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Although the Constitution does not provide for a specific right of privacy, the existence of such a right is beyond dispute.[1] The extent of the right is, however, difficult to determine when one considers the point beyond which the right of privacy will prohibit intrusion by either state or federal authorities into an individual's affairs. Only by balancing the individual's need for privacy with the state's interest in regulating private conduct, can a delineation be made.

The question of where to draw the line was raised recently in *Cotney v. Henry*.[2] Petitioner with consent of his wife and within the exclusive privacy of his bedroom committed an "abominable and detestable act" violative of the Indiana Sodomy Statute.[3] After waiving trial by jury, he was summarily sentenced to not less than two nor more than fourteen years in the Indiana Reformatory. In a habeas corpus proceeding, petitioner sought to challenge the constitutionality of the Indiana statute, but his writ was denied. On appeal the court concluded that an application of the Indiana Sodomy Statute to private, consensual acts between married persons might be an unconstitutional invasion of petitioner's right of privacy.[4]

As an independent doctrine the right of privacy attained legal recognition in an 1890 law review article written by Samuel D. Warren and Louis D. Brandeis.[5] Prior to this time, the right of privacy had been invoked as the underlying reason for prohibiting unreasonable searches

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[1] Boyd v. United States, 116 U.S. 616, 630 (1886); Mapp v. Ohio, 367 U.S. 643, 655 (1961); State of Texas v. Gonzales, 388 F.2d 145, 147 (5th Cir. 1968).

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

[3] BURNS' IND. STAT. CH. 169 § 10-4221:

> Whoever commits the abominable and detestable crime against nature with mankind or beast; or whoever entices, allures, instigates or aids any person under the age of twenty one (21) years to commit masterbation or self-pollution, shall be deemed guilty of sodomy and on conviction, shall be fined not less than one hundred ($100.00) nor more than one thousand ($1,000.00) to which may be added imprisonment in the state prison not less than two (2) nor more than fourteen (14) years.

[4] The court also determined petitioner's standing to seek a writ of habeas corpus in a federal court, the affect of his guilty plea and the objectionable vagueness of the Indiana Sodomy Statute. These questions are beyond the scope of this comment.

[5] Warren and Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193 (1890). *See*, Rodgers, *A New Era For Privacy*, 43 N.D.L. REV. 253 (1967). Apparently the Warren-Brandeis article was prompted, at least in part, by distasteful newspaper publicity of the "yellow journalism" variety. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 383 (1960). For the development of the right of privacy as an actionable tort, *see* W. PROSSER, THE LAW OF TORTS § 112 (3d ed. 1964).

and seizures and the privilege against self-incrimination as protected by the fourth and fifth amendments.[6] In *Olmstead v. United States*, while sustaining the government's right to monitor private telephone conversations, the United States Supreme Court restricted rights in privacy to "constitutionally protected areas." [7] However, in *Katz v. United States*, the court expressly overruled the *Olmstead* decision by declaring that the fourth amendment "protects people—and not simply areas." [8] The court recognized the right of privacy as one of a number of rights sought to be protected by the fourth amendment.[9]

In *Griswold v. Connecticut*,[10] the Supreme Court firmly solidified the right of privacy as an independent doctrine by expressly predicating its decision on an invasion of the marital right to privacy.[11] Although concluding that a criminal statute prohibiting the use of contraceptives was an unconstitutional invasion of privacy, three concurring justices articulated three separate and distinct conceptual approaches for sustaining the right of privacy. Justice Douglas, speaking for the court, considered privacy to be a right incidental to the expressed rights contained within the first eight amendments, but one which is necessary to give any positive meaning to the expressed rights.[12] Justice Goldberg, on the other hand, suggested that the right of privacy was an independent right contained within the Ninth Amendment, which includes a bundle of unexpressed but fundamental rights too numerous to relate.[13] And

[6] Boyd v. United States, 116 U.S. 616 (1886).

[7] 277 U.S. 438 (1928).

[8] 389 U.S. 347, 351 (1967); *see also* Desist v. United States, 37 U.S.L.W. 4225, 4226 (U.S. Mar. 24, 1969).

[9] *Id.* at 350.

[10] 381 U.S. 479 (1965).

[11] Reaction to the *Griswold* decision is evidenced by the enormous amount of legal literature. *See e.g.*, Beaney, *The Griswold Case and the Expanded Right of Privacy*, 1966 WIS. L. REV. 979; Blackshield, *Constitutionalism and Comstockery*, 14 KAN. L. REV. 403 (1966); Dixon, *The Griswold Penumbra: Constitutional Charter for an Expanded Law of Privacy?*, 64 MICH. L. REV. 197 (1965); Emerson, *Nine Justices in Search of a Doctrine*, 64 MICH. L. REV. 219 (1965); Katin, *Griswold v. Connecticut: The Justices and Connecticut's "Uncommonly Silly Law"*, 42 NOTRE DAME LAW. 680 (1967); Kauper, *Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The Griswold Case*, 64 MICH. L. REV. 235 (1965). *See generally*, Redlich, *Are There Certain Rights Retained by the People?*, 37 N.Y.U.L. REV. 787 (1962); *A Refreshing Approach to the Right of Privacy*, 5 WASHBURN L.J. 286 (1966); *Privacy After Griswold: Constitutional or Natural Right*, 60 NW. U.L. REV. 813 (1966).

[12] Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

[13] *Id.* at 486-489. Until the *Griswold* decision, the ninth amendment remained one of the least litigated amendments. *See e.g.*, Roth v. United States, 354 U.S. 476 (1957); United Public Workers of America v. Mitchell, 330 U.S. 75 (1947); Tennessee Elec.

finally, Justice Harlan viewed the decision as a further expansion of fundamental fairness through the due process clause.[14]

Regardless of the conceptual approach adopted, the interest of the individual in privacy must be simultaneously weighed against the interest the state seeks to protect. In *Griswold*, the benefit derived from state regulation did not outweigh the resulting encroachment upon the right of privacy. Essentially the same factual situation exists in *Cotney*. Both deal with consenting married adults and with the regulation of their sexual relationship. *Griswold* struck down a statute banning the use of contraceptives because neither society nor the individual suffered any perceivable harm nor was there any corresponding benefit to society by enforcement of such a statute;[15] therefore the need for regulation was clearly outweighed by the need to protect marital privacy. In *Cotney*, while the acts of sodomy seem more repugnant than the use of contraceptives,[16] the harm suffered by society is equally imperceptible because the consenting parties are husband and wife.[17]

Cotney, then, clearly represents an application of the principles espoused in the *Griswold* decision.[18] By adopting any one of the three conceptual approaches advocating the right of privacy, public super-

Power Co. v. T.V.A., 306 U.S. 118 (1939); Ashwander v. T.V.A., 297 U.S. 288 (1936). For the history of the ninth amendment and its possible application to future decisions, *see* Adams, *What Are The Rights Guaranteed By the Ninth Amendment?* 53 A.B.A.J. 1033 (1967); Ritz, *Ninth Amendment*, 25 WASH. & LEE L. REV. 1 (1968); Kelley, *The Uncertain Renaissance of the Ninth Amendment*, 33 U. CH. L. REV. 814 (1966).

14 Griswold v. Connecticut, 381 U.S. 479, 500 (1965). For a more expanded discussion of Justice Harlan's considerations, *see* Poe v. Ullman, 367 U.S. 497, 522 (1961) (dissenting opinion).

15 Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

16 This view points out the anomaly in legislating morality rather than harm. A conservative Catholic would consider the use of contraceptives a mortal sin, equally as repugnant as an act of sodomy. *See generally* Note, *Sodomy—Crime or Sin*, 12 FLA. L. REV. 83 (1959).

17 The concept of criminal conduct causing harm to society as opposed to harm to an individual has historically been a subject of debate. *See*, Dworkin, *Lord Devlin and the Enforcement of Morals*, 75 YALE L.J. 986 (1966); Comment, *Private Consensual Adult Behavior: The Requirement of Harm to Others in the Enforcement of Morality*, 14 U.C.L.A.L. REV. 581, 585 (1967); Monaghan, *Obscenity 1966: The Marriage of Obscenity Per Se and Obscenity Per Quod*, 76 YALE L.J. 127, 135-140 (1966); Rosen, *Contemporary Winds and Currents in Criminal Law, With Special Reference to Constitutional Criminal Procedure: A Defense and Appreciation*, 27 MD. L. REV. 103, 110 (1967); Comment, *The Bedroom Should Not Be Within the Province of the Law*, 4 CALIF. WEST. L. REV. 115, 124 (1968).

18 The essence of the *Cotney* decision was specifically foreseen in Comment, *The Bedroom Should Not Be Within the Province of the Law*, 4 CALIF. WEST. L. REV. 115 (1968).

vision of the private, marital sexual relationship through the imposition of criminal sanctions may be eliminated.[19] This is not to say that the right of privacy would prohibit prosecution of criminal acts between husband and wife, *e.g.*, murder or assault and battery.[20] Inherent in the *Cotney* decision is the implication that there is no crime committed between a husband and wife who engage in acts of sodomy, and that the marital right of privacy precludes any outside interference with consensual acts producing no harm to the individual parties.[21] Under these circumstances, condemnation by a legal code of mores constitutes an injurious deprivation of private security, in view of the lack of harm to the secular community,[22] the failure of uniform enforcement[23] and the psychological harm done to the individual.[24]

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19 The American Law Institute advocates this approach. MODEL PENAL CODE § 207.5 (1955). England presently allows consenting adults to engage in acts of homosexuality. HALSBURY'S LAWS OF ENGLAND 1284B (3d Cum. Supp. 1968). There is a plethora of material on the criminal nature of sodomy between consenting adults in private. For an exhaustive study, *see Project—The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement and Administration in Los Angeles County*, 13 U.C.L.A. L. REV. 643 (1966). *See also Sodomy Between Husband and Wife—Grounds for Divorce?*, 3 J. FAM. L. 124 (1963).

20 This was the concern of justice Duffy, who desired to know the result ". . . if Cotney had shot his wife in the privacy of their bedroom. . . ." Cotney v. Henry, 394 F.2d 873, 876 (7th Cir. 1968) (dissenting opinion).

21 Besides the Indiana sodomy statute being susceptible to the constitutional objection of vagueness and the "possible" failure to find a clear showing that the state had a clear interest in preventing such relations, the court felt that the statute might not be applicable to married couples. *Id.* at 875. In a broad sense, what the Indiana court has done (possibly unwittingly) is to question the applicability of any sodomy statute to husband and wife.

22 *See* authority cited note 16 *supra.*

23 *See* Slovenko, *Sex Mores and the Enforcement of the Law on Sex Crimes: A Study of the Status Quo*, 15 KAN. L. REV. 265, 271 (1967).

24 Slovenko and Phillips, *Psychosexuality and the Criminal Law*, 15 VAND. L. REV. 797 (1962).