mis-use. The drift towards more reliance on the government to control the standards of society places a huge encumbrance on society's capacity to insure and defend the civil liberties of the individual. Too often the individual's rights become "abrogated in the interests of expediency and efficiency."[74] The problem then has turned into a conflict over guarding the right to privacy of the individual and the right of personal integrity.

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[72]Tom Clark, "Religion, Morality, and Abortion: A Constitutional Appraisal," Loyola University Law Review, II (1969), 9.

[73]Arthur Robinson, "Genetics and Society," Utah Law Review, LXV (1971), 490.

[74]Doug Comer, "Sterilization of Mental Defectives: Compulsion and Consent," Baylor Law Review, XXVII (Winter, 1975), 174.

Compulsory sterilizations laws (for the mental defectives and "other select groups") have been a reality for almost fifty years. In fact the estimate is that there have been over 70,000 known sterilization operations to carry out these laws and innumerable sterilization operations without statutory approval.[75] In 1927 the compulsory sterilization laws were put to the test in Buck v. Bell.[76] The case was concerned with the legality of the Virginia statute that granted governmental control to sterilize state institution patients. The statute in question was to apply to those who were "afflicted with hereditary forms of mental illness or mental retardation." The rationale of the law was that the mental defectives "if . . . discharged would become a menace but if incapable of procreating might be discharged with safety and become self-supporting with benefit to themselves and to society."[77] Justice Holmes spoke for the Supreme Court when he said that "limiting sterilization to the institutionalized was fully rational" and not a denial of the equal protection of the laws: ". . . society can prevent those who are manifestly unfit from continuing their kind. . . ."

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[75] Ibid., 172. It should be noted that the sterilization laws have been in existence for almost fifty years in thirteen states.

[76] 274 U.S., 200 (1927).

[77] Charles W. Murdock, "Sterilization of Retarded: A Problem or a Solution?," California Law Review, LXII (May, 1974), 920.

Holmes concluded with the infamous statement that "the principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian Tubes . . . three generations of imbeciles are enough."[78] It is interesting to note that Carrie Buck, the supposed imbecile daughter of the imbecile mother whose mother was also an imbecile, was found to be not mentally defective.

Then in 1942 the Habitual Criminal Sterilization Act of Oklahoma was challenged in Skinner v. Oklahoma ex. rel. Williamson.[79] The law was to authorize the sterilization of "any individual convicted of three or more of certain classes and types of crimes." It is interesting to note that the defendant was to be sterilized for being convicted of "stealing chickens and two robberies with firearms." The law that approved of compulsory sterilization of "larcenists but not embezzlers," the Court said, was a breach of the equal protection of the laws clause. The Court, through Douglas, went on to justify its decision by stating that

> . . . we are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reacing and devastating effects. . . . There is no redemption for the individual whom the law touches. . . . He is forever deprived of a basic liberty.[80]

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[78] Buck, p. 207.

[79] 316 U.S., 535 (1942).

[80] Skinner, p. 541.

In concurring, Justice Stone stated his arguments differently,

> The real question we have to consider . . . whether the wholesale condemnation of a class to such an invasion of personal liberty, without opportunity to any individual to show that his is not the type of case which would justify resort to it, satisfies the demands of due process.[81]

Apparently the state law did not meet the demands as the invasion of the defendant's privacy was too great to be justified.

When the basis for the sterilization statutes have been on "convenience grounds" (approving sterilizations with the reasoning that it would be "in the best interests of the state" or "in the interests of the patient")the Supreme Court has generally decided that the wording of such statutes make them "so hopelessly vague, overbroad, and unrevealing of a compelling interest as to be self-evidently unconstitutional."[82]

In 1962 an Ohio Probate Court (of Zanesville County) held in In Re Simpson[83] that it could order a sterilization operation on a 18 year old sexually promiscuous mental defective who had already had one illegitimate child without statutory approval because the mother was seeking the operation. In 1968 a federal district court held that to approve of sterilization operations of mental defectives

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[81] Skinner, p. 544.

[82] Comer, "Sterilization of Mental Defectives," 181.

[83] 180 Northeastern Reporter, 2nd ed., 206 (1962).

without legislative approval was to surpass the Court's authority.[84] Also in 1968 the Nebraska Supreme Court through Carter, held that the statute that provided for sterilizations of mentally defective persons as a prerequisite for parole or release from a state institution was constitutional and enforceable. The court stated that

> . . . the surgical operation of vasectomy on mentally defective males and of salpingectomy on mentally defective females is a simple operation without pain or discomfort to the patient. It does not reduce his sex impulses nor limit his capacity to engage in sexual relations. It does no harm to the patient other than to eliminate his capacity to procreate.[85]

Doug Comer noted a correlation between this case and another type of case and he suggested that less drastic means could be used.

> . . . Even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.[86]

Then in 1969 the parents of a 34 year old sexually promiscuous mental defective sought authority for a sterilization operation. The Texas State Court took note

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[84] Wade v. Bethesda Naval Hospital, 337 Federal Supplement, 671 (1968).

[85] In Re Cavitt, 157 Northwestern Reporter, 2nd ed., 171 (1968).

[86] Shelton v. Tucker, 364 U.S., 479 (1960). This case was concerned with a school policy that teachers had to list organizations that they belonged to before they would be hired.

that the girl had already had two illegitimate children but stated that it had no constitutional authority to order such an operation.[87]

In the 1970's the courts generally have agreed that involuntary sterilizations encroach on the rights of the individual. In 1974 the Supreme Court of Missouri, through Judge Henley, held that even though the parent's had requested the sterilization of their mentally defective child it could not authorize the operation without statutory approval in spite of the surgery being necessary "for her health and welfare."[88]

In 1973 a black welfare mother from Montgomery, Alabama signed forms to have her two daughters (one 14 and one 12) sterilized (one is mentally retarded). The mother said that she thought she was agreeing to give the girls birth control shots. In 1975 the court's decision said that the H.E.W. approval of federal funds to be used to sterilize the "legal or judicial incompetents" was overstepping the agency's statutory authority with the insinuation that such a procedure would probably be unconstitutional.[89]

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[87] Frazier v. Levi, 440 Southwestern Reporter, 2nd.ed., 393 (1969).

[88] Interest of M.K.R., 515 Southwestern Reporter, 2nd ed., 467 (1974). See also In Re Kemp's Estate, 118 California Reporter, 64 (1975).

[89] Relf v. Weinberger, 42 U.S. Law Week, 2493 (March 15, 1975).

Finally, in 1976 the Supreme Court of North Carolina sustained that statute which allows sterilizations of "retarded or insane persons" when it stated that the law was within the state's "police power" and that in "preventing the birth of additional retarded persons (the law) would serve the interests of society as a whole, the potential parent, and the unborn child itself."[90]

Though voluntary sterilization has become "the world's most popular form of birth control"[91] involuntary or compulsory sterilization continues to be an area not uniformly or well protected by courts. As one author noted,

> Unrestrained sterilization of mental defectives as a panacea for the ills of society can be justified on neither legal, ethical nor social grounds. . . . Sterilization must not be compelled except under the most urgent of circumstances; and certainly never as a matter of expediency. And, when consent is sought, it must be given under exacting standards befitting the importance of the right being surrendered. Until such controls exist, what is for the most part a benign social tool may become an uncontrolled weapon turned against the society that employs it.[92]

Euthanasia

The right to privacy argument has been extended to the concept of euthanasia. With the issue being brought to

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[90] In Re Moore, 221 Southeastern Reporter, 2nd ed., 307 (1976).

[91] The Denton Record Chronicle, May 20, 1976, Sec. 1, p. 6.

[92] Comer, "Sterilization of Mental Defectives," 198.

national attention in 1975, the argument used by people seeking a "good or happy death" is that "bodily integrity is the most basic aspect of personal privacy and . . . should receive significant constitutional protection."[93] This reasoning falls right in line with the constitutional right of privacy rationale which encompasses a qualified right to determine what is done with one's body.

Many scholars trace the idea that euthanasia is "morally permissible" back to Socrates, Plato, and the Stoics. In 1516 Sir Thomas More's Utopia specifically dealt with the idea.[94] In more modern times the only country to sanction a form of euthanasia was Switzerland with the law that a physician might "provide, but not administer poison at the request of his suffering patient." The movement for legalizing the idea began in 1932 in England with the founding of the Voluntary Euthanasia Legalization Society C. Killick Millard.[95]

Cases on euthanasia have been scarce and the times that someone was prosecuted have been unusual and rarely has a conviction resulted. In spite of the few "written decisions" concerning euthanasia, the common law position concerning

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[93] Parker, "A Definition of Privacy," 236-242.

[94] Walter W. Steele, Jr. and Bill Hill, "A Legislative Proposal for a Right to Die," Criminal Law Bulletin, XII (March-April, 1976), 143-144.

[95] Glanville Williams, "Euthanasia," The Encyclopedia Britannica, Vol. VIII (Chicago, 1970).

euthanasia is very lucid: "It is theoretically murder in the first degree."[96] In fact, Percy Foreman stated that "euthanasia is a euphemism for criminal homicide."[97] As of 1975, there were no "euthanasia laws" in the U.S., 16 states were "not actively pursuing legislation" in the realm of euthanasia,[98] 44 states had no "statutory determinations" as to when death occurred, and 41 states have passed the "Uniform Anatomical Gift Act" but the act does not have any clear definition as to when the "instant of death" is.[99] With these statistics, it is even more enlightening to know that 79% of the doctors responding to a 1974 survey "expressed some belief in the patient's right to have a say about his own death"[100] and that the estimate in the U.S. is that 75% "of all doctors practice passive euthanasia."[101]

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[96] William H. Baughman, John C. Bruha and Francis J. Gould, "Euthanasia: Criminal, Tort, Constitutional and Legislative Considerations," Notre Dame Lawyer, XXXXVIII (June,1973), 1203.

[97] Percy Foreman, "The Physician's Criminal Liability for the Practice of Euthanasia," Baylor Law Review, XXVII (Winter, 1975), 61.

[98] Walter Sackett, Jr., "Euthanasia: Why no Legislation," Baylor Law Review, XXVII (Winter, 1975), 5.

[99] C. Anthony Friloux, Jr., "Death? When Does it Occur?," Baylor Law Review, XXVII (Winter, 1975), 14-17.

[100] Luis Kutner, "The Living Will, Coping with the Historical Event of Death," Baylor Law Review, XXVII (Winter, 1975), 43.

[101] Sackett, "Euthanasia: Why no Legislation," 5.

Euthanasia can be defined as "a mode or act of inducing or permitting death painlessly as a relief from suffering" with the effort to allow the person "afflicted with an incurable disease or injury in its terminal stages" to have a "gentle and easy death" ("painless and quick").[102] But with technology progressing so rapidly "the time may well come when it will be possible to keep a person technically 'alive' indefinitely."[103]

Again, cases on euthanasia have been rare. The first reported American euthanasia trial was in 1823 in which the defendant had "allegedly drowned his children so they might go directly to Heaven." The court noted that "every willful taking of human life without justification" is murder.[104] Therefore, any willful act of euthanasia by someone other than the patient himself would be homicide under the American statutes. In 1950 a doctor "injected air into his patient's veins to shorten her life and relieve her sufferings from terminal cancer" but was acquitted by jury nullification.[105] Euthanasia is still considered murder in the statutes but prosecutions are rare. For example, in 1966 the California

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[102] Kutner, "The Living Will," 5.

[103] N. J. Bellegie, "Medical Technology as it Exists Today," Baylor Law Review, XXVII (Winter, 1975), 33.

[104] People v. Kirby, 2 Parkinson Criminal Reports, 28 (1832).

[105] Steele and Hill, "A Legislative Proposal," 152.

Supreme Court, through Judge Traynor, stated "One who commits euthanasia bears no ill will toward his victim and believes his act is morally justified, but he nonetheless acts with malice if he is able to comprehend that society prohibits his act regardless of his personal belief."[106]

In 1974 the New Jersey Superior Court held that the defendant Zygmaniak was insane at the time of the offense when he shot his brother (at his brother's request) who was paralyzed from a motorcycle accident but that he was competent at the time of the trial and thus he should be freed.[107]

In a case that aroused debate pro and con in the national news media, the parents of Karen Quinlan asked the New Jersey courts to legitimatize turning off the respirator that has kept their 22-year old comatose girl alive for over a year. In April of 1976 (a year after the girl was put on the respirator) the New Jersey Supreme Court ruled that the girl's "right to privacy" had been deprived and since she had been "unable to exercise" it her father would be able to act in her behalf as her legal guardian. The court went on to say that in cases involving the terminally ill,

> . . . the state's interest (in preserving life) weakens and the individual's right to privacy grows as the degree of bodily invasion increases

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[106] People v. Conley, 411 Pacific Reporter, 2nd ed., 911, 918 (1966).

[107] Zygmaniak v. Kawasaki, 330 Atlantic Reporter, 2nd ed., (1974).

> and the prognosis dims. Ultimately, there comes a point at which the individual's right overcome the state interest.[108]

According to the court, the respirator may be turned off after the attending physicians and a hospital ethics committee agree that there is "no reasonable possibility" of the patient reverting to "a cognitive, sapient state."[109] Though the opinion applies only to the terminally ill that "cannot act on their own behalf" it does establish a right to privacy in this particular area and the determination that an individual should be able to control the "integrity" of one's own body. Thus, the right of privacy has been expanded in this area so that the "good life" may be maintained. As one author explained,

> We may define the good differently, but no matter what our conception of the good life is, it presupposes a physical basis - a certain indispensable minimum of physical and social well-being - necessary for even a limited realization of that good life. Where that minimum is failing together with all rational probability of attaining it, to avoid a life that at its best can be only vegetative and at its worst run the entire gamut of degradation and obloquy, what high-minded person would refuse the call of the poet mourir entre les bras du sommeil, We must recognize no categorical imperative 'to live,' but 'to live well.'[110]

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[108] In Re Quinlan, 44 U.S. Law Week, 2462 (1976).

[109] Jean Seligman and Susan Agres, "A Right to Die," Newsweek (April 12, 1976), 52.

[110] Sidney Hook, "The Ethics of Suicide," International Journal of Ethics, XXXVII (1927), 173.

At least in the New Jersey courts, the rights of privacy has been enlarged to encompass the concept of

> . . . dying with dignity [for] to required that a person be kept alive against his will and to deny his plead for merciful release after the dignity, beauty, promise, and meaning of live have vanished, when he can only linger on its stages of agony or decay, is cruel and barbarous. The imposition of unnecessary suffering is an evil that should be avoided by civilized society.[111]

Hence, the few cases that have been adjudicated conclude that euthanasia is still homicide in most instances. But when the individual is in a "vegetative state" the individual has a "right of privacy" to decide his own fate. The Quinlan case leaves the distinct impression that the right of privacy will be expanded as a fundamental right when the doctor and patient or "guardian" agree that there will be no remission of the "vegetative state."

Hair

The right of privacy has also been used in the last ten years as a defense primarily by students to contest school regulations on the length of a male's hair or "facial adornment."[112] The right to control "one's own appearance" has become an integral part of the right of privacy. The courts'

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[111] Kutner, "The Living Will," 51.

[112] David P. Troup, "Comment - Long Hair and the Law: A Look at Constitutional and Title VII Challenges to Public and Private Regulation of Male Grooming," Kansas Law Review, XXIV (1975), 143.

reasoning generally has been that the right to control one's appearance should be a fundamental right.

Most cases that deal with personal grooming standards began in the late 60's or early 70's. There are a few cases still before the courts in the mid 70's but not as many as in the "protest era." The hirsute male bringing cases to court stressed many varied constitutional protections afforded by the amendments to the U.S. Constitution. The courts that have upheld a right to control one's own appearance have based the reasoning within the "penumbra" of the First, Fourth, Fifth, and Fourteenth Amendments.

It appears that the hair question began in earnest after the Tinker case in 1969 with the assumption that long hair was constitutionally defended by being of the nature of "symbolic speech" (as was wearing black armbands by students to protest the Viet Nam War).[113] Although most courts did not adopt this line of reasoning[114] it did seem to encourage protests by public school students (primarily) and public and private employees.

The bulk of cases concerning grooming habits has been with students or teachers. In 1969 a federal district court in Florida, through Judge McRae, held that the school

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[113] Tinker v. Des Moines Independent Community School District, 393 U.S., 503 (1969).

[114] U.S. v. O'Brien, 391 U.S., 367, 376 (1968).

board's refusal to rehire a black school teacher who refused to remove his goatee was arbitrary and discriminatory and was racily motivated and that the goatee was "an appropriate expression of the teacher's heritage, culture and racial pride."[115] In Wisconsin the federal court of appeals held that the school board could not eject or threaten to eject students from school for not complying with the hair length regulation because the length of a person's hair is a constitutional right of personal liberty.[116] Similarly in Miller v. Gillis[117] the high school dress code (hair must appear "clean and neat, tapered up the back of the neck, and not protruding over the ears or the eyebrows") the federal district court voided the code because it arbitrarily grouped "long hairs" and precluded them from going to school and did not apply to teachers and thus was a denial of the equal protection of the laws clause of the 14th Amendment.

Probably the most used rational by the courts has been that controlling one's appearance is a result of the "liberty protected by the due process clause of the Fourteenth Amendment." Defendant's usually claim that "one's liberty is infringed when the male is required to cut his

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[115] Braxton v. Board of Public Instruction, 303 Federal Supplement, 958 (1969).

[116] Breen v. Kahl, 419 Federal Reporter, 2nd ed., 1034 (1969); certiorary denied 398 U.S., 937 (1970.

[117] 315 Federal Supplement, 94 (1969).

hair or to shave."[118] In 1970 in Richards v. Thurston[119] the federal Court of Appeals for the First Circuit ruled that high school rules concerning the length of the hair "were improper absent either an inherent, self-evident justification or a justification affirmatively shown by the school authorities." In Dunham v. Pulsifer[120] the federal district court, through Judge Liddy, held that the hair length and sideburn regulations for athletes was unconstitutional and stated that the need for conformity and uniformity of appearance of athletes was not justification enough to infringe on fundamental rights. In a somewhat similar vein, in Crews v. Cloncs[121] the federal Court of Appeals struck down the policy that required "long haired" boys to have their hair trimmed for "health and safety" regulations (in such classes as "physical education, science lab, and industrial arts classes) when it stated that girls participated in these same activities safely and the policy was obviously a denial of equal protection. Also in 1970 a federal district court did not accept the testimony of a classroom teacher who believed that "Jesus had worn short hair and was clean shaven and, in effect, that this was a

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[118] Troup, "Long Hair and the Law," 148.

[119] 424 Federal Reporter, 2nd ed., 1281 (1970).

[120] 312 Federal Supplement, 411 (1970).

[121] 432 Federal Reporter, 2nd ed., 1259 (1970).

rule that God established."[122] Several arguments by schools and employers have been disputed by the courts. The argument that there is a relation between length of hair and grades was disputed by a federal district court.[123] Also disputed is the rationale that school regulations should be upheld to teach "respect for the law" and to avoid "undermining the authority of school administrators." Though disputed, the latter argument is still postulated. But Justice Douglas has stated,

> It comes as a surprise that in a country where the States are restrained by an Equal Protection Clause, a person can be denied education in a public school because of the length of his hair. I suppose that a nation bent on turning out robots might insist that every male have a crew cut and every female wear pigtails. But the ideas of 'life, liberty, and the pursuit of happines,' expressed in the Declaration of Independence, later found specific definition in the Constitution itself, including of course freedom of expression and a wide zone of privacy. I had supposed those guarantees permitted idiosyncracies to flourish, especially when they concern the image of one's personality and his philosophy toward government and his fellow men. Municipalities furnish many services to their inhabitants; and I had supposed that it would be an invidious discrimination to withhold fire protection, police protection, garbage collection, health protection and the like merely because a person was an off-beat, non-conformist when it came to hair-do and dress. . . .124

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[122] Parker v. Fry, 323 Federal Supplement, 728, 736 (1970).

[123] Dawson v. Hillsborough County, Florida, School Board, 322 Federal Supplement, 286, 301-302; affirmed 445 Federal Reporter, 2nd ed., 308 (1971).

[124] Ferrell v. Dallas Independent School District, 393 U.S., 856 (1968); facts of the case at 261 Federal Supplement, 545 and 392 Federal Reporter, 2nd ed., 697.

Another disputed argument has been the "fear that if male students were permitted to wear long hair, boys would soon look so much like girls that 'confusion over appropriate dressing room and restroom facilities' would result.[125] Different courts have treated these arguments in different ways. In Lindquish v. City of Coral Gables[126] the city claimed that there was a need to maintain "uniformity, neatness, and style" in the fire department but the federal district court stated that the department "had failed to prove any safety justification for the regulations" and "had failed to show any causal relationship between the length of sideburns and the efficiency of the department."

It is interesting that in one circuit a court upheld hair regulations for a high school[127] and then nullified a similar policy in a state junior college.[128] In the junior college case federal district Judge William Wayne Justice

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[125] Bishop v. Colaw, 450 Federal Reporter, 2nd ed., 609 (1971).

[126] 323 Federal Supplement, 1161 (1971).

[127] Karr v. Schmidt, 460 Federal Reporter, 2nd ed., 609 (1972).

[128] Lansdale v. Tyler Junior College, 470 Federal Reporter, 2nd ed., 659; certiorari denied, 411 U.S., 986 (1973).

held that the hair length rule was "irrelevant and of no importance to administration" and that such a regulation created "arbitrary classifications" of college students and violated the due process and equal protection provisions of the 14th Amendment.[129]

In 1973 in Brown v. D.C. Transit System, Inc.,[130] the District of Columbia district court held that the monopoly that the bus company had "made it very unlikely that business would be adversely affected by a driver's hairstyle and, therefore, the regulation was irrelevant to any legitimate governmental interest."

In 1974 a federal district court allowed a prison inmate to wear long hair (in violation of prison rules) because he was an American Indian and the hair was "an integral part of the religion practiced by members of his tribe."[131] In fact, at least one court held that there is a constitutional right to govern one's personal appearance.[132] And yet, some courts seem to sidestep the issue. In Epperson v. Board of Trustees, Pasadena Independent School

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[129] Ibid.

[130] 44 U.S. Law Week, 3204 (1973); see also Troup, "Long Hair and the Law," 161.

[131] Teterud v. Gillman, 385 Federal Supplement, 153 (1974).

[132] Lusk v. McDonough, 386 Federal Supplement, 183 (1974).

District[133] a five year old boy was not allowed to stay in school because he had let his hair grow longer than school regulations to hide a physical deformity on his head and to avoid ridicule from his fellow students. The federal district ruled the question moot because by the time the case was heard the school had relaxed its policy to make exceptions in cases like Epperson's. With respect to public employment fireman Michini's case seems to exemplify the judiciary's position best. In this case, the federal district court advised that "because firefighters, unlike police officers, work as a team unit, perhaps a military-type organization and regulations were justified.[134]

However, in the public employment area in 1975 a federal district court voided "grooming regulations" as they were being enforced on correctional officers in the county jail. The court stated that "the regulations were not reasonably related to the state's interests in discipline, safety, and rehabilitation."[135] And in Texas, a junior college professor brought suit seek to be reinstated after he had been dismissed for violating the college's grooming policy by wearing a beard. The federal Courts of Appeals

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[133] 386 Federal Supplement, 317 (1974).

[134] Michini v. Rizzo, 379 Federal Supplement, 837 (1974).

[135] O'Doherty v. Seniuk, 390 Federal Supplement, 456 (1975).

through Circuit Judge Gewin, held that the college's policy was constitutionally impermissible under the 14th Amendment and went on to state that an adult's "constitutional right to wear his hair as he chooses supersedes the state's right to intrude.[136]

In 1976 there have been three cases that have been of some importance in the hair controversy. In New York the state Supreme Court decided that the district attorney did not have the authority to request and obtain a court order to have the suspect of a robbery shave (his beard) so that he could participate in a lineup. The court went on to state that if there was probable cause to "invade the suspect's constitutional right to determine his facial appearance" the suspect should have been arrested for the robberies.[137]

But concerning public employment the Supreme Court has been very restrictive on expanding the right of privacy to hair policies. Lieutenant Quinn in the Chicago Fire Department was suspended from work for having a goatee in violation of the department's personal appearance regulation. The court sidestepped Quinn's argument that his personal

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[136]Hander v. San Jacinto Junior College, 519 Federal Reporter, 2nd ed., 273 (1975).

[137]People v. Vega, 379 New York Supplement, 2nd ed., 419 (1976).

freedoms as guaranteed by the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments had been violated by noting that the Civil Service Commission of the city of Chicago had since changed its rules and no decision was necessary.[138]

But when policeman Kelley challenged police grooming regulation the Supreme Court, through Justice Rehnquist, held that the New York Suffolk County regulations for male members fostered an "esprit de corps" in the department. This spirit was sufficient justification for the hair regulations. Rehnquist went on to hold that ". . . similarity of garb and appearance may inculcate within the police force itself, (a) justification for a hair style regulation that is sufficiently rational to defeat a claim based on the liberty guarantee of the Fourteenth Amendment."[139]

Thus the right of privacy has been extended haphazardly in the area of hair length. It appears that for public employees (particularly those in uniform) and public school students (especially high school and lower) the courts will not constitutionally extend the right. However, private employees and students at institutions of higher learning have been given, by the courts, the right to control one's appearance.

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[138] Quinn v. Muscare, 96 S. Ct., 1752 (1976).

[139] Kelley v. Johnson, 96 S. Ct., 1440 (1976).

Polygraph

Mechanical instruments similar to the polygraph - inaccurately referred to as "lie detectors" - have been a reality for over fifty years and the basic tenet among states is that the outcome of such a test will not be admissible in court as evidence.[140] The first case that an appellate court ruled on the admissibility of the tests as evidence was Frye v. U.S. in 1923.[141] In this case the federal Court of Appeals held that the test was inadmissible in federal courts because of the lack of scientific backing. By 1965, however, the American Bar Association, in an editorial, thought that "the genuine voluntary use of the polygraph test should not be prohibited by law."[142] In the 1970's there have been several federal and state court decisions that have allowed the results of the tests to be introduced into evidence in the court.[143]

In 1972 Lonny McDavitt was convicted of breaking and entering. The defendant told the jury (over state objections) that he offered to take the test at the time of his arrest. With this offer in court, the state agreed to give him the

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[140]"The Emergence of the Polygraph at Trial," Columbia Law Review, LXXII (May, 1973), 1119.

[141]293 Federal Cases, 1013 (1923).

[142]Morris D. Forkosch, "The Lie Detector and Mechanical Jurisprudence," Oklahoma Law Review, XXVII (1975), 288.

[143]"The Emergence of the Polygraph at Trial," 1119.

test. After the test was administered, the results were submitted at the trial. The New Jersey state court held that to admit the texts (that showed the defendant had been lying when he said that he was innocent of the charges) was a "plain error."[144] Yet the Superior Court (Appellate Division), through Judge Sullivan, allowed the test to be introduced into evidence after approval of defendant and prosecutor.[145] The McDavitt case still requires the examiner to be trained and stresses the "place, circumstances, and method of examination" as being important factors. The case also hints at the right of privacy argument that if a person refuses to take the test he would be protected by the Fifth Amendment's protection against self-incrimination,

At about the time of the McDavitt case, two federal cases were concerned with polygraph tests and their admissibility. In U.S. v. Ridling[146] (a perjury case), the federal district court held that the tests would not be admissible in court without a stipulation from both sides that if the defendant "failed" the results would be entered in court. In U.S. v. Zeiger[147] (an assault case), the federal district

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[144] State v. McDavitt, 286 Atlantic Reporter, 2nd ed., 86 (1972).

[145] State v. McDavitt, 297 Atlantic Reporter, 2nd ed., 849 (1972). (Reinstated conviction.)

[146] U.S. v. Ridling, 350 Federal Supplement, 90 (1972).

[147] U.S. v. Zeiger, 350 Federal Supplement, 685 (1972).

court, through Judge Parker, held that the polygraph examiner could testify as to the "truthfulness" of the defendant - but he could not make comments about innocence or guilt. These two cases leave the courts with two questions concerning the polygraph's use and the right of privacy: (1) when is there an invasion of privacy? and (b) does the right against self-incrimination supersede the use of these tests? The courts appear to be in agreement that compulsory taking of the tests or introducing the results of the tests without both sides agreeing so violates the individual's right of privacy.

In 1974 the Supreme Court of Washington, through Judge Stafford, refused to admit polygraph tests into evidence without a qualification as to the minimum requirements of the polygraph operator and as to the "trustworthiness" of the polygraph and its "professional acceptability of examination techniques."[148]

The use of the polygraph tests has then taken on an even more questionable use in recent years. Though the test cannot be compulsory they can be an informal requirement as a requisite for receiving a job. It is estimated that there are over 500,000 tests given every year to "screen" prospective

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[148] State v. Woo, 527 Pacific Reporter, 2nd ed., 271 (1974).

applicants to jobs.[149] The federal government and numerous states have a "total ban" on the use of the tests for employment screening,[150] but private businesses employ the device for various reasons (particularly to determine if employees are stealing from the business).

Since there are virtually no "effective judicial or legislative controls" on the tests, they have become a common way of "screening applicants" for employment, and of "checking up" on present employees. Employers normally do not know what is in the test or who gives the test or in what manner it is interpreted. The main problems with these tests is the discrimination against people with arrest records, the involuntary aspect (especially in times of economic instability), the "blacklist" of people who failed the tests (and the use of this "failure" to bar employment throughout the industry), and the polygrapher's overcautious interpretations of the results (to keep the business as his client). As of 1975, thirteen states have statutes that "limit or ban the use of the polygraph for employment purposes."[151]

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[149] The Dallas Morning News, March 21, 1976, Sec. G, p.4.

[150] Forkosch, "The Lie Detector," 288.

[151] Trudy Hayden, "The Polygraph Tests," The Privacy Report edited for American Civil Liberties Union by Trudy Hayden, II (April, 1975), 2-8. The thirteen states are Alaska, California, Connecticut, Delaware, Hawaii, Maryland, Massachusetts, Minnesota, New Jersey, Oregon, Pennsylvania, Rhode Island, Washington.

But civil libertarians still fight the tests. In Akron, Ohio, five forver employees are suing a store that fired them after giving them a lie detector test (Psychological Stress Evaluation tests). The tests results were distributed throughout the city to other stores making it virtually impossible for those fired to find new employment. Also, the city of Akron has an ordinance that prohibits a test as a requirement to obtain or continue employment.[152] This case points out the serious aspects of invasions of privacy as a result of the Polygraph tests. Trudy Hayden suggested that the right of privacy continue to be guarded for

> Expediency is not a valid reason for pitting individuals against a degrading machine and process that pry into their inner thoughts. Limits, beyond which invasions of privacy will not be tolerated, must be established. . . . Privacy is a fundamental right that must be protected . . . from such unwarranted invasions.153

Similarly, one noted constitutional scholar noted that society should take into account that

> . . . the moral implications of electronic or chemical control over memory or personality are enormous, and the intrusion into the individual's freedom of action, of which his privacy is one part, raises serious issues of 'mind control' for consideration.[154]

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[152] Heil v. Paul Harris Stores, Inc. (1975). (No decision in the Courts at the time of this writing, therefore no citation.) For details of the case see "Polygraph Trial," The Privacy Report edited American Civil Liberties Union by Trudy Hayden, II (May, 1975), 10.

[153] Hayden, "The Polygraph Tests," 9.

[154] Westin, Privacy and Freedom, p. 157.

He also believed that the use of the polygraph as an informal requirement or condition of employment must be stopped.[155] Hayden also pointed out that the use of the polygraph violates the right of privacy in the Fourth Amendment (as an invasion by search and seizure), and Fifth Amendment (self-incrimination and the constitutional presumption of innocence until proven guilty), Sixth Amendment (right to confront and cross-examine one's accusers), and the Fourth Amendment (protection against unreasonable searches) and was an "assault on the fundamental dignity of the human personality."[156]

One must also remember that

> . . . as far as the judiciary is concerned, there is no way in which the lie detector can be used satisfactorily, whether for negative or corroborative purposes, lie detection or guilty knowledge results, without having its alleged conclusions (human interpretation) become practically accepted as conclusive.157

Thus the courts appear to be coming to the idea that the use of the polygraph in a compulsory manner (either formally or informally) encroaches on the individual's right of privacy.

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[155] Ibid.

[156] Hayden, "The Polygraph Tests," 4.

[157] Forkosch, "The Lie Detector," 310.

CHAPTER III

SEXUAL PRIVACY

Cohabitation and Miscegenation

With privacy originally being extended to "marital affairs" the move by many individuals to assert a sexual right of privacy has been expanding ever since Griswold. The question then arises - should government consider private sexual behavior between consenting adults to be none of its business, or should it attempt to regulate such behavior?

The tradition in Anglo-American (and English) laws (from a basis in the Bible) has been to consider an appropriate governmental function as being to control "deviate and extramarital sexual behavior." Almost every state has statutes that forbid "private, consensual sexual behavior, including fornication, adultery, sodomy, perversion and cohabitation."[1]

But many believe that the only reason that power can be "rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant."[2]

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[1]"On Privacy: Constitutional Protection for Personal Liberty," New York University Law Review, XXXXVIII (October, 1973), 719.

[2]Rolf E. Sartorius, "The Enforcement of Morality," Yale Law Journal, LXXI (April, 1972), 891.

Any intrusion into private morality impinges on the individual's right to privacy. The focal point then is

> . . . the notion of man's dignity, which is denigrated equally by procedures that fail to respect his intrinsic privacy . . . The ideal of man's individuality, which, after all, is what infuses meaning into the concept of freedom, is an emotional and personal as well as an intellectual affair. The temper of society is the soil in which it must find nourishment. Where society's sanctioned procedures exhibit a disdain for the value of the human personality, that ideal is not likely to flourish.[3]

The emphasis then is away from regulating morality and adherence to the privacy ideal. For

> . . . privacy is a special kind of independence, which can be understood as an attempt to secure autonomy in at least a few personal and spiritual concerns, if necessary in defiance of all the pressures of modern society. It is an attempt, that is to say, to do more than maintain a posture of self-respecting independence toward other men; it seeks to erect an unbreachable wall of dignity and reserve against the entire world.[4]

Since all but a few societies have pursued the goal of maintaining privacy for sexual associations[5] it seems but a simple step to insure sexual privacy. If society does not ensure this right then the right (along with liberty) will simply "fritter away." As one author noted,

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[3]Sanford H. Kadish, "Methodology and Criteria in Due Process Adjudication - A Survey and Criticism," Yale Law Journal, LXVI (January, 1957), 347.

[4]Erwin C. Griswold, "The Right to be let Alone," Northwestern University Law Review, LV (1960), 225, citing Clinton Rossiter, The Essentials of Freedom, p. 89. (Rossiter's work was not available in this library).

[5]David H. Flaherty, Privacy in Colonial New England (Charlotesville, 1972), p. 79.

> We in this nation have inherited a great sense of freedom. Historically and philosophically, this was based on a deep feeling for the importance and the integrity of the individual. The essence of this requires that we continue to recognize and respect 'the right to be let alone.'6

With the advent of the Griswold case many different types of sexual cases came under the "penumbra" of the right of privacy, although courts had been concerned for many years before that. As early as 1916 in People v. Byrne the New York Supreme Court upheld a statute prohibiting extramarital fornication or contraceptives use.[7] Then in more modern times, in 1959 a miscegenation statute in Louisiana was upheld because, as the state court said, interracial marriages had a tendency to make the couples' children "feel inferior" and therefore the state had a "compelling interest" in forbidding such marriages.[8]

But when in 1965 a New Hampshire husband and wife brought suit (a tort action seeking monetary remuneration) against their landlord for setting up a "listening-and-recording device" in their bedroom (without their awareness or approval)the judges sympathized with their complaint. The couple sought pecuniary damages for the landlord

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[6]Griswold, "The Right to be let Alone," 226.

[7]163 New York Supplement, 680 (1916).

[8]State v. Brown, 108 Southern Reporter, 2nd ed., pp. 233-234 (1959).

invading their privacy and causing them mental anguish, anxiety, mortification, and embarrassment. The Supreme Court of New Hampshire, through Chief Justice Kenison, observed that private marital relations between married couples in their own bedroom was their own affair and no one else's unless someone was being hurt. The court concluded by stating that

> . . . it is unnecessary to determine the extent to which the right of privacy is protected as a constitutional matter without the benefit of statute. . . . For the purposes of the present case it is sufficient to hold that the invasion of the plaintiff's solitude or seclusion, as alleged in the pleadings, was a violation of their right of privacy and constituted a tort for which the plaintiffs may recover damages to the extent that they can prove them. 'Certainly no right deserves greater protection. . . .[9]

In 1967 the case of Loving v. Virginia[10] came to the Supreme Court. In the case Richard Perry Loving (a white man) had married a negro woman in the District of Columbia and then settled in Virginia. He had been convicted of violating the Virginia state ban on interracial marriages. The Supreme Court, by Warren, held that the anti-miscegenation statutes that prevented marriages between persons solely on the basis of racial classifications were a violation of the Equal Protection and Due Process Clauses of the 14th Amendment. The court ruled that the statute infringed on the fundamental right of marriage.

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[9]Hamberger v. Eastman, 11 American Law Reports, 3rd ed., 1288, 1294 (1965).

[10]388 U.S., 1 (1967).

In 1970, a federal district court, through Judge Peckman, decided that discharging a postal clerk for cohabiting with a woman not his wife was a violation of his Ninth Amendment constitutional right of privacy.[11]

General cases

In 1971 in State v. Barr[12] Charles Barr and June Clark were prosecuted and convicted under the New Jersey fornication law. The defendants claimed that consensual and heterosexual intercourse between two adults in private could not be regulated or proscribed by a state statute. When the case came to the State Supreme Court the fornication law was upheld but the court ruled that unmarried parents could not be prosecuted for requesting welfare aid for the illicit children. The court went on to declare that the statute (requiring the mother to give the name of the father to be able to obtain the aid) did not interfere with the right of privacy which the defendants argued was protected in private adult relations (as in Griswold).

In 1972 a Iowa state court held that since the state cohabitation statute did not punish homosexual cohabitation it was void for discriminating against heterosexuals.[13]

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[11] Mindel v. United States Civil Service Commission, 312 Federal Supplement, 485, 488 (1970).

[12] 265 Atlantic Reporter, 2nd ed., 817 (1971).

[13] State v. Kueny, 12 Criminal Law Reporter, 2401 (1972).

In New York, the state Supreme Court ruled that a forty-one year old male who had been "living and working as a female for sixteen years" and who was experiencing "severe psychopathology" should be allowed to obtain public aid with the intent of receiving a "sex conversion operation."[14] The extension of the right of privacy has not, as yet, been extended to some things such as nude bathing at a seashore.[15]

It is perhaps necessary to emphasize that much of the general law which has developed around the right to privacy is based on concepts related to the private dwelling of persons, and the apparent desire of the courts to keep the policeman out of the bedroom. These do not necessarily always relate to sex, but two examples will demonstrate clearly the lengths to which a court might go to protect this privacy. In 1975 the Supreme Court of Alaska ruled unanimously that there is no "adequate justification" for the "state's intrusion into the citizens right of privacy" by its restriction on the retention of marijuana by an adult for "personal consumption in the home" and therefore "possession of marijuana by adults at home for personal use is constitutionally protected."[16] And in 1969 a man was

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[14] Denise R. v. Lavine, 364 New York Supplement, 2nd ed., 557 (1975).

[15] Williams v. Hathaway, 400 Federal Supplement, 122 (1975).

[16] Ravin v. State, 537 Pacific Reporter, 2nd ed., 494 (1975).

convicted under the Georgia obscenity statute for having obscene film (three reels) in his home. The police had a warrant to search the house for bookmaking materials but they could only find the film. The U.S. Supreme Court, through Justice Marshall, held that the possession of the film in the privacy of his home was a "fundamental" right of freedom that can not be interfered with by the government reaching

> into one's privacy. . . . Whatever may be the justification for other statutes regulating obscenity, we do not think they reach into the privacy of one's home. . . . If the first amendment means anything, it means that a state has no business telling a man, sitting alone in his own home, what books he may read or what films he may watch.17

While the Supreme Court has never protected public obscenity, it came clear in Stanley that what one wishes to view, or depict, or paint, or sculpt in his own home is not subject to community approval at all.

Lesbians have had a little luck in the courts, although courts seem to be leaning towards lesbian mothers having control of the child (what the court says, is "in the best interests of the child").[18] Still, in 1975 in Chaffin v. Frye[19] custody of the children went to the mother's parents.

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[17] Stanley v. Georgia, 22 Law Edition, 2nd ed., 542, 549-550 (1969).

[18] "The Lesbian as Mother," Newsweek, September 24, 1973, pp. 75-76.

[19] Chaffin v. Frye, 119 California Reporter, 22 (1975).

The reason for the ruling, however, was not the fact that the mother was a lesbian but because of several criminal convictions and the fact that she was unemployed and filing for bankruptcy. But in a Texas case, a woman was denied custody of her nine-year-old adopted son because of her lesbian relationship with another woman.[20]

Prostitution and Homosexuality

In the area of prostitution the attempt has been made by civil libertarians and women's organizations (such as COYOTE, Call Off Your Old Tired Ethics, the prostitute organization) to allow the prostitutes their claim of a right to control their own bodies in the privacy of their own enclave with consenting adults. Though the courts have generally shield away from this claim, the fact that prostitutes are publicly organizing and demanding a right of privacy has brought about significant changes in the general attitude of society towards these individuals. But most cases regarding prostitutes have upheld the state's compelling interest in controlling morality.

In a number of nations there appears to be far more concern with legalizing prostitution than in the United States. As an example, in 1957 in England the Wolfenden

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[20]"In Trouble: A Texas Mother loses custody of her Nine-Year-Old son because she is a Lesbian," People Magazine, January 19, 1976, 51-52. (No citations were available at the time of this writing.)

Committee recommended that prostitution should not be made illegal but that statutes should be enacted "to drive it off the streets" because "public soliciting was an offensive nuisance to ordinary citizens." The Committee's report also explained that

> [The] function [of the criminal law], as we see it, is to preserve public order and decency, to protect the citizen from what is offensive or injurious and to provide sufficient safeguards against exploitation or corruption of others, particularly those who are specially vulnerable because they are young, weak in body or mind or inexperienced. . . . It is not, in our view, the function of the law to intervene in the private lives of citizens, or to seek to enforce any particular pattern of behavior. . . .[21]

Thus, the laws concerning prostitution have not punished prostitution as an offense but have penalized the public solicitation so that the average citizen may be protected, since he is an "unwilling witness of it in the streets, from something offensive." But H.L.A. Hart says that punishment is not the answer for

> . . . it would be a mistake to consider the object of punishment as being deterrent or reformative or preventive and nothing else. The ultimate justification of any punishment is not that it is a deterrent but that it is the emphatic denunciation by the community of a crime. . .22

Therefore the government attempts to control or regulate morality. As Lord Devlin said "A recognized morality" is

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[21] Wolfenden Report, (New York, 1963), p. 81.

[22] H.L.A. Hart, Law, Liberty, and Morality (Stanford, 1963), p. 65, citing Lord Denning, "Report to Royal Commission on Capital Punishment," p. S.53.

"as necessary to society's existence as a recognized government."[23] However, controlling or regulating the morals of a community does not appear to many to be of any consequence except to intrude on the individual's right of privacy, even though controlling situations in which coercion or actual bodily harm may take place would be considered a legitimate state interest.

Attempting to regulate prostitution has been a police weapon for many years. In San Francisco in 1942 the city began to quarantine accused prostitutes for three days to run tests to see if they had any disease. The prostitutes could not make bail for the three days unless they went ahead and took the penicillin treatment. As late as 1972 San Francisco was still using this procedure in cases where the arresting officer felt that the prostitute's previous behavior and arrest record established the fact that she was a prostitute. One argument with a quarantine type policy is that it punishes a person for what they are (or have been) and not for any violation of the law.[24] Those

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[23]Lord Devlin, The Enforcement of Morals (Oxford, 1959), p. 13.

[24]Harriet Katz Berman, "Quarantine: Policing Prostitution," Civil Liberties, edited for American Civil Liberties Union by Claire Cooper, March, 1974, 1. See also "Call Me Madam" Newsweek, July 8, 1974, p. 65. This article points out that the quarantine policy was dropped as a result of pressure from COYOTE. It also points out that the estimate of cost per prostitute arrest in San Francisco is $1,200

who favor such a policy counter with the argument that the state is simply trying to prevent the spread of disease and thereby protect the health and morals of society. But some would argue with that notion. As Hart pointed out "there is no evidence that the preservation of a society requires the enforcement of its morality 'as such.'"[25] However, despite the claims for protection, Nevada is the only state so far to legalize prostitution.

It should be pointed out that in a vast majority of cases the prostitute's right of privacy has been successfully countered by the state's argument of a "compelling state interest" in policing the prostitutes or, as some would say, regulating morality.

In L'Hote v. New Orleans[26] in 1900 the statute restraining prostitutes (women of "lewd character) was upheld by the Supreme Court because it hindered the spread of "sin."[27] In 1972 the Denver venereal disease ordinance was

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[25]Hart, Law, Liberty, and Morality, p. 82.

[26]177 U.S., 578, 596 (1900).

[27]See The Denton Record Chronicle, May 9, 1976, Sec. A., p. 1. Lewisville Mayor Denison is attempting to obtain a court order to close down several massage parlors near the city of Lewisville because of the "lewd character" of the parlors.

disputed for its discrimination in that it only applied against women. The statute in question required women but not men to yield to examinations for VD checks whenever the police requested the test. An alleged postitute claimed that her privacy was being invaded by the "harrassment" of the police vice squad along with the embarrassment that she was submitted to in taking the tests. The case was dropped when the city made a motion to dismiss because the city had a right to protect the health and morals of the city and agreed to "be equal" in enforcing the law. However, most prostitution cases uphold the state's controlling interest.[28]

In 1973, the Alaska state district court declared that the prostitution laws were biased against women particularly in their enforcement.[29] But in 1974 a federal district court held that laws prohibiting the interstate transportation of women for prostitution purposes are not an undue restraint on the individual's Ninth Amendment's right to privacy in "sexual and moral matters."[30]

In 1975 the Delaware prostitution statute was upheld because the state court did not believe that sex was the

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[28]"A Prostitution Case," Civil Liberties, edited for American Civil Liberties Union by Claire Cooper, February, 1972, 8.

[29]State v. Fields, 13 Criminal Law Reporter, 2376 (June 27, 1973).

[30]U.S. v. Caesar, 368 Federal Supplement, 328 (1974).

basis for the classification of the statute prohibiting prostitution.[31] Also in 1975, the Illinois statute concerning prostitution was upheld with the state court agreeing with the statute that provided that "any person who performs, offers or agrees to perform any act of deviate sexual conduct for money commits (an) act of prostitution, (and that the) offense is committed by performing, or offering, or agreeing to perform any such act for money."[32] In Grant v. State[33] the Georgia state court held that the state was not required to prove any money was actually paid or any acts of intercourse were actually performed to convict someone of prostitution.

In 1976 in Iowa the state court ruled that the purpose of the statute prohibiting prostitution and "lewdness" was to criminalize and penalize "commercial sexual relations" and it applied to "equivalent conduct of males and females" and therefore was not an unconstitutional invasion of the defendant's right of privacy.[34]

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[31] Blake v. State, 344 Atlantic Reporter, 2nd ed., 260 (1975).

[32] People v. Johnson, 339 Northeastern Reporter, 2nd ed., 32 (1975).

[33] 221 Southeastern Reporter, 2nd ed., 210 (1975).

[34] State v. Price, 237 Northwestern Reporter, 2nd ed., 813 (1976).

Any real effort to enforce prostitution laws equally regarding both women and men brings up a particular sore spot in the civil liberties (for example, privacy) area. In Washington and Salt Lake City the utilization of decoys to apprehend men who attempt to engage prostitutes appear to entrap the victim as shown by the following information from the June 28, 1976 Newsweek. In New York and Boston, male police officers ambulate through the street and apprehend any prostitute who propositions them. It is interesting to note that the laws against entrapment (both federal and state) forbid the police to use any methods that involve "luring someone into committing a crime that he might not have committed without the encouragement." One explanation for the utilization of the decoys in recent years is that numerous local courts have forbidden the previous method of regulating prostitution (police "sweeps" of all the prostitutes that could be found and then sending them off to jail). The use of women decoys to entrap men is even more controversial, particularly when a United States Congressman found himself facing prosecution after female police decoys testified that he propositioned them.[35]

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[35]Merrill Sheils, "The 'Flatfoot Floozies,'" Newsweek, June 28, 1976, 27-28; Susan Fraker, "What Hath Ray Wrought?," Newsweek, June 28, 1976, 22. Democratic Congressman Allan Howe is the Utah representative facing charges for propositioning a prostitute.

The entrapment question brings out two criteria as Judge Learned Hand stated,

> (1) Did the agent induce the accused to commit the offense charged in the indictment; (2) if so, was the accused ready and willing without persuasion and was he awaiting any propitious opportunity to commit the offense. On the first question the accused has the burden, on the second the prosecution has it.[36]

Civil libertarians argue that entrapment by the police is a blight on the right of sexual privacy. As one author has pointed out, "regardless of one's views of the morality of such behavior, there should be no crime when there is no victim.[37] Yet the use of entrapment procedures continues. One recent article suggests that federal entrapment cases were primarily concerned with drug offenses while at the state (trial) level the primary use of entrapment is concerned with prostitution, homosexuality, and "other consensual sexual crimes."[38]

But, even though the notion of protection from entrapment is an old tradition, it was not used as a defense in a criminal case in federal court until 1878[39] and not for

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[36]U.S. v. Sherman, 200 Federal Reporter, 2nd ed., 880, 882-883 (1952).

[37]Walter Barnett, Sexual Freedom and the Constitution (Albuquerque, 1973), p. 2.

[38]Roger Park, "The Entrapment Controversy," Minnesota Law Review, LX (January, 1976), 164, 230.

[39]U.S. v. Whittier, 28 Federal Cases, 591 (1878).

acquittal until 1915.[40] In 1935 the Supreme Court said that

> Entrapment is the conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer.41

The argument then is that the use of entrapment methods by governmental agents infringes on the right of privacy.

Homosexuals have been the primary target of entrapment procedures. In such a situation the homosexuals' defense normally has been that there has been an invasion of privacy between consenting adults in private. In Kelly v. U.S.[42] (only one witness to the alleged homosexual advance) and Guarro v. U.S.[43] (insufficient evidence as to any homosexual advance) both cases were dismissed because of police entrapment. In Guarro, the federal district court drew an analogy with selling drugs and this case and concluded that

> . . . the difference is that selling drugs is a crime against society no matter how willing the customer may be to purchase, whereas a homosexual touching of an apparently willing and competent person is not an 'assault,' whatever else it may be in the catalogue of criminal offenses.44

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[40] Woo Wai v. U.S., 223 Federal Reporter, 412 (1915).

[41] Sorrells v. U.S., 287 U.S., 435, 454 (1935), Justice Roberts concurring. In this case a Prohibition agent posing as an army friend asked for some liquor from the defendant. After several requests the defendant sold him some whiskey and the defendant was arrested.

[42] 194 Federal Reporter, 2nd ed., 150 (1951).

[43] 237 Federal Reporter, 2nd ed., 578 (1956).

[44] Guarro, p. 580.

One would have to conclude generally, however, that claims of entrapment in the field of sexual relations have been of little use in protecting homosexuals caught by police, and of even less use in protecting prostitutes or male customers of female police decoy prostitutes, whatever effect its use may have in other areas of law. Questions are often asked as to why governments concern themselves so much with the apprehension and conviction of those considered to be sexual deviates. Many arguments have been advanced which purport to show that prostitution is a great danger to the sanctity of marriage and the family, but no one has claimed that homosexual conduct carries this same threat. However, throughout most of human history homosexuality has been looked upon both as a sin and as an abhorrent and abnormal practice, while heterosexual prostitution has been considered, at most, as a sin. But when the courts began to protect private "in the home" non-forced sexual relations between heterosexuals, these same courts rather quickly found themselves faced with claims that refusing the same protections to homosexuals either (1) violated the Equal Protection Clause (remember the rules on contraceptives and abortions for unmarried as well as married persons are protected by this rule), or (2) violated the right to sexual privacy of those involved.[45] Additional ammunition for the

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[45] "On Privacy: Constitutional Protection for Personal Liberty," 727.

homosexual was to be found in Robinson v. California where the United States Supreme Court had held that a person could not be punished because of an illness over which he had no control (narcotics addiction).[46] Homosexuals were quick to point out that they had no control over their illness either, but it did them very little good. Most courts pointed out that narcotics addicts were still punishable if they were caught with the narcotics or while under narcotic influence, and that homosexuals were only being punished generally for solicitation or being caught in the act, not because they were homosexuals. An example is furnished by Rittenour v. District of Columbia,[47] the Municipal Court of Appeals, through Judge Hood, acknowledged "three separate classes of sexual behavior to which criminal sanctions might be applied: public acts, private acts involving a non-consenting party, and private consensual acts." Rittenour won his appeal, however, because the officer intimated a complying attitude of consent and Rittenour's act occurred in the "privacy of his own home." The court concluded by saying that "basically and essentially the appellant was arrested, tried and convicted on a charge of being a homosexual; but under our law homosexuality is not a crime."[48]

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[46] 370 U.S. 660 (1962).

[47] 163 Atlantic Reporter, 2nd ed., 558 (1960).

[48] Rittenour, p. 559.

This decision prompted many to say that "if the Rittenour decision is correct, sanctions against private consensual sodomy may also warrant reexamination."[49] Yet the morality laws (specifically the sodomy laws) that began back in the time of Henry VIII have not been rescinded because, as one author noted, a majority of Americans would be apprehensive that this would mean that society approved of "immorality."[50]

It is interesting to note in light of the tremendous outlay of police manpower to control homosexuality that one study found that in 49 (64%) of the 76 societies other than our own for which information is available, homosexual activities of one sort or another is considered normal and socially acceptable for certain members of the community. In fact, the United States is among a minority of nations prohibiting private homosexual relationships between consenting adults.[51] In another survey the estimate was that approximately 60 million of about 100 million males in American society "will violate the sodomy laws at least once during their lives." In addition, the survey found that (using the strictest statutory verbiage) 95% of all males

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[49]"Private Consensual Homosexual Behavior: The Crime and its Enforcement," Yale Law Journal, LXX (1960), 627.

[50]Barnett, Sexual Freedoms and the Constitution, pp. 2, 81.

[51]Clellan S. Ford and Frank A. Beach, Patterns of Sexual Behavior, (New York, 1951), p. 125.

would be classified as "sex offenders."[52] With all these statistics, the anti-homosexual laws and the right of privacy do not seem to balance. The record since Griswold, however, seems to indicate that the courts are attempting to reach some kind of balance, even though those who wish complete homosexual freedom might not believe it. The record is mixed, but from it perhaps some generalizations about the rights of homosexuals might be made.

In 1965 the Court of Appeals, through Judge Duniway, held that photographing a public restroom to obtain evidence to convict reported homosexual activity was not an unreasonable Fourth Amendment search. The dissent, through Judge Browning, said that "the right of privacy must yield to the right of search is a rule to be decided by judicial officers not policement or government enforcement agents.[53]

In 1966 a bizarre case came to the Oregon state court. Two homosexuals had been married in 1962 (one dressed as a woman). After living together for a while one left and offered to testify against the other if he would not be prosecuted for acts of sodomy. The testimony was sufficient to convict the other homosexual of sodomy.[54]

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[52]Alfred Charles Kinsey, Wardell B. Pomeroy and Clyde E. Martin, Sexual Behavior in the Human Male, (Philadelphia, 1948), pp. 371, 392.

[53]Smayda v. U.S., 352 Federal Reporter, 2nd ed., 251, 255-257 (1965).

[54]State v. Edwards, 412 Pacific Reporter, 2nd ed., 526 (1966).

In 1967 in People v. Roberts[55] the defendant was convicted for an homosexual act in a man's restroom. The California state court held that the state statute barring consensual homosexual acts was valid and constitutional and so the conviction remained.

In 1968 the court was given the difficult task of deciding a case in which Charles Cotner had been brought to trial for committing an act of sodomy with his wife. Cotner had pleaded guilty and was sentenced to two to fourteen years in the state reformatory under the Indiana Sodomy Statute by the complaint of his wife (though no force was implied). Cotner filed a habeas corpus petition because he was not apprised of the Griswold decision and its potential of prohibiting the state to bar certain consensual relations between married people. Since Cotner had pleaded guilty and was not completely aware of the charge or his potential defense, the U.S. Court of Appeals reversed and remanded the case. The court said,

> . . . we think that Cotner has standing to complain about Indiana's intrusion into the privacy of Cotner's marriage relation, even though his wife made the complaint against him. It is essential to the preservation of the right of privacy that a husband have standing to protect the marital bedroom against unlawful intrusion.[56]

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[55] 64 California Reporter, 70 (1967).

[56] Cotner v. Henry, 394 Federal Reporter, 2nd ed., 873, 875 (1968), certiorari denied 393 U.S., 847 (1968).

In 1969 the California Supreme Court held that the State Board of Education could not revoke a teacher's credentials for noncriminal homosexual activity unless the activity would affect his professional duties.[57] Also in 1969 the Court of Appeals, through Chief Justice Bazelon, held that the Civil Service Commission's policy of discharging any federal employee found to be a homosexual did not relieve the Commission of the duty of showing how the homosexuality would impair the employee's effectiveness in his job (the defendant's dismissal was overturned). The court referred explicitly to the homosexual's constitutional right of privacy.[58]

In 1969 the Virginia sodomy law was held to have been constitutionally applied to a petitioner who had been tried and convicted in state court of forcing the act of sodomy upon his wife and he received twenty year prison sentence.[59]

There are some cases where it is easy to see why the individual's right of privacy is superceded by a compelling state interest. In People v. Hurd[60] conviction of a father for sodomy with his young daughter was upheld by the California state court.

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[57] Morrison v. State Board of Education, 461 Pacific Reporter, 2nd ed., 375 (1969).

[58] Norton v. Macy, 417 Federal Reporter, 2nd ed., 1161 (1969).

[59] Towler v. Peyton, 303 Federal Supplement, 581 (1969).

[60] 85 California Reporter, 718 (1970).

In 1970 Alvin Buchanan was convicted of sodomy in a public restroom. He claimed that the acquisition of the evidence submitted against him violated his Fourth Amendment rights because in the restroom he had a rational expectancy of privacy. The federal district court, through Judge Sara T. Hughes, declared article 524 of the Texas Penal Code (making sodomy a crime) unconstitutional. In this case in addition to the plaintiff, a homosexual who wished to represent the "private consent" argument and a husband and wife (the Gibsons) who wanted to protect the rights of married people who were apprehensive of future litigation for consensual sodomy in private also joined in the suit. The court referred to Griswold's "penumbra" of the First Amendment defending privacy from governmental encroachment and also pointed out that married couples and sodomy prosecution was a "real threat from a District Attorney who takes pride in the manner in which he has enforced the law."[61] It should be pointed out that the only real litigant was Buchanan, who had been convicted of public restroom sodomy, and not the Gibsons who in fact were not being prosecuted.

Similarly in 1971 defendant Pruett was prosecuted for public sodomy. The Texas State Supreme Court upheld the sodomy statute as being constitutional. The court reasoned

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[61] Buchanan v. Batchelor, 308 Federal Supplement, 729, 732, 735 (1970); judgment vacated and case remanded to District Court in Wade v. Buchanan, 401 U.S. 989 (1971).

that the statute as applied to public acts was a legitimate state concern and therefore the statute was valid. The United States Supreme Court dismissed an appeal for lack of a "substantial federal question."[62] Therefore statutes that are applied to public sodomy are constitutional but those that are applied to private consentual relations (particularly marital and possibly homosexual) are unconstitutional.

In September of 1971 four male homosexuals filed suit in U.S. District to have the D.C. sodomy statute struck down in its assiduous enforcement and application concerning consentual sexual (homosexual) behavior between adults in the privacy of their own home. On May 24, 1972 the suit was dropped with the stipulation that the sodomy statute would not be applied to "private consensual sexual acts involving adults (persons age 16 and over)."[63]

In Dixon v. State[64] the Supreme Court of Indiana ruled that the right of marital privacy could not be extended beyond married persons (therefore private cunnilingus between an unmarried woman and man was punishable). In

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[62] Pruett v. Texas, 463 Southwestern Reporter, 2nd ed., 191 (1971), appeal dismissed 402 U.S., 902 (1971).

[63] Schaefers v. Wilson, 11 Criminal Law Reporter, 2252 (May 24, 1972).

[64] 268 Northeastern Reporter, 2nd ed., 84 (1971).

1971 two men tried to receive a marriage license in Minnesota. The county clerk refused to issue them a license despite the fact that under the Minnesota law there was no specification as to the sex of the people applying for the license. The couple declared that by denying homosexual pairs the right to obtain a marriage certificate that the state was infringing on the Equal Protection Clause of the Fourteenth Amendment. The couple used as a reference Justice Douglas' opinion in Griswold concerning marital privacy as being very significant,

> Marriage is a coming together for better or for worse, hopefully enduring and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.[65]

They also relied on Robinson v. California[66] and the argument that by denying them a marriage license that they were being condemned for "an illness, which may be contracted innocently or involuntarily" established cruel and unusual punishment. The couple also relied on the Ninth Amendment as guaranteeing them "fundamental rights" such as the right to marital privacy. The couple also relied on the "Loving decision" because the Court had decreed that a marriage certificate could not be prohibited simply because

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[65] Griswold, p. 484.

[66] 370 U.S., 660 (1962).

of the fact that the two seeking the certificate were of "different races." The couple's arguments, though interesting, were all denied by the court, and the marriage license was not issued.[67]

In a similar case, a librarian at a state university was dimissed because he attempted to "foist tacit approval of this socially repugnant concept (homosexuality) upon his employer."[68]

In 1971 a district court held that asking questions of an active homosexual about his sexual activities (and his refusal and subsequent revocation of "secret" security clearance in a private industry) was a violation of his right of privacy.[69]

James and W. J. Warner, a married couple, were convicted of oral sodomy on a eighteen year old girl, and they claimed the right of marital privacy protected them from prosecution. In 1971 the Oklahoma state court held that acts performed by force by husband and wife upon a woman victim was not constiuutionally protected under the Griswold right to marital privacy.[70]

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[67] Baker v. Nelson, 191 Northwestern Reporter, 2nd ed., 185 (1972); appeal dismissed, 41 U.S. Law Week, 3167 (1972).

[68] McConnell v. Anderson, 451 Federal Reporter, 2nd ed., 193, 196 (1971); certiorari denied, 405 U.S., 1946 (1972).

[69] Gayer v. Laird, 332 Federal Supplement, 169 (1971). See also Marks v. Schlesinger, 384 Federal Supplement, 373 (1974).

[70] Warner v. State, 489 Pacific Reporter, 526 (1971).

In 1971 in federal district court an immigrant alien homosexual brought suit because of a denial of his request for naturalization. The court held that discreet homosexuality practiced only in private with other consenting adults was not a rational basis to infer that an immigrant alien lacked "good moral character." The court went on to note that "it is now established that official inquiry into a person's private sexual habits does violence to his constitutionality protected zone of privacy" and "to the extent that these laws (sodomy statutes) seek to prohibit and punish private homosexual behavior between consenting adults, they are probably unconstitutional in light of Griswold."[71]

In 1972 a federal court stated that laws "against fornication, sodomy, and adultery engaged in by consenting adults is an unconstitutional invasion of the right of privacy."[72]

In 1973 a homosexual teacher was transferred from one school in the district to another. He claimed that his transfer was due to his being a homosexual. To protest his cause he went on radio and television. The federal district court held that simply because a teacher is a

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[71] In Re Labady, 326 Federal Supplement, 924, 929 (1971).

[72] U.S. v. Moses, 41 U.S. Law Week, 2298 (1972).

homosexual is not a valid reason to transfer or dismiss the teacher - but that he must restrain his public speech or activity to avoid controversy which detracts from the educational process.[73] The teacher's contract was not renewed primarily because of his television appearances to protest.

In 1973 a husband and wife were convicted under the Virginia sodomy law for "private, consensual acts of sodomy with a third party." The couple's children found pictures that had been taken of the acts and took them to school. The couple was arrested on charges filed by school authorities and were tried and convicted. The federal district court that heard the case adopted the Roe idea of a "fundamental human value" and right of private marital affairs, and that the law "doubtless threatens an invasion of the right of privacy" because it could be utilized to prosecute secluded, intimate marital conduct. The court also said that there could not be any discrimination as to single or married individuals (in light of Eisenstadt) and hence the sodomy law "could not constitutionally be applied to any private, consensual, adult sexual behavior." But, the court held that isolation was a requirement to utilize a constitutional defense for privacy in sexual behavior and that because of the photographs and their haphazard usage

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[73] Acanfora v. Board of Education of Montgomery County, 359 Federal Supplement, 843 (1973).

the couple relinquished their constitutional defense and so they could not contest the sodomy statute on the basis of a right to privacy.[74]

The Court continues to show little sympathy for those convicted of public sodomy. In fact, in 1973 defendant Stone's conviction for committing acts of public sodomy was upheld. Although the defendant argued that the statute in question was vague and interfered in the constitutional right of privacy the Court rejected this line of reasoning. In fact the Court upheld the conviction despite the fact that the Supreme Court of the state where the offense occurred (Florida) had subsequently ruled the statute void for vagueness (the "abominable and detestable crime against nature" with a maximum penalty of twenty years). The U.S. Supreme Court held that the new interpretation of the statute would not be applied to the defendants retroactively.

However, the courts have insisted that homosexuals must be afforded equal treatment in matters other than sexual. In 1974 a homosexual student organization at the University of New Hampshire brought suit against the university to grant them access to facilities and sponsor events and participate in social functions. The federal district

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[74] Lovisi v. Slayton, 363 Federal Supplement, 620 (1973).

court held that the homosexuals should have the privileges that they were requesting and that to deny such rights would be a denial of equal protection.[75]

In state legislatures and courts the right of privacy for homosexuals is variable and confused. In New York and California two similar bills to give homosexuals more rights were defeated.[76] In cases in 1975, the New York state court held that the statute that punished consensual sodomy between unmarried people was subject to both public and private activities.[77] In keeping with past decisions concerning homosexuality, a Minnesota state court held that being a homosexual is not a crime but committing sodomy with a child is.[78] In State v. Dale[79] the Arizona statute that punished sodomy and lewdness was held to intrude on the right of privacy and therefore was nullified. Similarly in the Arizona Appeals Court the same statute that prohibited sodomy came under attack.[80] The court voided the statute because it could not be enforced on unmarrieds because to do

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[75]Gay Students' Organization of the University of New Hampshire v. Thompson, 367 Federal Supplement, 1088 (1974).

[76]"Gays on the March," Time, September 8, 1975, 37.

[77]People v. Rice, 363 New York Supplement, 2nd ed., 484 (1975).

[78]State v. Schweppe, 237 Northwestern Reporter, 2nd ed., 609 (1975).

[79]544 Pacific Reporter, 2nd ed., 241 (1975).

[80]State v. Callaway, 542 Pacific Reporter, 2nd ed., 1147 (1975).

so would violate the equal protection of the laws clause and therefore violate the right of privacy. Also in 1975 the New Mexico state court of appeals heard a case that involved rape and sodomy in a woman's bedroom. The jury believed that there was consent and so found defendant innocent of rape but guilty of sodomy. The appeals court by Judge Sutin held that the 1963 sodomy statute invaded the constitutional rights of consenting adults, and unconstitutionally invaded the right of marital privacy and regulated sexual conduct of consenting adults in the home. The court concluded that "the power to prohibit sodomitic conduct between consenting adults does not fall within the police power of the State."[81]

Similarly, in 1976 the Supreme Court heard a case from Tennessee involving "crimes against nature." In Rose v. Locke[82] the Supreme Court rejected the contention by defendant that the statute prohibiting crimes against nature was vague and therefore should be voided. The Court held that forcible cunnilingus in prison could be interpreted as a crime against nature even though the general interpretation of "crime against nature" had been that it meant sodomy.

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[81] State v. Elliot, 539 Pacific Reporter, 2nd ed., 207 (1975). See also State v. Bateman, 540 Pacific Reporter, 2nd ed., 732 (1975).

[82] Rose v. Locke, 96 S. Ct., 243 (1975)

Two 1976 cases have adhered to the court's opinion in Rose. In State v. Natzke[83] the Arizona appeals court, through Chief Justice Haire, upheld a statue that prohibited "lewd and lascivious acts." The court interpreted lewd and lascivious acts to incorporate among other things, a prohibition against cunnilingus. Therefore, the court reasoned that the statute was not unconstitutionally vague when applied to a person who has allegedly engaged in such conduct. In another case, the federal Court of Appeals (Ninth Circuit), Judge Jameson upheld the right of the federal government to dismiss a clerk typist (Equal Employment Opportunity Commission) who openly professed to be a homosexual and had "received widespred publicity in this respect in at least two states." The court went on to point out that the employee had "flaunted" his homosexuality by giving interviews and at one time applying for a license to marry a man. The court decided that the government's interest in "promoting the efficiency of the public service" outweighed the employee's First Amendment rights to "advocate and practice homosexuality."[84]

Finally, in March of 1976 the U.S. Supreme Court heard a case concerned with an action seeking a declaratory

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[83]544 Pacific Reporter, 2nd ed., 1121 (1976).

[84]Singer v. United States Civil Service Commission, 530 Federal Reporter, 2nd ed., 247 (1976).

judgment as to the constitutionality of the Virginia statute making sodomy a crime. The defendant was the City Attorney of Richmond who claimed that the statute (similar to the one in Wainwright) was in the state's legitimate interest of regulating "deviate behavior." Doe, the complainant, argued that in light of Griswold the statute was an invasion of privacy because it could regulate homosexual relations between adult males, consensually and in private. The Supreme Court, through Justice Rehnquist, affirmed the lower court's decision that the statute was not an unconstitutional invasion of privacy even if applied to active and regular consensual homosexual activities in private.[85]

The Doe case seems to be in accord with the Supreme Court's line of reasoning concerning sodomy. The Court has consistently upheld sodomy statutes (particularly for public sodomy). With Doe the Court seems to point out that homosexuals will not be given a right of privacy with regards to sodomy. Since private sodomy has been prosecuted only rarely the Court's decision does not appear to be a step backwards for homosexuals. The decision, however, still leaves the threat of prosecution for homosexual relations between consenting adults in private. Thus, Griswold principles of marital privacy will not be extended to homosexuals at this time.

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[85]Doe v. Commonwealth, 403 Federal Supplement, 1199 (1975); 96 S. Ct. 1489 (1976).

Regardless of court reluctance to move in this area, in 1974 the American Psychiatry Association voted to remove homosexuality as a mental disorder or as a deviant behavior.[86] With the difficulty of controlling homosexuality and the many laws that homosexuals may be arrested under, one author suggested that society is still punishing the homosexual for what he is and not for what he has done.[87] In fact one exhaustive study came to the conclusion that police patrols and decoys concerning homosexuals should be curtailed considerably.

> Empirical data indicate that utilization of police manpower for decoy enforcement is not justified. Societal interests are infringed only when a solicitation to engage in a homosexual act creates a reasonable risk of offending public decency. The incidence of such solicitations is statistically insignificant. The majority of homosexual solicitations are made only if the other individual appears responsive and are ordinarily accomplished by quiet conversation and the use of gestures and signals having significance only to other homosexuals. Such unobtrusive solicitations do not involve an element of public outrage. The rare indiscriminate solicitations of the general public do not justify the commitment of police resources to suppress such behavior. It is accordingly recommended that operation of suspected homosexuals by police decoys be eliminated and that routine patrol of bars, public toilets and parks by plainclothes and uniformed officers be utilized to suppress offensive homosexual conduct.[87]

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[86] "An Instant Cure," Time, April 1, 1974, 45.

[87] Martin Hoffman, The Gay World (New York, 1968), p. 80.

[88] "The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement and Administration in Los Angeles County," U.C.L.A. Law Review, XII (1966), 795-796.

CHAPTER IV

CONCLUSION

The contention of this work has been that there is a constitutional right of privacy. Though it has only been explicitly espoused by the courts (particularly by the U.S. Supreme Court) it has become a weapon to stave off society's encroachments or attempts to control or divert the individual from his right to be left alone. As the cases that have been examined in this work show, the right of privacy emanates from a "penumbra" of amendments to the Constitution. The Amendments that have been used by the courts to develop a right to privacy protection have been the First (primarily privacy of speech or expression, such as in Stanley), Third (protection against quartering of troups - a "man's home is his castle"), Fourth (protection from unreasonable searches and seizures), Fifth (protection against self-incrimination as with forced polygraph tests), Sixth (right to confront witnesses and cross examine accusers, again with polygraph tests), Eighth (it is cruel and unusual punishment to deprive someone of privacy, particularly in relation to prisoners), Ninth ("rights retained by the people"), and the Fourteenth (no state may deny any person due process or equal protection of the law).

A brief recapitulation of cases that bave been examined bring out three points. One, the right of privacy has been extended almost completely to private marital affairs, the availability of contraceptives, and abortions. In Griswold the Supreme Court for the first time explictly espoused a right of marital privacy. This right was concerned with the availability of contraceptives to married couples. Then in 1972 in Eisenstadt the court extended the right to include availability of contraceptives to unmarried individuals. The court reasoned that to allow married couples the right and not allow unmarrieds the same right would be a denial of equal protection of the laws. Then in 1973 in Roe v. Wade and Doe v. Bolton the court expanded the right of privacy to a woman's prerogative to have a child or not. The court specifically states that a right of privacy was fundamental as to abortions. In 1976 the court completed the abortion rights by holding that neither the state nor the husband, nor the parent of a woman or unmarried minor may interfere with a right to an abortion in the first twelve weeks of pregnancy. This right, the court said, applied equally to adults and minors, and married and unmarried individuals. The court reasoned that a woman has the right to control her body in something so fundamental as having a child or not. The court's reasoning, though originally applying to contraceptives and abortions, has also been extended by the lower

courts to marital privacy (particularly with sodomy prosecutions as in Cotner. Finally the courts have, in most instances, held that cohabitation and miscegenation laws are unconstitutional. Cohabitation laws have been declared void when applying to heterosexual and homosexual relations (Mindel and Kueny cases). Also miscegenation laws have been held to violate the Equal Protection of the laws clause of the Fourteenth Amendment and the "fundamental right of marital privacy" (as in Loving). Therefore, the statutes that interfere in marital (or similar) relations, availability of contraceptives, or abortions have been declared to be an invasion of privacy.

Under particular circumstances other rights may be protected by the courts as a right of privacy. For instance, homosexuals will be protected in employment. This means that they may not be denied a job or fired from a job simply because of their sexual preference (Macy and Morrison). Also homosexuals may not be punished for "discreet" affairs (In Re Labady, Schaefers, Rittenour) or exercising their student rights at a college (Gay Organization of the University of New Hampshire). However, homosexuals will not be protected if they "flaunt" their sexual predilection (Singer and Acanfora).

With regards to sterilizations the courts have generally held that the state has a right to order such operations on mental defectives (Buck). However, in some courts the

operations must be requested by a parent and proof must be established as to the need for the operation (In Re Simpson). Also, several judges have said that courts could not order sterilizations without statutory permission (Wade, Frazier, In Interest of M.K.R.). Compulsory sterilizations of prisoners as a condition for release, though upheld in the courts (Skinner, In Re Cavitt), might be questionable as to its legality in light of the expanding right of privacy.

The "right to die" may be becoming a right of privacy. Before 1976 the courts had been rather firm in insisting that euthanasia was homicide. But in 1976 In Re Quinlan points out that at least in New Jersey there is a right to die. The right applies only to someone that is in a chronic, vegetative state and the patient's doctor and closest relatives agree to the act of euthanasia (and possible a hospital ethics committee also).

Control over the length of one's hair depends on the particular circumstances as to whether there will be a constitutionally protected right of privacy or not. A private employee or student at a college or junior college would have the right (Brown, Hander). But public employees such as policemen and firemen (Michini, Kelley, Quinn) and students in public schools (if the school shows a "compelling interest" in the regulation) would not be protected.

The results of polygraph tests will be allowed at a trial only if both sides agree to its use and that the outcome will be admitted as evidence (Ridling, Zeiger, McDavitt). The use of tests by employers for various reasons is under scrutiny (Heil) by the courts to determine if the polygraph tests (particularly forced use by employers) intrudes on the individual's right of privacy.

Three, it appears that in some areas the right of privacy has not and may not be extended. Prostitution laws ("lewd and lascivious conduct" in public) have been uniformly upheld by the courts (Natzke, Price, Grant). The courts reason that the state has an obligation to regulate "deviate behavior." Homosexual acts (public sodomy) have not been given privacy protection by the courts either (Pruett, Smayda, Roberts, Wainwright). Similarly, prisoners have not been extended the right with regards to sodomy in jail (Rose). Also the courts have shied away from protecting consensual adult relations when the activity becomes public (Lovisi). In addition, the courts have refused to protect any sexual acts in which force takes place (Warner, Hurd). But since most acts of sodomy occur in private and are consensual the prosecution of such activity is rare. It does appear that police will continue to use their decoy methods and thus the entrapment controversy will continue.

This work has not been intended to be a philosophical analysis of a right of privacy nor an examination of the

many different types of cases concerned with privacy. The purpose has been to point out, primarily through the "sexual privacy" cases, that the courts have been the arena through which privacy originated as a legal right and has been expanding since its origins. From the cases that have been examined it appears that the courts are willing to adhere to a general right of marital privacy and specifically to the couples' right to contraceptives and abortions. The Supreme Court particularly in 1976 has thwarted several efforts to extend the right to public employees with regards to hair regulations and homosexuals' rights. Despite the court's refusal, it does seem evident that the state courts are more open to challenges to the sex laws then ever before. All of the courts seem to agree that there is a right of privacy but the different constitutional justifications make it appear that the courts are on a "fishing expedition" to defend the right rather than a philosophical crusade.

The courts do, however, agree that this "symbollic creation" of a constitutional right of privacy is necessary to the dignity of the individual but they have extended this "necessity" erratically. The courts also seem to agree that public acts will be distinguished from private ones and generally that public sexual acts (particularly where force is involved) will not be added to the "penumbras" of constitutional protections. The courts, however, have been

far from unanimous in their decisions concerning privacy. In almost every case examined in this work the courts have been divided in their decisions and usually have had very vigorous dissents either wholly for or vehemently against the right of privacy.

The main argument concerning sexual privacy has been with regards to the claim of society to regulate and enforce their police power (health, safety, welfare) with regards to "deviate" sexual behavior versuses the individual's claim of private, consensual, adult behavior. One work has noted that

> . . . at that moment in the history of man, when society decided that an attack upon one of its members was symbolically an attack upon all - a breaking of the general peace and order - and that the culprit should be punished by it rather than left to the vengeance of the victim or his family, it had accepted responsibility for maintaining law and order, for proscribing antisocial conduct and for punishing the wrong-doer.[1]

Hence the general thrust of the argument by the state government (the one primarily responsibility for criminal behavior in the states) has been that societal enforcement of controlling antisocial conduct is necessary to maintain a civilized society. Privacy advocates point to John Stuart Mill as a basis for opposing governmental regulations of individual liberties when he declared:

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[1]P. Allan Dionisopoulos and Craig R. Ducat, The Right to Privacy: Essays and Cases (St. Paul, 1976), p. 3.

> No society in which liberties are not, on the whole, respected is free, whatever may be its form of government; and none is completely free in which they do not exist absolute and unqualified. The only freedom which deserves the name is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs or impede their efforts to obtain it. Each is the proper guardian of his own health, whether bodily or mental and spiritual. Mankind are greater gainers by suffering each other to li e as seems good to themselves than by compelling each to live as seems good to the rest.2

Thus the argument is over societal intrusions and the costs on the liberties of the individuals that are involved. By weighing the conflicting "fundamental rights" and then assertaining whether societal claims outweigh individual privacy claims the courts have generally acknowledged a right of privacy but have determined that the interests to be balanced are "generally social [and] not individual claims."[3] In fact, Supreme Court Justice Rehnquist has taken this position. He has stated that the right of privacy should be limited and that the courts should "confine" the constitutional discussion of a right of privacy to questions about unreasonable searches and seizures and choose some place other than a judicial form for the resolution of other kinds of privacy issues."[4]

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[2]Currin v. Shields, editor, John Stuart Mill: On Liberty (New York, 1956), pp. 15-17.

[3]Roscoe Pound, "A Survey of Social Interests," Harvard Law Review, LVII (1943), 1.

[4]William Rehnquist, "Is an Expanded Right to Privacy Consistent with Fair and Effective Law Enforcement? Or, Privacy, You've Come a Long Way, Baby," Kansas Law Review, XXIII (1974), 10.

However, Rehnquist fails to take into account that the interests or rights involved are not "of equal intensity, nor equal importance." But the balancing of interests generally favors social and not individual interests. One work suggested that the "numerically larger interest always triumphs so that balancing becomes, in fact, a smoke screen for outright majoritarianism."[5] Yet Rehnquist believes that legislation should be presumed to be constitutional unless the challenger to the statute can show that the statute is "unreasonable, arbitrary, or capricious." He does advocate judicial restraint, feeling that the best policy concerning privacy should be legislative discretion and not judicial.[6]

Opposing the Rehnquist notion would be the people who advocate an "activist judiciary." One author noted the inseparably intertwined notion of an activist judiciary and the espoused right of privacy. In the extreme position, this argument would mean an absolute prohibition on government infringement of certain right such as thoughts and beliefs.[7] But it is evident that the right of privacy as yet is not an absolute right.

Thus, there is a constitutional right to privacy that appears to sort out "human situations and then constantly

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[5]Dionisopoulos and Ducat, The Right to Privacy, p. 11.

[6]Rehnquist, "Is an Expanded Right to Privacy Consistent with Fair and Effective Law Enforcement?," 22-23.

[7]Dionisopouls and Ducat, The Right to Privacy, p. 12.

test the legal standards to work out solutions to the problems of conflicting interests."[8] The balancing of interests then will determine if privacy is to be expanded or not.

Throughout the last decade the courts have held that sexual privacy is a problem that belongs in the courts' province. Since the notion of privacy "can spurt out uncontrollably in all directions" the virtues and problems inherent in the balancing test are open to scrutiny. With the vague qualitative standards to articulate "fundamental rights" it is easy to see why there is no "guidance for making a choice."[9]

Thus there definitely are problems inherent in the right of privacy. Particularly the problems arise with social costs, administrative difficulties of enforcing the laws or not, and the ambiguous standards of maintaining or expanding the right. In fact some would question whether solutions to perplexing problems belong in the courtroom at all or would be best left for the legislature's determination. Specifically, some say that if the right becomes an almost absolute right the problem of instability in society may occur with a breakdown of morality.

Therefore the right of privacy will probably continue to be important. It will also continue to be considered

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[8] Ibid., pp. 13-14.

[9] Ibid., p. 11.

by some as a fundamental right. It is interesting to note that the right of privacy has certainly come a long way from tort relief with Warren and Brandeis to the espoused right of marital privacy in Griswold. Since 1965, the right has continued to expan in certain areas. It does appear that the privacy rights will probably expand to adult, private, consentual behavior in the future. But the expansion into that area will more than likely be contested by the state using the police power as their argument. Also sex laws aimed at punishing heterosexual couples and their "deviant" behavior (sodomy, cohabitation, miscegenation) will probably be taken off the law books.

Aside from the almost absolute right to an abortion (at least in the first twelve weeks of pregnancy) or contraceptives, it appears that the other areas examined in this work will continue to be regulated to one extent or another by the government. The only area that the courts appear not likely to extend the right of privacy is in the area of homosexuals and prostitutes' rights. This denial refers primarily to forcible and/or public relations. Yet with Doe v. Commonwealth it even appears that private "deviate" relations might be punished if the laws were enforced. It may be that the right of privacy will continue to expand from the original marital privacy idea to "similar" sexual relations between consenting unmarrieds (adults) in seclusion.

The Supreme Court has thus made it clear that the predilection of the individual to "do his own thing" will be balanced with the community interests.[10] This primary and recurring collision between the police powers of the state and the individual's privacy will continue to be debated, and the courts will continue to balance interest to determine whether social interest of the group or the social cost to the individual are more important to the well-being of society.

Thus the explicitly espoused constitutional right of privacy appears to be firmly entrenched, with the courts the major outlet for protecting and expanding the right. This fact will probably continue despite the belief of many that the proper realm for privacy extensions would be from the legislature. With the idea of privacy in mind, Justice Louis Brandeis once observed:

> . . . The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognize the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone - the most comprehensive or rights and the right most valued by civilized men. To protect that right, every

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[10] Ibid, p. 3. See Jacobson v. Massachusetts, 197 U.S., 11 (1905); Helvering v. Davis, 301 U.S., 619 (1937).

> unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation. . .11

And he added:

> Men born to freedom are naturally alert to repel invasion of their liberty by evil minded rules. The greatest dangers to liberty lurk in insidious encroachments by mean of zeal, well meaning but without understanding.12

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[11] *Olmstead v. U.S.*, 277 U.S. 438, 478 (1927), Justice Brandeis in dissent.

[12] *Olmstead*, p. 479.

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