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The United States Supreme Court and the protection of individual privacy

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THE UNITED STATES SUPREME COURT
AND THE PROTECTION OF INDIVIDUAL PRIVACY

BY

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Privacy is an amorphous concept. It has not only a legal meaning, the subject of this study, but also socio­logical and psychological meanings which are beyond our purview here. An individual "right" to privacy, or "right to be let alone," as it is often characterized, is an even more complex idea. It suggests a fundamental obligation of people to respect another's private thoughts and affairs. But a general "right to be let alone" must be separated from the more limited discussion which will follow of the United States citizen's right to privacy from governmental intrusion, as the Supreme Court has protected that right within the constitutional framework. The more general "right to be let alone" also includes those undesired intrusions into one's privacy by other citizens and the press which are protected in some instances through tort cause of action, as provided by state statutes and common law. Though an interesting and indeed complex area itself, the private law right "to be let alone" is severed from this study except as it necessarily must be dealt with briefly in the first chapter, where its effect on the introduction of the privacy right into public law will be shown.

Although this study of privacy will be restricted to the Supreme Court's protection of it against invasion by
government, it is still a survey and analysis of rather large
dimensions, for what the constitutional "right to privacy"
has come to connote includes a congeries of rights concerning
beliefs, ideas, the home, the dignity of the individual,
solitude in one's intimacies, autonomy in personal decision-
making, electronic eavesdropping into one's private conversa-
tions, and disclosure of personal information. This study
will attempt through a traditional method of case analysis
to determine the development of the Court's position on in-
dividual privacy rights by examining not only its decisions,
but also the dicta and some dissenting opinions, which often-
times formed the basis of a later decision, and critical
assessments made by Court observers.

Analysis will begin with the origins of the privacy
concept in the eighteenth and nineteenth centuries and will
continue with the cases dealing with privacy through the
mid-twentieth century. With the enunciation of a general
"right to privacy" doctrine in *Griswold v. Connecticut* in
1965\(^1\), the Court faced, as it does with all vague new doc-
trines, a torrent of litigation complaining of intrusions
into all sorts of "privacy" areas. What the Court has said
in cases since 1965 about privacy, its constitutional under-
pinnings, and the *Griswold* decision itself is the heart of
this study.

"Apart from a good deal of private and official hand-
wringing"\(^2\) about the threats of government snooping, the other

\(^1\) 391 U.S. 479.

\(^2\) Robert B. McKay, "The Right of Privacy: Emanations
branches of the government have done little, if anything, to protect the privacy of the citizenry. Complaints which reached the Supreme Court were dealt with, at first, in light of the small amount of privacy doctrine available. Then, as new techniques were developed by the Court for protecting civil liberties and as government intrusions into private lives occurred more frequently, the Court progressively reinterpreted its privacy standards.

The central thesis of this study is that the Supreme Court, after a half-century of incrementally developing "zones" of privacy protection through the various guarantees in the Bill of Rights, has arrived at a distinct, independent "right of privacy" with the potentiality of protecting privacy in a broad range of situations. The Court has, at least since its Griswold decision in 1965, been developing a substantive, due process right to privacy in the areas of marriage, family, conception, and abortion. Although the privacy right's perimeters have yet to be determined, its new "substantive" nature lends itself to the protection of a myriad of other liberties involving personal conduct. However, the Court has shown that the right to privacy cannot be absolute, but must be weighed against the subordinating interest of the state in invading individual and group privacy. In other words, the "right to privacy" has become a basic part of the theory that government is an institution of limited powers that must meet a heavy burden of justification when it interferes with the freedom of its citizens.
CHAPTER I

ORIGINS OF THE PRIVACY RIGHT

IN CONSTITUTIONAL LAW

The Concept of Privacy

Mankind's search for privacy has ancient origins. Indeed, zones of privacy can be found "marked off, hinted at, or groped for" from the first pages of the Bible to the writings of Socrates and Epictetus, Thomas More, Locke, and Emerson. Privacy has been spoken of as one of the most "elementary needs of all humans" and as "one of the truly profound values for a civilized society." It has also been called a "fundamental tenet of the American value structure," and an underlying theme of the Bill of Rights.


Furthermore, it is said that "some of the central meanings of democracy are embedded in protections of privacy." 7

As the interest in privacy developed, various attempts were also made to define a "right" to privacy in sociological, psychological, and philosophical, as well as legal, terms. "Autonomy," "secrecy," "solitude," "control over the communication of information about oneself," 8 and "the rightful claim of the individual to determine the extent to which he wishes to share of himself with others" 9 are a few of the definitions that have been advanced. Since the late nineteenth century, however, the term that has most often been used is simply "the right to be let alone." 10 The "right to be let alone" could be claimed against government when one acted publicly as well as when one acted privately. It was the claim that there is an area that has not been given over to public control—a sphere that a man can carry with him into his home, his bedroom, his church, club, or organization, and in some respects, into the street. Even when public, it was part of the inner man. It was part of his "property" in the Lockean sense," the kind of property with respect to which its owner has delegated no power to the state." 11

It is difficult, and almost impossible, however, to determine precisely what the scope of an all-encompassing "right to be let alone" would be. There is either the danger of over-definition, by which privacy would include the entire range of human freedom, or the danger of under-definition by which the right to privacy would be limited to statutory and common law protections and to those zones of privacy that can be identified as explicitly within the Bill of Rights, primarily in the First Amendment. Although the definition, much less the scope, of the right to privacy has yet to be determined by the Court, privacy has, nonetheless, been involved in or referred to extensively in decisions of the Court for many decades. Aspects of privacy were protected when adjunct to or part of other values or areas explicitly protected by specific provisions of the Constitution. However, it was not until 1965 with Griswold v. Connecticut, 381 U.S. 479, that the Court recognized the substantive quality of the privacy right and declared it constitutionally protectable through the "penumbras" of a number of "emanations" from the Bill of Rights. Until that constitutional declaration in Griswold, privacy had been, if not a legal right, then a


See below, p. 34.
cultural norm which "served the purpose of providing a rallying point for those concerned about the encroachments of mass society on the individual" which began to occur in the late nineteenth century with the industrial and technological revolutions.  

In the eighteenth and early nineteenth centuries, the Constitution, statutes, and common law had provided effective protections for the privacy needs of the person, home, and communications. Locke assumptions of individualism, private property, and limited government which were ingrained in early American political thought and the Constitution, had helped protect privacy. The First Amendment was considered to protect "private sentiment," "private judgment," and "freedom of communion," including the "liberty of silence," and to free associations from "the spy, the mouchard, the dilator, the informer, and the sycophant" of police government.  

Privacy was traditionally afforded protection also through the Third, Fourth, and Fifth Amendments. The Third Amendment's prohibition of the quartering of soldiers in one's home in time of peace without the owner's consent reveals the early Americans' determination to protect the private realm

17 See appendix.
from government invasion. The Fourth Amendment, however, is the clearest expression of privacy protection since it recognizes the necessity for security in persons, houses, and possessions from unreasonable government search and seizure. The Fourth Amendment states the traditional British concept of a man's home as his castle. The Fifth Amendment's protection against compelled self-incrimination was another bulwark for privacy in early American life.

The Fifth Amendment was interpreted by the late-nineteenth century to be linked so closely to the Fourth Amendment's protection against unreasonable searches and seizures that the compelled production of evidentiary materials was considered to be the same as compelled self-incrimination. This virtual merger of constitutional guarantees was pronounced in Boyd v. United States, 116 U.S. 616 (1886), a criminal case which involved the threatened forfeiture of a shipment of plate glass because of the owner's refusal to produce an invoice for inspection by government officials. In Boyd the Court said that the Fourth and Fifth Amendments run "almost into each other" and that the doctrines of those amendments "apply to all invasions on the part of the government and its employes of the sanctity of a man's home and the privacies of life."

In an earlier case, Ex Parte Jackson, 96 U.S. 727 (1878), the Supreme Court had broadly interpreted what "effects" were protected by the Fourth Amendment by holding that the mails were to be protected from unwarranted govern-

18 116 U.S. 616, 630 (1886).
ment intrusions. In dictum the Court said that "[h]e constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be."20

After the broad interpretations of the Fourth Amendment given in Ex Parte Jackson and Boyd, the Court in Weeks v. United States, 232 U.S. 383 (1914), decided upon a means for enforcing the amendment's guarantees. It adopted the exclusionary rule which prohibited the admission in federal courts of illegally seized evidence. The decision further stressed the necessity of the safeguards of the Fourth Amendment in order to protect the sanctity of one's home and effects:

If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.21

These criminal cases involving government search and seizure have been cited since the earliest protection of privacy was made available through such litigation. Before the technological revolution, physical searches and seizures were "primitive" but primary techniques of government intrusion into person, home, and effects.22 The technological

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20 96 U.S. 727, 733.

21 232 U.S. 383, 393.

innovations of the late nineteenth century, which accompanied the industrial revolution, though making possible much of the privacy Americans enjoy, also made possible new means for invading privacy. Following closely behind the inventions of the telephone, microphone and recorder, and instantaneous photography, were wiretapping, electronic eavesdropping, and surreptitious photography. Psychological and sociological research developed methods of testing personality, detecting lies, and accumulating information by numerous means.

With the wide range of techniques becoming available for surveillance, information-gathering, and psychological studies, the major threats to privacy became the political, administrative and cultural institutions, including popular journalists, private police and investigators, private business researchers, and psychological and sociological researchers. The average American seemed to take the intrusions as a matter of course and did not complain. Glenn Negley, writing about the value that Americans have traditionally given to privacy, explains that it is "a historical commonplace that problems often await acknowledgment until circumstantial developments force them upon our attention." America's failure to recognize privacy "as a factor pertinent to moral and political speculation" has made the inevitable confrontation "one of the most critical problems of contemporary political and legal analysis." Negley further says that the rapid change in our technology and social structure "forces us to recognize that the privacy which ... has
apparently been casually presumed as an ingredient of moral action can no longer be presumed but must be specified.\textsuperscript{23}

In 1890, the increasingly intrusive press so enraged two young Boston attorneys that they specified the privacy to which they felt every citizen has a right. In an article in the Harvard Law Review espousing the view that man is entitled to "be let alone," Samuel D. Warren and Louis D. Brandeis (later to be Justice Brandeis) wrote that "political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society."\textsuperscript{24} They insisted that the courts had used the principle, but under other labels, for there was no common law recognition of the right of privacy. Even though legal authorities have differed on the value of a privacy tort,\textsuperscript{25} the Warren and Brandeis article appears to have been influential in deciding cases concerning privacy rights.


\textsuperscript{24}Samuel D. Warren and Louis D. Brandeis, "The Right of Privacy," Harvard Law Review 4 (December 1890): 193. The article developed from their outrage over newspaper accounts of the personal affairs of Boston bluebloods, including Warren's family.

\textsuperscript{25}See Beaney, "The Right to Privacy and American Law," p. 257. See also William L. Prosser, "Privacy," California Law Review 48 (August 1960): 383, who subdivides privacy in tort law into four categories: (1) appropriation of another person's name or likeness for personal advantage; (2) intrusion upon a person's seclusion or solitude or into his private affairs; (3) public disclosure of embarrassing private facts about a person; (4) publicity that places a person in a false light in the public eye. See also Edward J. Bloustein, "Privacy, Tort Law, and the Constitution: Is Warren and Brandeis' Tort Petty and Unconstitutional as Well?" Texas Law Review 46 (April 1968): 611, where the discussion centers on the "mass publication tort." See also Harry Kalven, Jr., "Privacy in Tort Law," p. 326, who said Warren and Brandeis gave birth to a "trivial" tort.
which began appearing at the turn of the century. Since the first legal recognitions of a right to privacy in tort law, the privacy right has been granted status of varying degrees throughout the states. Some have recognized it in common law while others have granted it statutory status. Whatever the standing of the privacy claim in private law, important though it be, it will not be further discussed in this paper. It has been important, however, for the development of a constitutionally recognized concept of privacy. It is doubtful whether privacy claims against the intrusions of government would ever have entered the courtroom, if they had not first been recognized and discussed in the private law sector. 

Fourth Amendment Privacy Protections

By the second decade of the twentieth century, the term "right to privacy" or "right to be let alone" had been introduced into legal circles. About the same time, a privacy issue which has been of continuous focus throughout this

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26 In Schuyler v. Curtis, 15 N.Y. Supp. 787 (1891), the court recognized a right to privacy in a question of whether private citizens had a right to erect a statue of a locally prominent woman over her family's objections. In Roberson v. Rochester Folding Box Co., 171 N.Y. 538 (1902), the court found that a right of privacy had been invaded when the plaintiff's photograph was used without her permission to sell flour. In Pavesich v. New England Life Insurance Co., 122 Ga. 190, 50 S.E. 68 (1905), the court held that a victim of an invasion of privacy could recover damages.

27 In Ettore v. Philco Broadcasting Corp., 229 F 2d 481, 485 (1956), Judge Biggs said, "The state of the law is still that of a haystack in a hurricane... We read of the right of privacy, of invasion of property rights, of breach of contract, of equitable servitude, of unfair competition, and there are even suggestions of unjust enrichment." Quoted in Breckinridge, The Right to Privacy, p. 127.

28 For further discussion of the private law of privacy, see Beaney, "The Right to Privacy and American Law."
century, arose in a criminal case before the Supreme Court. The case was *Olmstead v. United States*, 277 U.S. 438 (1928), which came before the Court as a direct result of the Eighteenth Amendment ratified in 1919 and the Volstead Act which Congress had passed to enforce it. The petitioner Olmstead, a rum runner, was convicted during Prohibition on evidence of conversations that federal agents had heard in the five months they tapped his phone. Chief Justice William Howard Taft, writing the opinion of the Court for a majority of five, said that the liberal construction of the Fourth Amendment could not "justify enlargement of the language employed beyond the possible practical meaning of houses, persons, papers, and effects, or so to apply the words search and seizure as to forbid hearing and sight."29 The Court refused to continue the liberal interpretation of the Fourth Amendment begun by Boyd and Weeks. Clinging to the concept of tangible, "propertied" privacy, the Court held that wiretapping was not a physical trespass in the technical sense and therefore was not a violation of the Fourth Amendment.

Of the four dissenters, Justice Louis D. Brandeis contributed immeasurably to the constitutional doctrine of privacy. His words have been quoted in federal and state court opinions ever since he penned them. If the Brandeis view had prevailed, a broad right of privacy would have been firmly established in the Fourth Amendment. Justice Brandeis argued that the Fourth Amendment was traditionally a guarantee of a broad right of privacy and that the Framers "... conferred, as against the Government, the right to be let alone...."30

30 Ibid., 478.
Furthermore, he said that new ways would be found to abuse individual rights, and so guarantees had to be continually extended to protect these rights:

But "time works changes, brings into existence new conditions and purposes." Subtler and more far-reaching means of invading privacy have become available to the government. Discovery and invention have made it possible for the government, by means far more effective than stretching upon the rack to obtain disclosure in court of what is whispered in the closet. 31

After the retreat of the privacy doctrine in Olmstead, the Fourth and Fifth Amendments' privacy implications were virtually abandoned by the Court for several decades. 32 Olmstead remained the basis for legal wiretapping and electronic eavesdropping even after Congress inserted an ambiguous provision, Section 605, into the Federal Communications Act of 1934. That section was designed to outlaw wiretapping and electronic eavesdropping by federal officers, but when the question came before the Court in Goldman v. United States, 316 U.S. 129 (1942), the Court held that electronic eavesdropping by the means used here—a detectophone placed against the petitioners' wall—was neither a "communication" nor an "interception" within the meaning of the Federal Communications Act. Furthermore, since there had been no "interception" of a telephone conversation before its destined place, but only an "overhearing" of the message, there had been no trespass, therefore, under the Olmstead rationale.

Through the fifties and early sixties the Court generally

31 Ibid., 473.
33 316 U.S. 129, 133.
followed the Olmstead-Goldman "trespass" doctrine and upheld the use of electronic devices to monitor conversations. In On Lee v. United States, 343 U.S. 747 (1952), the Court invoked the "physical trespass" distinction and held that the petitioner had freely engaged in conversation with a federal agent and overruled his objection that his Fourth Amendment right of privacy had been invaded by the recording of his conversation and admission of it as evidence against him. In Lopez v. United States, 373 U.S. 427 (1963), the Court upheld the use of a secret recording device by an Internal Revenue Service agent to obtain proof that he had been offered a bribe by a delinquent taxpayer. However, Justice William J. Brennan's dissent, in which Justice William O. Douglas and Arthur J. Goldberg joined, gave one reason to believe that the Court might be "on the brink of a ruling defining a comprehensive, positive right of privacy from unreasonable surveillance."

Olmstead's illiberal interpretation of the Fourth Amendment as limited to the tangible fruits of actual trespass was a departure from the Court's previous decisions, notably Boyd, and a misreading of the history and purpose of the Amendment. Such a limitation cannot be squared with a meaningful right to inviolate personal liberty.... Specifically, the Court in the years since Olmstead has severed both supports for that decision's interpretation of the Fourth Amendment. We have held that the fruits of electronic surveillance, though intangible, nevertheless are within the reach of the Amendment.35

34 Westin, "Science, Privacy, and Freedom," part 2: "Balancing," p. 1248. Westin says that an ideal ruling would be one holding Olmstead no longer relevant, recognizing a constitutional right of privacy in the First Amendment and "liberty" clauses of the Fifth and Fourteenth Amendments, and measuring government intrusions into privacy by the requirements of due process. Ibid.

Further in his dissent, Justice Brennan suggested a new basis for the privacy right--the First Amendment:

But freedom of speech is undermined where people fear to speak unconstrainedly in what they suppose to be the privacy of home and office.... The right to privacy is the obverse of freedom of speech in another sense. The Court has lately recognized that the First Amendment freedoms may include the right, under certain circumstances to anonymity.... The passive and the quiet, equally with the active and the aggressive, are entitled to protection when engaged in the precious activity of expressing ideas or beliefs. Electronic surveillance destroys all anonymity and all privacy; it makes government privy to everything that goes on.36

What Justice Brennan was referring to when he said that the Court since Olmstead "has severed both supports for that decision's interpretation of the Fourth Amendment" were the two decisions in 1961 and 1963 that had somewhat weakened the Olmstead rationale. In Silverman v. United States, 365 U.S. 505 (1961), the Court held that the use of a spike microphone constituted a trespass against which the Fourth Amendment's guarantees did apply. Then, in Wong Sun v. United States, 361 U.S. 471 (1963), the Court held that obtaining incriminating conversations by recording devices without a warrant was an illegal search and seizure.

In protecting privacy in the traditional areas of search and seizure, that is, areas other than electronic surveillance, the Court was slow to evolve stringent constitutional standards. The rule excluding evidence illegally seized which was developed in Weeks in 1914 as effective against the federal government was not applied against the states until 1961 in Mapp v. Ohio, 367 U.S. 643. Mapp overturned Wolf v. Colorado, 338 U.S. 25 (1949), which had held that although

36 Ibid., 470-71.
"security of one's privacy against arbitrary intrusion by the police" was enforceable against the states through the due process clause, "the ways of enforcing such a basic right raise questions of a different order."\textsuperscript{37} Mapp, in overturning Wolf, held that "all evidence obtained by searches and seizures in violation of the Constitution, is by that same authority, inadmissible in a state court."\textsuperscript{38}

In the years between Wolf and Mapp, the Court encountered alleged violations of the Fourth Amendment's "unreasonableness" provision. In Rochin \textit{v. California}, 342 U.S. 165 (1952), police officers had forceably pumped the stomach of a prisoner and used the evidence to convict him of drug trafficking. Justice Felix Frankfurter, who had written the Wolf opinion, also wrote this opinion. But without a mention of Wolf, he said that such coerced confessions were constitutionally excluded from state trials through the Fourth and Fourteenth Amendments "not only because of their unreliability ..." but because, even if independently verifiable, they "offend the community's sense of fair play and decency."\textsuperscript{39} Furthermore, Frankfurter said the stomach pump proceedings "do more than offend some fastidious squeamishness or private sentimentalism. This is conduct that shocks the conscience."\textsuperscript{40} Justices Hugo Black and William Douglas concurred in the decision, but insisted that the appellant's Fifth Amendment privilege against self-incrimination had been clearly violated. Justice Douglas said that

\textsuperscript{37}338 U.S. 25, 27-28 (1949).
\textsuperscript{38}367 U.S. 643, 655 (1961).
\textsuperscript{39}342 U.S. 165, 173 (1952).
\textsuperscript{40}Ibid., 172.
"words taken from [an accused's] lips, capsules taken from his stomach, blood taken from his veins are all inadmissible ... without his consent ... because of the command of the Fifth Amendment." 41

In another case involving Fourth Amendment rights before the Mapp decision, Irvine v. California, 347 U.S. 128 (1954), the Court faced the problem of reconciling the divergent implications of Wolf and Rochin. In Irvine, police illegally entered the Irvin es' house, installed electronic surveillance equipment, and from a nearby garage, recorded conversations. The police again illegally entered and ransacked the house and arrested the suspect. Nevertheless, the Court relied on Wolf to include evidence obtained. The Court said that Rochin had involved elements lacking in Irvine: an illegal search of the defendant's person and coercion. 42

The security of the home, person, and effects was set on a somewhat stronger base by the holding in Mapp. However, in other claims of Fourth Amendment privacy rights, the Court gave the government more latitude to determine what was a constitutional search and seizure. The Court relaxed the warrant restrictions on federal searches and seizures when "incident to arrest" 43 and when evidence was in "plain view." 44 Also, in an administrative inspection case, Frank v. Maryland, 359 U.S. 360 (1959), the Court, despite the invasion of privacy alleged, upheld the health department's warrantless inspection of the

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41 Ibid., 179.
44 See Ker v. California, 374 U.S. 23 (1963).
appellant's home for rodents because the inspector had substantial evidence from a search of the grounds. The majority opinion by Justice Frankfurter recognized a right to privacy but seemed to say that it could only be invoked against searches for criminal evidence, and not solely to protect one's privacy. Justice Douglas, with whom Chief Justice Earl Warren and Justices Black and Brennan joined, dissented:

The Court said in Wolf ... that "the security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society." Now that resounding phrase is watered down to embrace only certain invasions of one's privacy.45

In other cases involving the claim of inviolability of the body, as in Rochin, the Court generally balanced the privacy claim against the state's interests in health, public safety, and morality. In Breithaupt v. Abram, 352 U.S. 432 (1957), where the results of a blood-alcohol test administered on an unconscious man were admitted in evidence for a manslaughter conviction, the Court upheld the admission of the evidence. It said that "as against the right of an individual that his person be held inviolable ... must be set the interests of society ...."46 Justice Black joined with Justice Douglas in the following dissent:

But the sanctity of the person is equally violated and his body assaulted where the prisoner is incapable of offering resistance .... Nor would I draw a line between involuntary extraction of words from his lips, the involuntary extraction of the contents of his stomach, and the involuntary extraction of fluids of his body when the evidence obtained is used to convict him.... The indignity to the individual is the same in one case as in the other...47

47Ibid., 432, 443-44.
By the beginning of the early sixties, it was unclear whether the Court had determined "inviolability of the body" to be a privacy right protectable through the Fourth and Fourteenth Amendments. Rochin had declared that forced stomach pumping was "conduct that shocks the conscience" whereas Breithaupt permitted a blood-alcohol test without consent. Two cases reaching the Supreme Court in 1964 were inconclusive with respect to fashioning a right to privacy, but were significant indications of increasing litigation in this constitutional area. In Schlagenauf v. Holder, 379 U.S. 104 (1964), the petitioner alleged an unconstitutional invasion of the privacy of his body since good cause was not shown for the lower court's requiring multiple medical examinations to be performed on his person. The Court did not rule on the privacy question, but did vacate the judgment of the lower court. However, Justice Douglas, dissenting in part, would deny at any time a compulsory medical exam upon the defendant in a damage suit. He said that "[n]either the Court nor Congress ... has determined that any person whose physical or mental condition is brought into question during some lawsuit must surrender his right to keep his person inviolate."48

In a second case in 1964, the Court denied certiorari. In York v. Story, 324 F. 2d 450 (9th cir. 1963), cert. denied 376 U.S. 939 (1964), a federal court had held for the first time that a right of privacy through the "liberty" clause of the Fourteenth Amendment had been violated by the state. In

48 379 U.S. 104, 126.
York, a young woman brought a damage suit claiming an abridgment of her civil rights when, after she had reported an assault on her person, police forced her to undress before them for photographs and then passed the photographs around the station. The lower court spoke of the privacy which was invaded in the following terms:

We cannot conceive of a more basic subject of privacy than the naked body.... A search of one's home has been established to be an invasion of one's privacy against intrusion by the police, which, if "unreasonable," is arbitrary and therefore banned under the Fourth Amendment. We do not see how it can be argued that the searching of one's home deprives him of privacy, but the photographing of one's nude body, and the distribution of such photographs to strangers does not.\(^49\)

Although finding that the photographing of the plaintiff's body had been a violation of the Fourth Amendment, the lower court held that Fourth Amendment grounds could not dispose of the whole case, since the subsequent acts of police in distributing prints of the photographs could not be characterized as unreasonable searches. Therefore, the court concluded that all the unlawful acts of the police "constituted an arbitrary intrusion upon the security of her privacy, as guaranteed to her by the Due Process Clause of the Fourteenth Amendment."\(^50\)

The Fourth and Fifth Amendments were the starting point for the development of a right of privacy by the Court. However, the gains made by Silverman and Wong Sun in the area of electronic surveillance and by Mapp, Rochin, and York in areas of searches and seizures were meager when weighed against the general permissiveness of the Court in electronic surveil-

\(^49\) 324 F. 2d 450, 455 (9th cir. 1963).
\(^50\) Ibid., 456.
lance, as evidenced by On Lee and Lopez; in the area of police searches and seizures, as evidenced by Irvine and Breithaupt; and in the area of administrative searches, as evidenced by Frank.

First Amendment Privacy Protections

Privacy was more effectively protected in the fifties and early sixties by recognition of those privacy interests implicit in the specific guarantees of the First Amendment. After the end of World War II, new specialists in intrusions were created with new arguments for their indispensability: the war itself, the Cold War, and national security. Their creation, however, also created the necessity for protecting the individual's political privacy rights under the First Amendment. The Office of Strategic Services, Military Intelligence, Federal Bureau of Investigation, and Central Intelligence Agency carried on far-flung activities in surveillance and invasion of civilian privacy in order to acquire information and monitor the actions of Americans. The House Un-American Activities Committee and the Senate Subcommittee on Internal Security conducted extensive investigations into the lives of citizens considered "security risks" and forced the administrative branch of the federal government, as well as state governments and private

51 Justice Brandeis once wrote that we should "be most on our guard to protect liberty when the government's purposes are beneficient...." Olmstead v. U.S., 277 U.S. 438, 479 (1928).

52 See Ralph Nader, "Invasion of the Home," in Uncle Sam Is Watching You, p. 231, for a review of the extension of the surveillance technology into the private sector.
employers, to institute "security checks" on employees, bringing into use personality testing and lie detecting.

Though the intensity of anxiety about "national security" declined in the sixties, the investigative, prying, and snooping routines of the government remained.\(^5\) They remained for numerous reasons, but probably most of all because of the self-perpetuating way in which bureaucracy operates. Once a program has been started, the political and occupational interests keep it going. There is still a dangerous overtone to the surveillance of today. Government agencies gather and assemble facts about millions of ordinary Americans into computers and make this information available to private organizations and businesses under less-than-adequate safeguards. Americans hear that they "are rapidly entering the age of no privacy ..." and the next step in sophisticated snooping may be electronic snooping inside the brain "so that even our thoughts may be made available to anyone with curiosity and a sensitive machine."\(^5\)

In popular novels written since the 1949 publication of George Orwell's 1984, the citizen is urged to become more fearful.


of the threats that government intrusions pose for society.\textsuperscript{55} In a not-so-humorous vein a law professor has predicted that by the year 2000, "someone will make a fortune merely by providing, on a monthly, weekly, daily, or even hourly basis, a room of one's own."\textsuperscript{56}

Thus it is apparent that First Amendment rights and closely related rights of privacy in ideas and actions "cannot survive ... unless the courts and public mores install a curtain of law and practice to replace the walls and doors that have been swept away by the new instruments of surveillance."\textsuperscript{57} However, it has only been in recent years that the outrage of congressional committees and the press over the enormities of government intrusion has activated a new concern for the protection of privacy. In other words, what Americans have considered to be as democratic as the secret ballot--the privacy of individual political ideas--has not always been protected by government. This freedom, as well as other facets of individual behavior--one's beliefs, emotions, associations, reputation, and personal conduct--was not defined by the Court until the mid-twentieth century.

In the fifties the Court recognized the threat posed by government interrogation and prying into one's private ideas and associations and, in a series of cases, actively protected privacy rights through the First Amendment. In \textit{NAACP v. Alabama}, 357 U.S. 449 (1958), the right of associational


\textsuperscript{57}Westin, \textit{Privacy and Freedom}, p. 398.
privacy was enunciated. In *Watkins v. United States*, 354 U.S. 178 (1957), the right of political privacy was identified. The right to anonymity in public expression was most ably presented in *Talley v. California*, 362 U.S. 60 (1960).

In NAACP individual privacy interests were being invaded by Alabama's efforts to require the National Association for the Advancement of Colored People (NAACP) to turn over its membership and officer lists. The Court found a "vital relationship between freedom to associate and privacy in one's associations" and referred to that privacy as one of the fundamental freedoms protected by the due process clause of the Fourteenth Amendment. In a subsequent case filed against the NAACP, *La. ex rel. Gremillion v. NAACP*, 366 U.S. 293 (1961), the Court held two state statutes unconstitutional which, as applied to the NAACP, required the filing of the names and addresses of officers and members and affidavits testifying that none of the officers of any group with which the NAACP was affiliated was subversive.

In cases such as these the Court defended the privacy of association where the association was not subversive and not engaged in unlawful activities. This distinction was made by the Court in NAACP when it referred to its decision in *N.Y. ex rel. Bryant v. Zimmerman*, 278 U.S. 63 (1923), which had upheld the state's requirement that the Ku Klux Klan file

58 357 U.S. 449, 462 (1958). "Freedom to engage in association," though not a specifically enumerated right in the Bill of Rights, was nonetheless held by the Court in *NAACP v. Alabama*, 357 U.S. 449, 430, to be "an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."
the names of its members. That decision was based on the unlawful nature of Klan activities. The distinction was also made with reference to the case of *Uphaus v. Wyman*, 360 U.S. 72 (1959), where the state's interest in obtaining the names of the guests at the World Fellowship camp, known to have Communist connections, outweighed the constitutional interests asserted by the appellant as to his associational privacy. Through such cases the Court made clear that privacy cannot be an unlimited right of associations "that seek undesirable social objectives whose methods of operation run afoul of reasonably applied conspiracy doctrines."59

The Court made certain also that the government clearly ascertained the unlawful or conspiratorial nature of associations. Thus, in *Gibson v. Florida Legislative Investigating Committee*, 372 U.S. 539 (1963), the Court reversed the contempt conviction of the president of the Miami branch of the NAACP. The decision rested on the lack of sufficient evidence by the legislature to prove a substantial connection between the Miami NAACP and Communist activities.

Political privacy was also identified as an important adjunct to the freedoms of the First Amendment in *Watkins*. In that case, however, the right was not granted absolute status, but the Court said it would be protected in Congressional committee hearings if "pertinency" was not satisfied.60


60In *Watkins*, the Court reversed the conviction of a labor union official who, before the House Un-American Activities Committee, refused to answer questions about persons no longer in the Communist Party.
Chief Justice Warren, writing for the Court, said: "There is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress." 61

In *Sweezy v. New Hampshire*, 354 U.S. 234 (1957), the state equivalent of *Watkins*, the refusal of a guest lecturer at a state university to answer questions asked of him by a state official investigating alleged subversive activities had led to a conviction for contempt. Chief Justice Warren, who wrote the Court's opinion overturning the conviction, said, "We do not now conceive of any circumstance wherein a state interest would justify infringement of rights in these fields." 62 The broadest statement of political privacy yet written by members of the Court, however, was Justice Frankfurter's concurring opinion:

> ... the inviolability of privacy belonging to a citizen's political loyalties has so overwhelming an importance to the well-being of our kind of society that it can't be constitutionally encroached upon on the basis of so meager a countervailing interest of the state. 63

Furthermore, he said that it was the Court's duty to balance "the right of a citizen to political privacy as protected by the Fourteenth Amendment and the right of the state to self-protection." 64

In protecting the right to anonymity in public expression in *Talley*, the Court found the right closely related to the right of associational privacy enunciated in the NAACP cases. In *Talley*, a California ordinance requiring

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63 Ibid., 265.
64 Ibid.
handbills to carry the names and addresses of sponsors was invalidated. The Court noted the important role that anonymous pamphlets and circulars had played in mankind's progress and held that the California ordinance "would tend to restrict freedom to distribute information and thereby freedom of expression." 65

These three First Amendment rights of privacy were substantially well established by the sixties, but they were, for the most part, political rights, and were still to be weighed against the "countervailing interest of the state." An area of contended First Amendment privacy that the Supreme Court did not protect during that decade was the so-called right of "solitude" or the right not to speak or be spoken to, such as the right of a traveler on public transportation to be free from imposed radio music and news. In Public Utilities Commission v. Pollak, 343 U.S. 451 (1952), the Court reviewed a court of appeals decision that held that a constitutional right of privacy had been violated by the Washington, D.C., public utilities commission's imposition of radio news and music on the complainant. The Court balanced the privacy claim against the interests of the general convenience of passengers and found the latter interest more substantial. Moreover, the Court held that the commission had not violated any constitutional right of riders under the First Amendment or under the "liberty" concept of the Fifth Amendment.

The fifties and early sixties did not see the blossoming of a right to privacy since the Olmstead rationale

65362 U.S. 60, 64 (1960).
remained (although some weakening of it occurred), the inviolability of the body was still not secured, administrative searches were upheld, and police were given even greater latitude in search and seizure procedures. However, the "spirit engendered" by the Court's activism in protecting First Amendment privacy rights during those years perhaps gave impetus to the judicial formulation in 1965 of a general right of privacy.

66 "Privacy after Griswold: Constitutional or Natural Law Right?" p. 819.
CHAPTER II

A UNITARY RIGHT OF PRIVACY ENUNCIATED

Until Griswold v. Connecticut, recognition by the Court of a right to privacy was either adjunct to a criminal action, especially when it could fit neatly into the search and seizure category, or it was expressed in terms of First Amendment guarantees of freedom of expression. Proponents of an independent doctrine of privacy foresaw the development of a broader interpretation within the concept of "liberty" through the due process clause of the Fifth and Fourteenth Amendments, especially after a lower federal court had successfully used such an interpretation in the York case. The chief proponent of this view was Justice William O. Douglas, one of the Court's strongest libertarians and most steadfast supporter of a right to privacy.

Justice Douglas came on the Court in 1939. In 1942 in Goldman, he adhered to the Olmstead "trespass" doctrine, but by 1952, in On Lee v. U.S., he had had a change of heart, dissenting in favor of the protection of privacy under the Fourth Amendment. As discussed in Chapter I, Justice Douglas urged recognition of a right of privacy through the self-incrimination clause of the Fifth Amendment in Rochin and in Irvine.

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1 381 U.S. 479 (1965).
2 See above, pp. 19-20.
and to some extent in Schlagenhauf. He also argued that the Wolf decision afforded protection of a Fourth Amendment right of privacy. In his 1958 book, The Right of the People, avowing his devotion to civil liberties, Douglas used words very similar to those he would use in the majority opinion in Griswold:

There is, indeed a congeries of ... rights that may conveniently be called the right to be let alone. They concern the right to privacy--sometimes explicit and sometimes implicit in the Constitution. This right of privacy protects freedom or religion and freedom of conscience ... the privacy of the home and the dignity of the individual.

Justice Douglas expressed a belief that natural rights, explicit or implicit in the Constitution, were broadly based in morality and religion: "The penumbra of the Bill of Rights reflects human rights which, though not explicit, are implied from the very nature of man as a child of God." Although he stated that "every Fourth Amendment contest involves to a degree an issue of privacy," he did not choose that Amendment as his basis for the right to privacy, but concluded that due process includes those guarantees "implicit in the concept of ordered liberty" and outlaws practices "repugnant to the conscience of mankind." This concern for those guarantees "implicit in the concept of ordered liberty" led him to write in his dissent in Public Utilities Commission v. Pollak that along with privacy implications in

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5 Ibid., p. 89.
6 Ibid., p. 149.
8 343 U.S. 451 (1952).
the First, Fourth, and Fifth Amendments, there was also a guarantee of privacy within the "liberty" of the Fifth and Fourteenth Amendments.

Although Justice Douglas had a strong ally in Justice Hugo Black in defending civil liberties, including a broad interpretation of privacy through the First Amendment and the self-incrimination clause of the Fifth Amendment, he and Black separated with regard to the Fourth Amendment's right of privacy and to guarantees of privacy and other areas of "the right to be let alone" through substantive due process. Although they were both libertarians, it was Douglas' view that the Constitution was written to, in John Marshall's famous words, "be adapted to the various crises of human affairs," whereas Black opposed any such view, acknowledging his utter distaste for "judicial legislating." Black believed judges should seek the Framers' intent by examining the "literal meaning" of the words in the Constitution. It was this essential difference of opinion about the judicial function that was to emerge between these two justices in the Griswold decision.

In Poe v. Ullman, substantially the same case as Griswold, but which the Court did not decide for lack of justiciability, Justice Douglas, in his dissenting opinion, again suggested that the substantive guarantee of "liberty" embodied

9Douglas included within this right such freedoms as religion, travel, and silence. See Douglas, The Right of the People, chap. 2.
a right to privacy:

Though I believe that "due process" as used in the Fourteenth Amendment includes all of the first eight amendments, I do not think it is restricted and confined to them.... "Liberty" is a conception that sometimes gains content from the emanations of other specific guarantees ... or from experience with the requirements of a free society.12

Thus, when Griswold came before the Court in 1965, involving the same area of unenumerated "liberty," it seemed the opinion was already prepared in Douglas' mind. The only remaining task was to win a majority of the Court's support.

Background of the Litigation

It had not been an easy road that finally led opponents of Connecticut's tough anti-birth control laws to a satisfactory Supreme Court decision, indeed to positive action in any form. Between 1917 and 1963, Planned Parenthood and other birth control groups had seen no less than twenty-nine bills for modification or repeal of the contraceptive laws die in the state legislature. Connecticut's contraceptive laws were known to be the strictest among the state versions of the federal Comstock Act of 1873.13 The Connecticut statute prohibiting use of contraceptive devices was enacted in 1879 and, after revisions in 1883 and 1958 which added an accessory statute, the statutes at issue were the following:

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12Ibid., pp. 515-17.
13Peter Smith, "The History and Failure of the Legal Battle Over Birth Control," Cornell Law Quarterly 49 (Winter 1964): 275. The federal Comstock Act stood until 1932 when the courts ruled it virtually nugatory. The Connecticut statute was enacted under pressure from the Protestant community, as part of a general moral decency act. In 1879 the statute was removed from the act and made a single statute with an accessory clause to include those who assisted people in obtaining contraceptives. Ibid.
Any person who uses any drug, medicinal article
or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or
imprisoned not less than sixty days nor more than
one year or be both fined and imprisoned. 14

Any person who assists, abets, counsels, causes, 
hires or commands another to commit any offense 
may be prosecuted and punished as if he were the 
principal offender. 15

Since the legislative tactic seemed futile, in 
1935 the Birth Control League of Connecticut began the legal 
struggle by opening a birth control clinic which resulted 
in State v. Nelson 16 and Tileston v. Ullman, 17 in both of which 
the Connecticut Supreme Court of Errors affirmed the constitutionality of the statutes, holding them to be reasonable 
exercises of the state's police powers. The prosecution in 
both cases concerned the accessory statute. The Supreme 
Court denied appeal in Tileston on grounds that the plaintiff, 
a doctor, had no standing to assert his patients' rights. 18

A massive legal assault took place between May 1958 
and May 1959, in which nine persons brought action for declaratory judgment as to the constitutionality of the statutes. The case that reached the Court, Poe v. Ullman, 19 involved 
litigants under the fictitious names of Poe, Doe, and Hoe, 
who sought to establish their right to receive contraceptive 
information from their physician, Dr. Buxton, also a litigant. 20

15 Section 54-196, ibid..
16 126 Conn. 412, 11 A. 2d 856 (1940).
17 129 Conn. 84, 26 A. 2d 582 (1942).
18 310 U.S. 44 (1940), appeal dismissed.
20 For information about the other six persons who had brought action, see Smith, "Legal Battle over Birth Control," p. 239.
They contended that the statute prohibiting the use of contraceptives deprived them of life and liberty without due process of law.\(^{21}\) However, in the opinion of the Court, written by Justice Felix Frankfurter, the history of general non-enforcement of the birth control statute and the remote likelihood of arrests under it, demonstrated that the case neither possessed the immediacy required nor was a true controversy. Hence, the Court should not adjudicate any constitutional question involved. Joining Justice Frankfurter in the opinion were Chief Justice Earl Warren and Justices Tom C. Clark, Charles E. Whittaker, and William J. Brennan. Of course, as mentioned earlier, Justice Douglas dissented, enunciating a marital privacy right which the Court would later accept:

The regulation as applied in this case touches the relationship between man and wife: It reaches into the intimacies of the marriage relationship ... when the State makes "use" a crime and applies the criminal sanction to man and wife, the State has entered the innermost sanction of the home. If it can make this law, it can enforce it. And proof of its violation necessarily involves an inquiry into the relations between man and wife. That is an invasion of the privacy that is implicit in a free society.... This notion of privacy is not drawn from the blue. It emanates from the totality of the constitutional scheme under which we live.\(^{22}\)

Justice John M. Harlan, in dissent, believed that the statute was "an intolerable and unjustifiable invasion of privacy in the conduct of the most intimate concerns of an individual's life"\(^{23}\) and found it unconstitutional on Fourteenth Amendment grounds:

\[\ldots\] the full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by

\[^{22}\]367 U.S. 497, 519-21.
\[^{23}\]Ibid., 539.
the precise terms of the specific guarantees elsewhere provided in the Constitution. ... It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints ... and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.²⁴

The Facts of Griswold

In reaction to the Court's denial of appeal in Poe, the Planned Parenthood League of Connecticut, in open defiance of the law, made known that it would proceed to open birth control clinics.²⁵ With the opening of a clinic at New Haven, Estelle T. Griswold, Executive Director of the Planned Parenthood League of Connecticut and Dr. Charles L. Buxton, physician, professor at Yale Medical School, and director of the New Haven Center, were arrested under the accessory statute. Litigation was initiated as State v. Griswold, State v. Buxton. After the statute was again upheld by the Connecticut Supreme Court, Griswold v. Connecticut came to the U.S. Supreme Court. Griswold and Buxton appealed to the Court on Fourteenth Amendment grounds, asserting that the offense with which they were charged—counseling and supplying contraceptives to married persons—should not be made a crime by the state. The Court, however,

²⁴ Ibid., 543. Justice Stewart joined the dissents of Justices Douglas and Harlan. Justice Black dissented by saying that he believed the constitutional issue should be decided.

²⁵ The League issued this statement upon the Poe decision: "We welcome the recognition by the Court that the law has in fact become a nullity." N.Y. Herald Tribune 21 June 1961, quoted in Smith, "Legal Battle over Birth Control," p. 2.5.
instead of finding standing of appellants under the accessory statute, found that they had "standing to raise the constitutional rights of the married people with whom they had a professional relationship," distinguishing the facts of standing and justiciability of Tileston.

The Court held that the Connecticut statute forbidding the use of contraceptives violated the right of marital privacy "lying within the zone of privacy created by several fundamental constitutional guarantees." The division of the Court at 7-2 would give one the impression, at first glance, of virtual unanimity in the new "penumbral right to privacy" theory. However, only Justice Tom Clark seemingly concurred fully in Justice Douglas' opinion, since he wrote no opinion. Justices John Harlan, Byron White, and Arthur Goldberg wrote distinctly separate opinions, with Chief Justice Earl Warren and Justice William Brennan joining in Justice Goldberg's. The dissents also were not casual, for Justices Hugo Black and Potter Stewart each wrote lengthy dissents, each joining in the other's.

The Opinion of the Court

Given Justice Douglas' posture on the right to privacy as inherent in the concept of "liberty," especially in his Poe dissent four years earlier, one would have expected him to place the Griswold decision directly on the due process clause of the Fourteenth Amendment. Instead, he enun-

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26 391 U.S. 479, 481.
27 The Court was obviously using the standing issue in order to be able to consider the question of "use" of contraceptives and the broader right to marital privacy.
28 391 U.S. 479, 485.
associated an implicit "right to privacy" based on a "penumbral" notion of constitutional rights. He had indeed spoken of "emanations of other specific guarantees" prior to Griswold, but it had been tied to the concept of "liberty" within the due process clause. Now he introduced a vague and uncertain theory which proposed that "emanating" from the various guarantees of the Bill of Rights were various "zones of privacy," each of which would be given constitutional status. He defended this penumbral theory by pointing to times when the Court had defended other unwritten "penumbral" rights:

The association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parents' choice—whether public or private or parochial—is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of those rights.

Justice Douglas mentioned Pierce v. Society of Sisters, Meyer v. Nebraska, and NAACP v. Alabama, as granting such peripheral rights to individuals and said that "without those peripheral rights the specific rights would be less secure." Guaranteeing the penumbral rights of privacy, he said, are various rights and the peripheral rights which emanate from them:

The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which

30 381 U.S. 479, 482.
31 Ibid., 483.
government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."32

Thus the basis for the Court's ruling that the contraceptive statute of Connecticut was unconstitutional was the "penumbral" right to marital privacy created by various "emanations" from the specific guarantees of the Bill of Rights. The reason that Justice Douglas formulated this basis is discernible early in the opinion when he notes that the appellants urge their claim upon the Fourteenth Amendment's Due Process Clause:

Overtones of some arguments suggest that *Lochner v. N.Y.*, 198 U.S. 45, 1905 should be our guide. But we decline that invitation as we did in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 1947...[et al.]

Justice Douglas obviously shied away from the "invitation" to reinvigorate the activist due process dogma of the *Lochner* era since the modern court's "hands off" stance would hardly allow it. In perhaps an effort to allay the Court's fears, he said:

We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions.34

Perhaps a reason for his formulating such a broad opinion was the hope of drawing together his dissident majority by eliminating the suggestion that the Court was attempting to encroach upon the state's powers to guard the health and

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32 Ibid., 432. See appendix for exact wording of these Amendments.
33 Ibid., 482.
34 Ibid.
morals of its citizens. Nevertheless, he shrewdly included some very able grounds for finding the statute unconstitutional as an infringement of due process when he said:

Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.35

Differing Evaluations on the Court

Indeed, the new fundamental right to privacy which arose from the "penumbras" of the Constitution seemed to attract some of the justices' attentions away from the spirit of substantive due process woven throughout the decision. Nevertheless, there was still sharp disagreement on the Court concerning the "totality of the Constitution" as the basis for the privacy right. Discussion centered on the determination of exactly what part of the Bill of Rights justified a new constitutional right broader than the traditional First, Fourth, or Fifth Amendment approaches.

Justice Goldberg rejected any necessity for a "penumbral" theory and argued that the right was fundamental through the Ninth and Fourteenth Amendments. First, he relied on the due process clause—which "protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights."36 The Ninth, he said, reveals that the Framers believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights

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35 Ibid., 485.
36 Ibid., 486.
specifically mentioned in the first eight Constitutional Amendments.\textsuperscript{37}

To somewhat abate the arguments lodged by strict constructionists like Justice Black against such liberal interpretations of the Ninth and Fourteenth Amendments, Goldberg made these points:

(1) In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the "traditions and (collective) conscience of our people" to determine whether a principle is "so rooted (there) ... as to be ranked as fundamental." \textsuperscript{38}

(2) [Dissenters] would permit experimentation by the States in the area of the fundamental personal rights of citizens. I cannot agree that the Constitution grants such power either to the states or to the Federal Government. \textsuperscript{39}

(3) Finally, it should be said of the Court's holding today that it in no way interferes with a State's proper regulation of sexual promiscuity or misconduct. \textsuperscript{40}

Justice Harlan, who in his Poe dissent had referred to the "liberty" of the Fourteenth Amendment as a "rational continuum,"\textsuperscript{41} argued in a concurring opinion that

the proper constitutional inquiry in this case is whether this ... statute infringes the Due Process Clause ... because the enactment violates basic values "implicit in the concept of ordered liberty."\textsuperscript{42}

Conceding a point to Justice Douglas' opinion, that "relevant inquiry may be aided by resort to one or more of the provisions of the Bill of Rights," he nevertheless concluded that "it is not dependent on them or on any of their revelations."

\textsuperscript{37}Ibid., 483.
\textsuperscript{38}Ibid., 493.
\textsuperscript{39}Ibid..
\textsuperscript{40}Ibid., 498.
\textsuperscript{41}367 U.S. 497, 543.
\textsuperscript{42}381 U.S. 479, 500.
Furthermore, "[t]he Due Process Clause ... stands on its own bottom."\(^{43}\)

Justice White, in his concurrence, based the unconstitutionality of the Connecticut statute on its "sweeping scope ... with its telling effect on the freedoms of married persons" and on its unreasonableness to the state's stated purpose: banning illicit sexual relationships. He, therefore, concluded that the statute "deprives such persons of liberty without due process of law." However, he stressed that the due process clause should not be used to invalidate statutes "if reasonably necessary for the effectuation of a legitimate and substantial state interest and not arbitrary or capricious in application."\(^{44}\)

As expected, the dissenters, Justices Black and Stewart, took offense with the natural law-fundamental law-due process approach of the majority. First, however, Justice Black challenged the new "right to privacy:"

The Court talks about a constitutional "right of privacy" as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge the "privacy" of individuals. But there is not. There are, of course, guarantees in certain specific constitutional provisions which are designed in part to protect privacy at certain times and places with respect to certain activities. Such, for example, is the Fourth Amendment's guarantee against "unreasonable searches and seizures."\(^{45}\)

However, with regard to the Fourth Amendment's guarantee of privacy, he said:

> It belittles that amendment to talk about it as though it protects nothing but "privacy." To

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\(^{43}\) Ibid.

\(^{44}\) Ibid., 507.

\(^{45}\) Ibid., 508.
treat it that way is to give it a niggardly interpretation, not the kind of liberal reading I think any Bill of Rights provision should be given."46

Furthermore, he said that the Court uses the term "right to privacy" as a "comprehensive substitute for the Fourth Amendment's guarantee against searches and seizures."47 As a strict constructionist, he viewed it as a term that "can easily be shrunk in meaning but which can also ... easily be interpreted as a constitutional ban against many things other than searches and seizures."48 Finally, concerning the overall decision of the Court, he 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.49

Concerning some of the justices' use of the due process clause and the Ninth Amendment as bases for finding the statute unconstitutional, Justice Black found the two to be the same thing--merely using different words to claim for this Court and the federal judiciary power to invalidate any legislative act which the judges find irrational, unreasonable, or offensive.50

Concerning the Ninth Amendment especially, he said that use of "such broad, unbounded judicial authority would make of this Court's members a day-to-day constitutional convention."51

Justice Black obviously drew the conclusion that the Court had in Griswold revived the due process clause "with an 'arbitrary and capricious' or 'shocking to the conscience'
formula," whereas he had hoped "that we had laid that formula, as a means for striking down state legislation, to rest once and for all...." 52

Justice Stewart, dissenting, believed the Connecticut statute to be "an uncommonly silly law," but agreed with Justice Black that "we are not asked in this case to say whether we think this law is unwise, or even asinine." He said, furthermore, that "we are asked to hold that it violates the United States Constitution. And that I cannot do." 53

Justice Stewart particularly attacked the Ninth Amendment approach of Justice Goldberg, saying that it "turn[s] somersaults with history." 54 He felt rather that the Ninth, like the Tenth Amendment, was

framed ... and adopted ... simply to make clear that the adoption of the Bill of Rights did not alter the plan, that the Federal Government was to be a government of express and limited powers, and that all rights and powers not delegated to it were retained by the people and the individual States. 55

Although the seven justices in the majority disagreed on the specific underpinnings of claims of right to privacy, they did agree that the contraceptive statute had invaded an area considered to be fundamentally and intimately private—the relationship of husband and wife. Whether a value "implicit in the concept of ordered liberty" or an "emanation" of the penumbral right of association of the

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52 Ibid., 522.
53 Ibid., 527.
54 Ibid., 529.
55 Ibid., 530.
First Amendment as Justice Douglas urged, the right to marital privacy is a constitutional right.

However, unlike some rights which the Court holds "absolute," especially those guaranteed in the First Amendment, the new right to marital privacy was qualified in several majority opinions so as not to be interpreted too broadly or absolutely. Justice Goldberg had said that it would not interfere "with a state's proper regulation of sexual promiscuity or misconduct" and that "the State may prevail only upon showing a subordinating interest which is compelling." Justice White had made it clear that states could enact statutes "reasonably necessary for the effectuation of a legitimate and substantial state interest and not arbitrary or capricious in application."

Reaction to Griswold

While the facts of the case dealt only with those limited to marital privacy, its reasoning was certainly intended to be applicable to many other unspecified situations. It was this fact of broadness and ambiguity, along with the shaky basis of the new right to privacy, with no specific provision of the Constitution to sustain it, that caused a general feeling of skepticism among legal analysts.

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56 "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." Ibid., 485.

57 Ibid., 498.
58 Ibid., 497.
59 Ibid., 507.
As if these considerations did not make the pronouncement of a unitary right to privacy novel enough, it could also be noted that the decision ignored the technical "trespass" requirements which had guided the Court when confronted with Fourth Amendment claims to privacy. Since there had been no police entry into the bedroom of the appellants or those married couples for whom they sought relief, no "trespass" argument could be substantiated. The Court had divorced its decision, therefore, from the "preferred position" given to "propertied privacy" in criminal prosecutions and from the traditional declaration of a privacy right only within a specified provision of the Bill of Rights.

Philosophical Criticism

In primarily a philosophical disagreement with the Court, Ernest Van Den Haag called the Court's opinion "an elaborate 'jeu de mots' in which different senses of the word 'privacy' were punned upon and the legal concept generally mismanaged in ways too various to recount." Van Den Haag felt that rather than "privacy," the issue was "autonomy" since the government was attempting to "regulate" personal affairs, not "get acquainted" with them. He sympathized with the conceptual difficulties "if the confusion was inadvertent," but "if deliberate, admired the Court's ingenuity!" Van Den Haag criticized the Court, however, for having "muddled the separate issues" of "privacy" and

60 Although Justice Douglas, maneuvering to find as many grounds as possible for the right to privacy, asked the moot question: "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship." Ibid., 485-6.
"autonomy" and suggested that conventional grounds should have been used for the decision, such as arbitrary interference with personal liberty in contravention of the due process clause or even an endeavor to establish a particular religious tenet in violation of the First Amendment.  

In agreement with Van Den Haag's philosophical argument was Hyman Gross who regarded the Griswold opinion as unsatisfactory as the decision was reached by "punning" on the privacy concept. He felt as did Van Den Haag that Griswold only contributed to the "conceptual muddle" around privacy.

Robert Dixon found the case "longer on yearning than on substantive content" and saw the concept of intrinsic privacy becoming so blurred in judicial usage as to make its "reasoned evolution ... quite difficult, if not impossible." Dixon felt that in order to narrow the field of privacy from the general "laissez faire" policy of a general freedom of action, the Court should think of "right to privacy" in terms of limits upon government's powers to force exposure, thus involving personal secrecy in conduct and ideas, plus the factor of solitude, involving freedom from certain social impositions and pressures. Dixon saw an additional dimension in Griswold of neither secrecy nor solitude, but a "right to access to information relevant to the specific condition of privacy at issue." Thus, he said that Griswold, by adding

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this dimension, did little to clarify privacy's conceptual dimensions. Furthermore, the Griswold opinion, he said, provides varied and flexible underpinnings to fit those situations that don't fit into established categories neatly but still seem to rest on values thought to be vital and which, for lack of a better term, are called privacy.

Criticism of Appellants' Standing

The first issue which critics challenged aside from the use of the "privacy" concept itself was Justice Douglas' broad approach to standing, allowing the defendant clinic supervisors to raise the rights of married couples not before the Court. This approach in itself raised the privacy question, for it submerged the question of whether the state had the power to regulate birth control clinics or whether the regulatory legislation was a reasonable means to accomplish the state's purpose of discouraging sexual promiscuity. These basic and difficult questions were virtually glossed over by the Court's rush to get into the business of privacy. (Noteworthy is the fact that the attorneys for the appellants indicated in their briefs that the bases of the appeal were a due process test of whether the statute was a reasonable means to achieve a proper legislative purpose, and a First Amendment test of whether the statute also violated appellants' freedom of expression to disseminate information and advise their patients.

Robert Dixon had this to say about the decision on appellants' standing:


64 Ibid., p. 215.
Suffice it to say for the present that unless some kind of information-access theory is recognized as implicit in Griswold, then it stands as a decision without a satisfying rationale. At least it will stand thus except for those who can join the Court in using the ploy of "standing" to remake the actual birth-control-clinic situation into a marital-use-of-contraceptives situation.65

The "standing" issue was important to the manner in which Justice Douglas arrived at the conclusion that the privacy of marriage had been invaded. Robert Dixon, continuing with his line of criticism, thus said:

With the issue thus remade, we have a modern morality play, with much judicial fingershaking at fictional police invading a fictional bedchamber of a fictional couple in search of evidence of the use of contraceptives. The actual result of Griswold may be applauded, but to reach this result, was it necessary to play charades with the Constitution?66

Constitutional Underpinnings

There seems to be a common assumption among a good number of those who reviewed Griswold that although the enunciation of a unitary right to privacy was novel, the theory behind it was not. It was compared to the natural rights theory which had been used to find police procedures unconstitutional abridgments of the basic rights of human dignity as in Rochin where police procedures were weighed on the scales of "conduct that shocks the conscience ... which offends the community's sense of fair play and decency."67 Also, Griswold's enunciation of a right to privacy was theoretically the same as the idea that we have certain basic rights "implicit in the concept of ordered liberty"  

65Ibid., p. 215.
which had been expressed in Palko, Napp, Irvine, and Rochin. One analyst of the Griswold opinion said that

the Court has no need to search for an identifiable, traditional "right to privacy" to justify the decision (since the Connecticut statute was simply inconsistent with the concept of reasonable liberty) ... which due process of law has come to connote for us and which we must let our nine justices apply.

For these same reasons, yet another Court observer said, "the case states no new theory...."

There was also opposition to the focus of five justices on the Ninth Amendment. Those already opposed to the breadth and multiplicity of the zones of privacy suggested by Justice Douglas felt that the focus on the Ninth did not help to narrow those zones: "Mr. Goldberg's approach, in short, does not offer assistance in defining privacy, but is at least congenial to further probing and experimentation."

At least two Court observers were generally pleased

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71 Many Court observers were surprised when five justices accepted the invitation to consider the Ninth Amendment. Justice Douglas included it among the enumerated rights from which the "penumbral" right to privacy could be derived, with Justice Clark concurring. Justices concurring with Goldberg's more extensive reliance on the Ninth were Warren and Brennan. See Thomas I. Emerson, "Nine Justices in Search of a Doctrine," Michigan Law Review 64 (December 1965): 219.

with the Court's efforts in *Griswold*. William M. Beaney in 1962 had urged that the Court "work out a right to privacy based on the 'liberty' concept in the Fifth and Fourteenth Amendments" or provisions of the First Amendment "since the inadequacy of the Fourth Amendment suggests that other constitutional sources of protection for the right need cultivation."\(^7\) After the *Griswold* pronouncement, Beaney said:

> The disagreement of members of the majority as to the Constitutional underpinning of the claim is less important than the fact that they agreed that a right to privacy had a constitutional basis.\(^7\)

Thomas I. Emerson said that "the Court's choice of the privacy doctrine, as the basis of its decision seems sound" and that the doctrine "represents the narrowest and most precise formula available, and the one most relevant to the issues presented." He felt that the creation of the privacy right "meets a critical need of society, and the new doctrine seems to have a viable and significant future."\(^7\)

**Importance and Scope of Griswold**

Actually, there were numerous possibilities for dealing with the *Griswold* case: the equal protection clause, the First Amendment, substantive due process, the right to privacy, or the Ninth Amendment.\(^7\) The importance of the case lay, however, in which choice was made and how it was proposed to be applied. In the equal protection area there

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\(^7\)Emerson, "Nine Justices," p. 233.

\(^7\)See generally, Emerson, ibid., for an excellent discussion of these alternatives.
were two possible claims: first, that the enforcement of the statute only against birth control clinics was discrimination against lower income classes of people, and second, that the statute effectively favored unmarried persons as against married couples. The use of the First Amendment claim would be possible only if a majority would allow it to be broadly interpreted so as to include conduct, since the case involved actual dispensing of contraceptives. Substantive due process would be a difficult route since, as previously mentioned, it summoned up the long-dead "Lochner" approach, besides involving the Court in making a purely moral judgment on a controversial issue. The Ninth Amendment had never been used to overturn a state statute, and was too untried to be used here to build a court majority.

For these reasons it can be inferred that the Court had no choice but to establish a new constitutional right to privacy. After having decided on the objective, the course had to be charted. It involved three problems: (1) source of the right, (2) standards for application, and (3) scope of its application. Sources have been extensively discussed through the opinions of the justices. The standards, however, were not made very clear by the Court. Justice Douglas seems to distinguish between the constitutionally invalid prohibition of use and the constitutionally permissible state regulation of manufacture or sale. He also alludes to the undue

77Contraceptives could be sold in Connecticut for prevention of disease, therefore favoring singles and persons engaged in extra-marital relations. Ibid., p. 220.
breadth of the Connecticut law.78

Justice Goldberg took the "undue breadth" approach, but also took a balancing approach as a standard for applying the right to privacy, placing a heavy burden of justification on the state. It is the Goldberg approach which was suggested by one Court observer to be the likely standard for future decisions dealing with privacy interests.

... a balancing of factors, with the government required to show a "compelling interest" supplemented by doctrines of undue breadth, vagueness and the feasibility of alternative measures.79

As to the third problem involved in effectively enunciating a constitutional right to privacy--scope of its application--the Court gave only subtle hints. It was the potential ramifications of the new right to privacy that had observers in 1965 wondering what was to come. However skeptical many observers of the Court were concerning the legal underpinnings of the right to privacy, one of them noted that the "greater significance" of Griswold was the Court's "forthright declaration, finally, that it would recognize as constitutional, claims of liberty not specifically tied to enumerations of the Bill of Rights."80 Professor Alan F. Westin, who is recognized as an authority on privacy in America, felt that favorable public reactions to the Griswold decision legitimized his position that a right to privacy is "vital to the present era."81 In 1966 Westin defended the

78 381 U.S. 479, 485.
unitary right to privacy in this statement:

If the Supreme Court's actions in the past fifteen years are viewed not as an extension of particular provisions of the Bill of Rights but as a case-by-case evolution of a functional, constitutional theory of personal and group privacy, the concept of privacy does not at all emerge as a "negative" concept in the Court's jurisprudence; it serves to protect positive needs of individuals and organizations in our society. 82

However, it appeared to other observers that the "penumbral" theory of privacy "would enable the Court to move its peripheries out boundlessly and at will." 83 This fear was dismissed by some who said the scope of Griswold was generally misunderstood by failing to distinguish from the Court's dicta the actual holding which did not require the right to privacy to be absolute in every matter. 84 Nevertheless, it was certain that the very breadth and vagueness of the opinion left the door open for "continued probing and refinement of the privacy principle." 85

If the scope of the right were measured strictly by the holding of the Court, and not the dicta, one would be concerned only with the treatment of the only specific privacy right mentioned—right of "marital privacy"—or in Justice Goldberg's opinion—rights of "marital privacy," the "marital home," and "to marry and raise a family." Thus, it would have been conceivable that the Court would consider

a right to privacy constitutionally recognizable only in the marriage relationship. However, since the Court nowhere in the opinion made such a limitation on its power in future cases involving privacy interests, it was not a reasonable prediction,

since constitutional doctrines have a way of expanding beyond the boundaries of the original case ... where, as here, the right established is one which responds so acutely to the growing needs of the society.86

If there existed the real possibility for the privacy doctrine to expand, at least in the context of marriage, family, procreation, and raising children, it was possible that action by the government to compel or limit births would also come within the invasion of privacy rights. The Griswold case thus held implications for sterilization laws, abortion laws, and government imposed birth control programs.87 It was possible for the right to privacy even to extend to other sex laws prohibiting such acts as adultery, homosexuality, and "perverse" sexual acts, although Justices Goldberg and White had expressly disclaimed that intention in their opinions. It was even conceivable that the right to privacy would be employed in a variety of other situations, such as electronic eavesdropping, various police practices, government investigations, loyalty oaths, official records of arrest, and the procedures of investigation involved in social welfare administration.88

87 Ibid., p. 232.
88 Ibid., pp. 232-33.
To be sure, the Griswold decision was vague, "and it is a certainty that when the Supreme Court of the United States employs vagueness in a decision, it is guaranteeing future litigation." With the assurance of litigation, the Court would face several choices: whether to narrow the privacy right, or use it at all; whether to seek a traditional course for protecting the "unenumerated liberties" through the due process or equal protection clauses; or whether to broadly interpret other enumerated rights such as the First and Fourth Amendments as they protect individual privacy.

CHAPTER III

THE COURSE OF PRIVACY PROTECTION

AFTER GRISWOLD

Several generalizations made after the Griswold decision now furnish meaningful insight into the Court's theory of a constitutional right to privacy almost a decade later:

(1) Development of the right to privacy was still subject to "continuing probing and refinement."¹

(2) Griswold created "varied and flexible underpinnings to fit those situations that don't fit into established categories neatly but still seem to rest on values thought to be vital"²

(3) The likely standard for measuring right to privacy claims would be the Goldberg approach of a "balancing of factors" including the government's showing of a "compelling interest," "undue breadth" or "vagueness," and "feasibility of alternative measures."³

(4) "The actual holdings ... did not require the right to privacy to be absolute in every matter."⁴

(5) The "vagueness" of the Griswold opinion was a guarantee of future litigation.⁵

² Ibid.
⁵ Ibid., p. 302.
All of these points have been relevant to the Court's determination of privacy rights since *Griswold*. The fact that decisions since *Griswold* upholding a privacy right have been based not on the "penumbral" theory but on an enumerated guarantee, either the First or Fourth Amendment or the due process and equal protection clauses of the Fourteenth Amendment, tends to support fully the prediction that the privacy right was subject to "continuing probing and refinement." *Griswold*’s "varied and flexible underpinnings: laid the groundwork for a variety of personal privacy claims to be upheld through the use of due process, equal protection, and specifically enumerated rights. Such balancing factors as "vagueness," "compelling state interest," "undue breadth," and "feasibility of alternative measures" became the standards for weighing the right to privacy against the state's interest and finding it "not ... to be absolute in every matter."

Although the privacy right was not found to be absolute in every matter, the constitutional holding of *Griswold* was flexible enough to reach into such areas as protecting pornographic materials in the home and guaranteeing the rights to marry whomever one chooses, to have or not to have children, and to make personal decisions in matters of family life. Finally, as to the last statement quoted above, the "vagueness" of *Griswold* has definitely generated litigation, for among those claims of privacy which followed *Griswold*, other than those just mentioned, were claims of rights to determine personal appearance and hairstyle and to communal and other non-traditional lifestyles, besides the many cases in criminal
action which were appealed on claims of invasion of privacy.

After Griswold came more practical applications of the privacy doctrine. Such high sounding natural rights theories as Justice William Douglas had expressed in Griswold were rarely heard from the Court in relation to the privacy claims it faced. The Court seemed bent on refusing to use the "penumbral" rights theory, although it significantly reaffirmed First and Fourth Amendment rights of privacy in the past decade. However, privacy rights protected under the Fourteenth Amendment, involving a variety of personal situations, were not based on a general right of privacy, but on the sexual, marital, and familial privacy rights enunciated in Griswold.

Since Griswold, two separate branches of the privacy right are distinguishable: the first involving protection of the home and personal possessions, including personal thoughts and conduct, primarily through First and Fourteenth Amendment rights and the guarantee against self-incrimination in the Fifth Amendment, and the second branch—the area specifically protected in Griswold—involving protection of sexual intimacies and personal decisions affecting marriage, procreation,

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6U.S. Senator Sam Ervin, D-N.C., Chairman of the Senate Subcommittee on Constitutional Rights, has said that on the basis of the complaints received by the committee, he has concluded that

the great majority of the grievances which individuals voice today about invasions of privacy are nothing more or less than violations of constitutional guarantees, especially those contained in the First, Fourth, and Fifth Amendments...


7This theory has been adapted from "Application of the Constitutional Privacy Right to Exclusions and Dismissals from Public Employment," Duke Law Journal (December 1973): 1044-5.
child bearing, and child rearing, through the due process and equal protection clauses of the Fourteenth Amendment. The right of privacy appears to have become two-fold, implying "secrecy" in the first area and both "solitude" and "autonomy" in the latter. Secrecy is an appropriate designation for the first area, expressed primarily as the home and personal possessions, including conduct and ideas, because it is an area which the government seeks to invade by forcing exposure of personal actions and ideas. Solitude and autonomy denote an intimate area of privacy in which the government is not necessarily snooping or forcing exposure, but in which it may attempt to interfere or regulate.

These two general areas will serve as the organizational framework for the following survey of privacy cases with which the Court has dealt from the Griswold decision in 1965 through May 1974. Under Personal Secrecy in the Home and Possessions, Including Conduct and Ideas, the following will be discussed: unreasonable search and seizure and surveillance, privacy of the home, privacy of association, and privacy of personal information. Under Solitude and Autonomy, Involving Personal Intimacies and Decisions, privacy of marriage, family, procreation, abortion, child-rearing, and sexuality will be discussed. The first area of privacy involving personal secrecy is discussed to determine whether the Court's traditional regard for Fourth and Fifth Amendment guarantees of privacy from Boyd through Mapp and for First Amendment guarantees of privacy since NAACP were to be related by the Court to the new general right of privacy.
which was announced in Griswold.

Privacy cases which relied explicitly on Griswold, and those which did not, will then be analyzed statistically, and that finding will be compared with conclusions this study has made about the trend of decisions affecting privacy interests. Finally, an area of privacy involving personal secrecy which the Court has not yet dealt with adequately—government accumulation of personal information—will be discussed along with the outlook for protection of privacy by other agents of the government.

**Personal Secrecy in the Home and Possessions**

*Including Conduct and Ideas*

**Freedom from Unreasonable Searches and Seizures**

In the area of safeguards for privacy in the Fourth Amendment, such as the prohibition of "unreasonable" searches and seizures and the requirement for warrants to issue only upon "probable cause," the Court continued to delineate the permissible scope of searches and to qualify standards of "reasonableness." In *Chimel v. California*, 395 U.S. 752 (1969), the Court reversed a conviction on the grounds that the search, though here incident to a lawful arrest, violated the Fourth Amendment's test of "reasonableness."\(^8\) However, in *United States v. Robinson*, 414 U.S. __, 94 S. Ct. 467 (1973), "reasonableness" included more than a search of the suspect's outer clothing for weapons. Justice Lewis F.

Powell, Jr., concurring in Robinson, said:

The search incident to arrest is reasonable under the Fourth Amendment because the privacy interest protected by the constitutional guarantee is legitimately abated by the fact of arrest.9

Citing Robinson as precedent, the Court in Gustafson v. Florida, 414 U.S. ___, 94 S. Ct. 488 (1973), affirmed the conviction of possession of marijuana after a search and seizure subsequent to arrest.

In Warden, Md. Penitentiary v. Hayden, 387 U.S. 294 (1967), the Fourth and Fifth Amendments' protections were claimed to have been abridged by the seizure of incriminating materials. However, the Court upheld the seizure since the materials were "evidentiary." Justice Douglas dissented on the grounds that the right to privacy protected by the Fourth Amendment with regard to personal effects had been unconstitutionally invaded. He spoke of the Court's traditional regard for privacy from Boyd through Mapp and said: "This right of privacy, sustained in Griswold, is kin to the right of privacy created by the Fourth Amendment."10

One of the Burger Court's most recent decisions involving the search and seizure of evidentiary material from an arrestee's body was in United States v. Edwards, 42 USLW 4463 (1974). The Court held there that the Fourth Amendment should not be extended to exclude from evidence certain clothing taken from the arrestee while he is in custody. Joining in a dissenting opinion written by Justice Potter Stewart were Justices William Douglas, William Brennan, and

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9 94 S. Ct. 467, 494.
10 387 U.S. 294, 324.
The intrusion here was hardly a choking one, and it cannot be said that the police acted in bad faith. The Fourth Amendment, however, was not designed to apply only to situations where the intrusion is massive and the violation of privacy shockingly flagrant. Rather, as the Court's classic admonition in Boyd... put the matter: "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way...." 11

In two recent cases involving compulsory disclosure to the government of personal financial records, the Court reached two distinctly similar conclusions about the privacy claims asserted. In the first case, Couch v. United States, 409 U.S. 322 (1973), where government's demand of an individual's tax records was claimed to have violated his right to privacy, the Court held that the privacy interest could not be claimed since the appellant had surrendered his privacy right when he gave his records to his accountant. More important, however, was the additional conclusion by the Court that privacy was not a claim here since much of tax information is public property anyway. Since the disclosure of the tax information exerted no "physical or moral compulsion," the criteria for Fifth Amendment privacy protection had not been met. 12

In the second case, California Bankers Association v. Shultz, 94 S. Ct. 1494 (1974), the Court upheld the controversial Bank Secrecy Act which requires in part that banks

disclose the names of those involved in domestic transactions of $10,000 or more. On the basis of standing, the Court overturned a lower court's ruling that the domestic disclosure requirement invaded the Fourth Amendment right of privacy. However, the Court, relying in part on Couch, said there was no invasion here of either a Fourth Amendment right or a right of privacy through the self-incrimination clause of the Fifth Amendment, since the "mere maintenance" by the banks of records required no disclosure to the government without due legal process.\(^1^3\) Furthermore, the Court sustained the government's contention that the law's provisions were a constitutionally permissible means to counter increasingly sophisticated crime. The dissenters were two "right to privacy" advocates, Justices Douglas and Marshall. Justice Douglas said that "customers have a constitutionally justifiable expectation of privacy in the documentary details of the financial transactions reflected in their bank accounts."\(^1^4\)

In criminal cases involving seizures of physical properties of the body, the Court has not extended a right of privacy through the Fourth Amendment, the self-incrimination clause of the Fifth, or through the Griswold decision, to protect the plaintiffs. In Schmerber v. California, 384 U.S. 757 (1966), the Court rejected a Fourth and Fifth Amendments' challenge to a compulsory blood-alcohol test since the test was "reasonable" and imposed no risk, and the probable cause

\(^{1^3}\) 94 S. Ct. 1494, 1513-14 (1974).
\(^{1^4}\) Ibid., p. 1527.
for defendant's arrest justified the test. Both Justices William Douglas and Hugo Black dissented in Schmerber. Justice Douglas said that he adhered to the views he expressed in his Breithaunt dissent, adding that since Griswold, the right to privacy was held to be within the penumbra of some specific guarantees of the Bill of Rights. Justice Black dissented, saying that the Court had wrongly departed from the teachings of Boyd, broadly construing the Fourth and Fifth Amendments.

Following the rejection of the privacy challenge in Schmerber, the Court upheld in United States v. Wade, 388 U.S. 213 (1967), the requirement for a defendant to exhibit his person for observation by prosecution witnesses at a post-indictment lineup. Also relying on Schmerber, but citing the "reasonableness" rule of Chimel, the Court even held permissible in Cupp, Penitentiary Supt. v. Murphy, 412 U.S. 291 (1973), the taking of incriminating samples of dried blood from a suspect's fingernails in the course of his arrest. However, in Davis v. Mississippi, 394 U.S. 721 (1969), the Court overturned a rape conviction on the grounds that fingerprinting petitioner without a warrant and using the results to convict him constituted a violation of his Fourth Amendment rights since there had been adequate opportunity for police to obtain a warrant. Justice Black dissented on the grounds that the decision was but one more in an ever-expanding list of cases in which this Court has been so widely blowing up the Fourth Amendment's scope that its original authors would be hard put to recognize their creation.15

Thus, Fourth and Fifth Amendment privacy interests in search and seizure cases involving police procedures continued to be balanced against the state's interest in self-protection by such tests as "reasonableness," "fact of arrest," and the necessity for seizing "evidentiary" material, especially when evidence was liable to be moved away if not seized immediately. However, in the area of administrative searches, the Court overruled its 1957 Frank decision. Frank had left unanswered the question of what grounds must be present to justify the inspector's right to enter one's home, and doubts developed about the viability of the decision, especially since two members of the bare majority in Frank—Justices Felix Frankfurter and Charles E. Whittaker—had retired from the Court. Camara v. Municipal Court of City and Co. of San Francisco, 387 U.S. 523 (1967), held that the Fourth Amendment prevents prosecution for a citizen's refusal to permit a warrantless code enforcement inspection of a personal residence. The Court required that inspections meet reasonable legislative or administrative standards. In a companion case, See v. City of Seattle, 387 U.S. 541 (1967), the Fourth was held to apply equally to business premises. However, in another administrative search case, Wyman v. James, 400 U.S. 309 (1971), a New York State caseworker's "visit" at a welfare recipient's home was upheld as "reasonable" and the Court upheld the termination of welfare benefits. 16

16See Wayne R. LaFave, "Administrative Searches and the Fourth Amendment: The Camara and See Cases," in The 1967 Supreme Court Review, ed. Philip B. Kurland (Chicago: University of Chicago Press, 1968), p. 33, where he says the Camara and See decisions were not enough. Even more critical, he
Freedom From Unreasonable Surveillance

The Court still refused to hold electronic surveillance unconstitutional under the Fourth Amendment. The privacy interests involved were not deemed compelling unless physical "trespass" had been involved, as in United States v. Black, 384 U.S. 983 (1966), where a spike microphone inserted into a wall to monitor defendant's conversation was held to be a "trespass" and therefore an abridgment of Fourth Amendment rights. Yet in Osborn v. United States, 385 U.S. 323 (1967), the use of a hidden recording device on the person of a federal agent to record incriminating statements which defendant made to the agent, was upheld by the Court. Justice Douglas dissented, advocating the recognition here of a constitutional right to privacy. His often-quoted opinion is increasingly relevant to the age of electronic surveillance:

We are rapidly entering the age of no privacy, where everyone is open to surveillance at all times, where there are no secrets from government. The aggressive breaches of privacy by the Government increase by geometric proportions. Wiretapping and "bugging" run rampant, without effective judicial or legislative control.

Secret television circuits in industry, extending even to restrooms, are common.... These examples and many others demonstrate an alarming trend whereby the privacy and dignity of our citizens is being whittled away by sometimes imperceptible steps.

says, is the need to ensure that authorized inspections are conducted with as little intrusion upon the citizen's (non-rebel's) privacy as possible. "The aspect of privacy of greatest concern to the greatest number of people is not rebelling against the inspection, but having the inspection at a convenient time." This type of litigation, he concedes, is infrequent, and it is unlikely the Court will be called upon to provide this protection. Therefore, the "only hope" is legislative and administrative self-control and a developing sensitivity to the problem. See also Daniel M. Migliore and Ronald D. Ray, "What v. Jarre: Is a Man's Home Still His Castle?" Journal of Family Law 10 (Winter 1971): 360.

17385 U.S. 323, 341.
The Court in *Berger v. New York*, 388 U.S. 41 (1967), seemed to signal some change in the Court's direction, by holding that wiretapping was under Fourth Amendment sanctions and by invalidating a New York statute authorizing official wiretapping. The Court reversed by 6 to 3 the conviction of Ralph Berger for conspiracy to bribe the chairman of the state liquor authority, since evidence had been obtained by wiretaps. But no clearcut opinion emerged; three statements were delivered by the majority and three by the minority. Even Justice Douglas in the majority and Justice Black in the minority agreed on one point: *Olmstead* had been overturned. Justice Tom C. Clark, however, writing one of his last opinions before his resignation, did not say so, nor did the other justices.  

Greater unanimity prevailed less than a year later in *Katz v. United States*, 389 U.S. 347 (1967), where the Court said that government agents involved in electronic eavesdropping were obligated to follow the requirements of the Fourth Amendment. "Suspicion" was not enough. A warrant was required. The Court emphasized that it would not make all bugging impermissible, but that the carefully limited use of electronic surveillance would be permissible when preceded by a warrant. The Court, however, did make "national security" and other prescribed areas, such as kidnapping, exceptions to the warrant requirement.

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19 In *Katz*, a conversation from a telephone booth was overheard by the FBI seeking evidence that Katz was transmitting wagering information across state lines. A "bug" was planted on top of the booth.
Justice Stewart, writing the Court's opinion, said that the Fourth Amendment "protects people, not places" and that the government's eavesdropping "violated the privacy upon which [defendant] justifiably relied."20 Justice Black was the sole dissenter in Katz. After reminding the Court of what he had said in his Griswold dissent, he said:

The Fourth Amendment protects privacy only to the extent that it prohibits unreasonable searches and seizures of "persons, houses, papers, and effects." No general right is created by the Amendment so as to give this Court the unlimited power to hold unconstitutional everything which affects privacy.21

Katz was not a total ban on unwarranted electronic surveillance, for it had made the exceptions for "national security" reasons and other specified areas. However, after Katz secured the warrant restraint on electronic eavesdropping, Congress acted at once to broaden the scope of eavesdropping by enacting the "Omnibus Crime Control and Safe Streets Act of 1968." In Title III, "Wiretapping and Electronic Surveillance," permission was granted for court-approved interceptions by federal, state, and local law enforcement officials in investigating a large number of crimes, and authority was given to the President to take measures he deemed necessary to safeguard the security of the nation. The Omnibus Act was an indication that the concern over "the plethora of problems riding a rising crime wave was echoed by the emergence of 'law and order' as a crucial political priority." The public was obviously "sold

21 Ibid., 373.
on the need for new laws allowing police investigatory forces to use electronic surveillance.'\textsuperscript{22}

The Court, however, qualified the "national security" exceptions of Katz in \textit{United States v. U.S. District Court}, 407 U.S. 297 (1972), where the federal government had engaged in the unwarranted electronic surveillance of dissident political groups under a veil of "national domestic security." The government attempted to use in its prosecution of dissidents the results of its wiretapping as evidence of identity. The Court in an 8-0 decision, held that even in the interest of domestic security, Fourth Amendment qualifications must be observed and that electronic surveillance is an impermissible investigative method unless judicially authorized by a warrant. The Court was confronted here with the issues of the power of the President, through his Attorney General, to authorize electronic surveillance. The Government's reliance on the Omnibus Act of 1968 was held by the Court to be without merit. There are two very significant facts about the Court's decision: "the government's attempts to revitalize the general warrant in the guise of national security has been decisively thwarted,'\textsuperscript{23} and there is a "thread of privacy running through this case


\textsuperscript{23} Alan Weisel, "Political Surveillance and the Fourth Amendment," \textit{University of Pittsburgh Law Review} 35 (Fall 1973): 70.
Such a standard for "upgrading of individual protection may not be forthcoming through traditional means" of the Fourth Amendment. It is vital that the constitutional right to privacy be more explicitly recognized in the Fourth Amendment's guarantees, as Justice Louis Brandeis urged long ago in his Olmstead dissent, and that law enforcers become more personally sensitive to the threats to individual and group privacy. In the wake of the United States District Court opinion, one court observer wrote very appropriately:

In the final analysis, therefore, the application of the warrant requirement to political surveillance--as in all other forms of search and seizure for which it is required--necessitates the same kind of voluntary and good faith compliance by governmental officials with constitutionally sanctioned procedures as do all other instances of the implementation of fundamental rights of the individual. Sadly, the events of recent years and months indicate the paucity of bona fides among our elected officials and their appointed assistants.

The prohibition of searches or surveillance without court order is becoming increasingly significant to the twin policy objectives of preserving morality of government and

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25 Ibid., p. 1030.

26 For example, it has even been suggested that police helicopter surveillance should be limited so as not to constitute an "invasion of the sanctity of a man's home and the privacies of life." See Amy Shiner, "Police Helicopter Surveillance," Arizona Law Review 15 (1973): 145.

27 Meisel, "Political Surveillance," pp. 70-1. Reference is here implied to the break-ins, during President Nixon's re-election campaign in 1972, of the Democratic Party Headquarters in the Watergate, into the office of Dr. Louis Fielding, psychologist for the "Pentagon Papers" defendant, Daniel Ellsberg, and other "dirty tricks" associated with the Nixon Administration which proceeded without judicial supervision.
preserving the privacy of the individual."\textsuperscript{28} The Fourth Amendment's right to privacy is, in Justice Douglas' words, not "self-executing," but is "only secure when its prohibitions are respected by law enforcement officers and enforced by the courts."\textsuperscript{29}

**Associational Privacy**

In another area of personal secrecy, the Court since Griswold has reaffirmed its position concerning the importance of the privacy of association. (In *NAACP v. Alabama*, the Court had found a "vital relationship between freedom to associate and privacy in one's associations." Though freedom to engage in association is not a specifically enumerated right, it was nonetheless held to be "an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment which embraces freedom of speech."\textsuperscript{30}) *DeGregory v. New Hampshire Attorney*, 383 U.S. 825 (1966), like the cases *Sweezy* and *Up haus* of the late 1950s,\textsuperscript{31} arose out of a New Hampshire subversive activities investigation. The defendant had refused to answer questions about his Communist activities prior to 1957. The Court reversed the contempt conviction, Justice Douglas writing that there was "no showing of 'overriding and compelling state interest' that would warrant intrusion into the realm of political and associational


\textsuperscript{30} 357 U.S. 449, 460, 462 (1958).

\textsuperscript{31} See above, pp. 23-4.
privacy protected by the First Amendment."\(^{32}\)

Some strong arguments have been made in recent years for the recognition of associational privacy, not only in the area of political activities of groups, but also in their social activities. One proponent of this broader right of associational privacy says that "the right to select one's intimate associates free of governmental compulsion, whether based upon the Criswell zone of privacy, the Ninth Amendment, or 'traditional' notions of substantive due process, is 'fundamental.'" This right, however, would be "limited by its very nature to the most personal social relationships."\(^{33}\)

The Court has not ruled decisively on this question, but in a restauranteur-sit-in case, Bell v. Maryland, 378 U.S. 226 (1964), Justices William Douglas and Arthur Goldberg in concurring statements, distinguished between unconstitutional denial of services in an establishment open to the public, and private social relationships. Justice Goldberg said:

> Prejudice and bigotry in any form are regrettable, but it is the constitutional right of every person to close his home or club to any person or to choose his social intimates and business partners solely on the basis of personal prejudice including race. These and other rights pertaining to privacy and private association are themselves constitutionally protected liberties.\(^{34}\)

The question of the right to freely select one's intimate associates and congregate in private clubs may yet

\(^{32}\) 323 U.S. 825.


\(^{34}\) 378 U.S. 226, 313.
be directly dealt with by the Court. A recent case involving a private club's refusal to serve a black man was decided by the Court without reaching the privacy question. In *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), the Court reversed the lower court's decision requiring the state, as liquor licensor of the club, to take action to remedy racial discrimination by the club. The Court ruled that the private club's action was not state action.35

**Privacy of the Home**

Although in the areas of "personal secrecy in the home and possessions" discussed thus far, the Court's decisions have not significantly reflected the impact of *Griswold*, the Court has nevertheless recognized a new aspect of the personal secrecy area, thereby giving a new significance to the right to privacy. This new aspect was defined in an unusual case, *Stanley v. Georgia*, 394 U.S. 557 (1969), as the "right to read or observe what [one] pleases... in the privacy of [the] home."36 However, the facts of the case and the underpinnings of the new right make *Stanley* relatively as difficult to interpret as was *Griswold*. For that reason, among others, it shows great potential for generating litigation covering a broad range of claims to personal activities in the home, and indeed has already done so.

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36394 U.S. 541, 564.
Although the appellant Stanley had been convicted of possession of obscene materials, his home had initially been legally entered and searched for evidence of book-making. While finding little evidence of that activity, federal and state agents did find three rolls of eight-millimeter film in a desk drawer in an upstairs bedroom. The state officer concluded, after viewing the film with a projector and screen also found in the bedroom, that they were obscene, and seized them.

Because of the seizure of materials for which the original warrant was not granted, the Court might have characterized the case as a search and seizure problem like Mapp; or because of the content of the materials involved, it could have characterized it as an obscenity case like Roth v. U.S., 354 U.S. 476 (1957); or still another ground could have been the privacy right as in Griswold. The Court chose the last alternative.27

Justice Thurgood Marshall, writing for the Court, said that mere private possession of any materials, whether obscene or not, was constitutionally protected because there is a fundamental "right to be free, except in very limited circumstances, from unwarranted governmental intrusion into one's privacy."38 The Court was not concerned with the ordinary Fourth Amendment grounds concerning the technical requirements of a warrant or the "reasonableness" of searches.

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27 Justices Stewart, Brennan, and White, concurring, urged reversal on Fourth Amendment grounds that an illegal search and seizure had taken place. Justice Black, though a strict constructionist and foe of privacy, was nevertheless an absolutist in terms of protections afforded by the First Amendment, and concurred in Stanley, viewing it as upholding First Amendment guarantees of free expression.

38 394 U.S. 557, 564.
without warrants, nor was it directly concerned with a determination of what "obscenity" is.

Since the state could not demonstrate a compelling interest for invading Stanley's private "library" of films in order to enforce the obscenity statute, the Court could find no basis for Stanley's conviction and thus held that private possession of obscene material "is [an] insufficient justification for such a drastic invasion of personal liberties." The Court, in effect, established a First Amendment form of "locus" or "res" test which had been only recently rejected in Katz where the Court had said that the Constitution "protects people, not places." The Court was not determining whether the film was constitutionally protected, but whether the state interest in suppressing pornography outweighed the constitutional protection given to the home. The Court approved the validity of obscenity regulation to protect children and unwilling adults from exposure, but could not justify the validity of these interests when mere private, consensual possession in one's home was on the balance. The Court made it clear that its ruling was intending no general rejection of the Roth doctrine in the distribution or public viewing of obscene materials, nor was it infringing upon the state's power to regulate "other items, such as narcotics, firearms, or stolen goods" in the home. By determining that the state's

39394 U.S. 557, 565.
41394 U.S. 557, 564.
allegation of obscenity was an insufficient justification for invasion of Stanley's privacy, Stanley "suggests that the notion of privacy cannot stand alone." 42 Although Justice Marshall wrote that the decision was not to disturb Roth's holding that obscenity is not protected by the First Amendment, his opinion, nevertheless, was expressed generally in First Amendment notions of freedom of expression and thought: "the right to read or observe what [one] pleases ... in the privacy of [the] home; 43 "to receive information and ideas, regardless of their social worth;" 44 to determine "the moral content of [his] thoughts;" 45 and "to satisfy his intellectual and emotional needs." 46

Legal experts and lower courts as well had problems interpreting Stanley's implications for obscenity, privacy, and searches and seizures. Though it had used First Amendment grounds, as well as privacy grounds, the Stanley decision is read now, after it has been tested by the lower courts and by the Supreme Court in recent obscenity cases, as purely a privacy case. 47 In a review of

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43 394 U.S. 557, 564.
44 Ibid.
46 Ibid.
the 1968 Supreme Court term, the Harvard Law Review termed Stanley's formulation as a clear First Amendment one and foresaw the task ahead of determining protected as opposed to unprotected forms of obscenity distribution. The belief that Stanley represented a dramatic shift in the Court's view of obscenity regulation was shared by a number of lower courts. Between 1969 and 1972, over fifty obscenity cases in the lower federal courts alone concerned the scope of the Stanley decision. For instance, in Karalexis v. Byrne, 306 F. Supp. 1363 (D. Mass. 1969), the court enjoined the state's prosecution of a theater owner under Massachusetts' obscenity laws for exhibition of "I Am Curious (Yellow)" in a public theater.

No occasion arose for a full treatment of the problems posed by Stanley until late in the 1970-71 term with the decisions in United States v. Reidel, 402 U.S. 351 (1971), and United States v. Thirty-Seven Photographs, 402 U.S. 363 (1971). The Court proceeded in these cases to "whittle Stanley's holding down to its facts" and exposed the decision as "hardly more than a reaffirmation that 'a man's home is his castle.'" In Reidel, pornographic booklets had been mailed in violation of a federal statute. The Court distinguished between the private right to possess pornography expressed in Stanley and the legitimate power of the government to regulate general obscenity:

50 Ibid., p. 312.
The focus of this language in Stanley was on freedom of mind and thought and on the privacy of one's home. It does not require that we fashion or recognize a constitutional right in people like Reidel to distribute or sell obscene materials.52

Reidel and Thirty-Seventy Photographs so stringently limited a person's ability to acquire obscene materials from outside the home that Justice Black, who had strongly concurred in the Stanley decision as upholding First Amendment rights of expression and thought, dissented in Thirty-Seventy Photos saying that now one can exercise his right in the home only if he "writes salacious books in his attic, prints them in his basement, and reads them in his living room."53

A series of more recent decisions, upholding governmental regulation of public viewing of obscene films, Paris Adult Theatre v. Slaton, 413 U.S. 49 (1973); upholding regulation of the acquisition and importation of obscene materials, United States v. 12 200-ft. Reels of Super 8mm. Film et al., 413 U.S. 123 (1973); and regulation of the transportation of obscene materials in interstate commerce, United States v. Orito, 413 U.S. 139 (1973), have further clarified the Court's intentions in Stanley. Chief Justice Warren E. Burger, delivering the Court's opinion in Paris, said the idea that "conduct involving consenting adults only is always beyond state regulation is a step we are unable to take."54 Burger also made it clear that the state retains an interest in the moral content of its citizens'

52 402 U.S. 351, 356.
53 402 U.S. 363, 382.
54 413 U.S. 49, 68.
thoughts and can restrict that content to protect the morality of society and prevent anti-social conduct. Furthermore, the Court has shown in the recent case, *Miller v. California*, 93 S. Ct. 2607 (1973), that obscenity standards may vary throughout the nation, and it has therefore instructed the courts to apply community standards to obscenity regulation.55

Since the Court erased all of Stanley's First Amendment content, the privacy aspect of the home is the narrow basis left for the decision. The emphasis now firmly established on simply "being at HOME" implies that one acquires the right to do things that one cannot do elsewhere. In fact, in *United States v. Orito*, Chief Justice Burger stated for the Court:

> It is hardly necessary to catalog the myriad activities that may be lawfully engaged in within the privacy and confines of the home, but may be prohibited in public.56

Activities such as smoking marijuana, gambling, and fornication could all be claimed as rights protected by Stanley's "privacy of the home." If Stanley does protect a range of activities similar in nature to private possession of obscene materials, then "privacy of the home" may prove to be a potent constitutional right. "Stanley must now be viewed as a supplement to the Fourth Amendment, giving added protection to the values of seclusion and repose centered about the home."57 However, to date, the courts have not made

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5593 S. Ct. 2607, 2617.
56413 U.S. 139, 142-3.
detailed inquiry into what activities may constitutionally go on in the home. Statutes regulating various practices considered harmful to society have been afforded a presumption of constitutionality. Yet, at least one member of the Court has spoken of the potential of \textit{Stanley}. Justice John M. Harlan placed \textit{Stanley} among the "[n]ew 'substantive due process' rules, that is, those that place ... certain kinds of primary private individual conduct beyond the power of the criminal law-making authority to proscribe."\textsuperscript{58}

Other facets of \textit{Stanley} in addition to "privacy of the home" allude to the possibility of a torrent of litigation. \textit{Stanley} spoke of "the right to satisfy [one's] emotional needs"\textsuperscript{59} and of the statute's "infringement of fundamental liberties."\textsuperscript{60} These statements could be extrapolated into a general doctrine of limitations on state power in the area of "fundamental liberties to satisfy one's emotional needs," such as private sexual conduct and drug use. In fact, in the area of marijuana rights, the report of the National Commission on Marijuana and Drug Abuse has recommended that all criminal sanctions be withdrawn from private use and possession of marijuana incident to such use, although the production and distribution of the drug would remain criminal activities.\textsuperscript{61} However, a very recent evaluation of the \textit{Stanley-Paris} impact on drug laws observes that

\textsuperscript{59} 394 U.S. 557, 565.
\textsuperscript{60} Ibid., 564.
"... the courts have been indifferent to arguments based on the right to privacy...." The article concludes that the nation's courts are not likely to extend the liberties of drug users since Paris held that even though "some human "utterances" or 'thoughts' may be incidentally affected, this does not bar the State from acting to protect legitimate state interest."62

Solitude and Autonomy,
Involving Personal Intimacies and Decisions

Griswold announced the existence of a constitutional zone of privacy, but "it did little to sketch the parameters of that zone."63 The case had a combination of elements which lower courts and various justices on the Supreme Court have interpreted in different ways. Griswold involved a place, the home, which either because of the sanctity of the activity involved or the sanctity of the home itself, might invoke constitutional protection. The general area of secrecy in the home and personal possessions has shown relatively little success, except for Stanley's narrow holding, in invoking stricter constitutional protection.

The Fourth Amendment exceptions to the home's privacy, the warrant and "reasonable" entry, in addition to qualifications made by the Court as to what is "reasonable" and what is "trespass," have functioned thus far to make the privacy of the home and possessions easily invaded upon a showing

of a compelling state interest. Privacy in this area since *Griswold* is, although a "fundamental" interest, nevertheless, non-absolute.

Since *Griswold*, however, another area of privacy which has become more conducive to invoking constitutional protection involves solitude in personal intimacies and autonomy in personal decision-making. Regardless of whether the Court further develops the *Stanley-Paris* notion of a protected locus, the Court has indeed made it clear that it will protect, apart from any locus test, certain fundamental privacy interests surrounding the solitude of human intimacies and the autonomy of personal decision-making relating to the course of a person's life.

**Marital and Familial Decisions**

The specific holding in *Griswold* that the "right of marital privacy" was a fundamental and constitutional right is now seen as part of a "rational continuum," in the words of Justice Harlan, of decisions protecting marriage, procreation, and family rights as a fundamental "liberty" guaranteed by the Fourteenth Amendment. The key cases in the early part of that "continuum" were *Meyer v. Nebraska*, 262 U.S. 390 (1923), in which the Court asserted that the "right to marry, establish a home, and bring up children" is a part of the "liberty" guaranteed by the Fourteenth Amendment; *Skinner v. Oklahoma*, 316 U.S. 535 (1942), in

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64 262 U.S. 390, 399.
which the Court held that compulsory sterilization of habitual criminals was a violation of the equal protection clause of the Fourteenth Amendment as a denial of "one of the basic civil rights of man" and that "[m]arriage and procreation are fundamental to the survival of the race;" and Pierce v. Society of Sisters, 268 U.S. 510 (1925), in which the Court extended Fourteenth Amendment protection to the "liberty of parents and guardians to direct the upbringing and education of children under their control."  

Although Skinner may be distinguishable as an equal protection case, and Meyer as a first amendment case, the characterization of family and procreation as "fundamental liberties" was a pertinent precedent for the Griswold holding and later decisions. It is suggested, furthermore, that Griswold marked a return to notions of substantive due process in areas relating to personal liberty.  

Continuing to develop this protection of the intimate relationship of marriage, the Court in Loving v. Virginia, 388 U.S. 1 (1967), affirmed a constitutional right to marry across the color lines, terming marriage again as one of the "basic civil rights of man," and held that "to deny this fundamental freedom ... is surely to deprive ... citizens of liberty without due process of law." Although "privacy" was not mentioned, the Court made a more fundamental determination of marriage.

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65 316 U.S. 535, 541.
66 268 U.S. 510, 543-5.
68 388 U.S. 1, 12.
and family rights through substantive due process language. The Court did this again in *Levy v. Louisiana*, 391 U.S. 68 (1968), where it held that a Louisiana statute denying a right of recovery by illegitimate children upon the death of their mother was discrimination contravening the equal protection clause of the Fourteenth Amendment and that the "rights asserted ... involve the intimate familial relationship between a child and his mother."69

The development of a zone of privacy protection around marriage and the family has thus far been viewed by the Court as a "traditional" zone. Although the Court has not dealt directly with rights to homosexual marriage or homosexual cohabitation without marriage, it recently confronted the right to adopt a non-traditional lifestyle, that is, communal living. In *Village of Belle Terre v. Boraas*, 94 S. Ct. 1536 (1974), a local zoning ordinance was challenged which barred communal living by restricting land use to one-family dwellings occupied by "traditional" family units or groups of not more than two unrelated persons. Action was brought to have the ordinance declared an unconstitutional violation of the equal protection clause and the rights of privacy, association, and travel. The Court voted 7-2 to sustain the right of localities to write zoning laws banning communal living in family residential areas.

Surprisingly, since the claim of right of privacy had been asserted, Justice Douglas was on the side of the

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69 391 U.S. 68, 71.
majority and wrote the Court's opinion. He wrote that states are entitled to make that kind of economic and social judgment and enforce it with zoning laws. Justice Marshall took up the banner of right to privacy, nonetheless, and asserted that appellee's constitutional right to privacy had been violated by an ordinance unnecessarily burdening the First Amendment right to association. He also urged that the Court recognize that Griswold guaranteed the right to "establish a home" as an essential part of the "liberty" of the Fourteenth Amendment.70

Yet in a case concerning a federal regulation of a non-traditional household, the Court took an opposite view. In Department of Agriculture v. Moreno, 413 U.S. 528 (1973), the Court affirmed the judgment of a three-judge district court that held as violative of the due process clause of the Fifth Amendment an amendment to the Federal Food Stamp Act which limited distribution of food stamps to households comprised of related persons. In this case, Justice Douglas concurred, observing that the provision "has an impact on the rights of people to associate."71 The strikingly different views of the Court in these cases either leads us to hypothesize that the Court has been inconsistent in the area of non-traditional living or that only where the government interest in regulating non-traditional living is deemed insufficient by the Court, would the right of persons to live in non-traditional settings be constitutionally protected.

7094 S. Ct. 1536, 1544.
71413 U.S. 528, 544.
Since Levy had held that the "illegitimate family" had equal rights to a "legitimate family," the latter hypothesis may be the answer.72

The Decision to Conceive

As Griswold, Skinner, and NAACP have demonstrated, the Court has indicated a continuing unwillingness to be bound by the specific terms of the Bill of Rights in defending fundamental liberties.73 Since the Griswold decision, Loving, Levy, and Department of Agriculture have used the fundamental rights approach to strike down statutes that violated the freedom to marry and the freedom of the "illegitimate" and "untraditional" family. Since the fundamental rights-due process approach "potentially allows courts so much discretion, judges ... must take care to set self-imposed limits in the form of reasoned and clear statements of the interests that are being protected."74

Thus, when the courts confront governmental invasion into private intimacies and decision-making, the question is whether the state's interest in the protection of public morality, health, or whatever, can justify the invasion.

Eisenstadt v. Baird, 405 U.S. 438 (1972), suggests that important freedoms cannot be curtailed without a sub-

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stantial countervailing interest. Eisenstadt involved a Massachusetts statute which forbad the distribution of contraceptive devices to anyone but a married person. In a 6-1 decision (Justices Lewis F. Powell, Jr. and William H. Rehnquist did not participate), the Court held that, in allowing the distribution of contraceptives by physicians to married persons while prohibiting distribution to the unmarried, the statute employed a classification that was not rationally related to a valid public purpose and therefore violated the equal protection clause of the Fourteenth Amendment. Somewhat out of context, however, the Court observed:

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.75

It is noteworthy that Justice Potter Stewart joined the majority opinion in Eisenstadt, since he had dissented in Griswold. However, it may have been that Eisenstadt "strain(ed) for grounds of invalidation which would avoid the Griswold ... issue. Direct confrontation of that issue would certainly have been controversial. Moreover, Justice William Brennan probably would have lost Justice Stewart's support if he had sought to extend Griswold directly."76 Also, it has been hypothesized that with the abortion cases due to be heard in that term, the Court

75405 U.S. 433, 453.
did not wish to jeopardize its options by giving a Griswold right to privacy interpretation to this decision. However, in retrospect, the real importance of the decision is

the revelation that the Court was as cognizant as everyone else that the rationale of Griswold was not dependent on the privacy of the marital relationship, but rather on the privilege to engage in sexual intercourse with reasonable certainty of avoiding the possible consequences of pregnancy. If, as Chief Justice Burger said in his solo dissent, this smacks of substantive due process, it will not deter the Court from its conclusion, so long as it doesn't impose such a label on its result.

Eisenstadt also suggests, though not explicitly stating it, "that Griswold should not be read too narrowly." In the line of the Skinner, NAACP, Stanley, Griswold, and Loving decisions, Eisenstadt again "reaffirms the Court's support for unspecified rights." It also "suggests that a decision as to when a state must bear the extraordinary burden of justification for intruding into a personal decision must refer to how fundamentally the activity in question affects the individual."

The Decision to Bear or Abort

Although Eisenstadt had only tentatively in dictum upheld a right to privacy through the Griswold decision, the words were there which defined privacy as the "right of the individual" and as a right involving freedom from

"unwarranted ... intrusion into ... the decision whether to bear or beget a child." Eisenstadt had not, however, displayed a judicial cohesiveness concerning the Griswold right of privacy since Chief Justice Burger had dissented; Justices Douglas and Byron White, the latter joined by Justice Harry A. Blackmun, wrote concurring opinions; Justice Stewart joined the majority opinion, probably because it did not rely on Griswold; and the two newest Justices, Powell and Rehnquist, did not participate.

The abortion cases, Roe v. Wade, 410 U.S. 113 (1973), and Doe v. Bolton, 410 U.S. 179 (1973), which the Court decided in its 1972 term, however, "indicated a judicial cohesiveness" and "elevated [the Eisenstadt] dictum to a constitutional mandate." Several of the justices joined in grounding the independent right of privacy in the Fourteenth Amendment's concept of "liberty" and in including within that right the right to decide on abortion. Concurring were Burger and Powell, supposedly appointed to provide a greater conservative balance on the Court. Justice Rehnquist dissented, saying that the Court was in effect returning to substantive due process philosophy.

In Wade, the district court had ruled that the right of single and married persons to choose whether to have children is protected by the Ninth Amendment through the Fourteenth Amendment and that the statute was uncon-
stitutionally vague. The Supreme Court affirmed the lower court's decision, but preferred to base the right to privacy on the due process clause of the Fourteenth Amendment, rather than on the Ninth.

The right to abortion, however, is not absolute, according to the Wade opinion, because it is reasonable and appropriate for a state to decide that at some point in time another interest, that of health of the mother or that of potential human life becomes significantly involved. The woman's privacy is no longer sole and any right of privacy she possesses must be measured accordingly.\(^3\)

The Court for the first time, however, expressly held that infringements upon the right to privacy must be justified by a "compelling state interest." Before the point that the fetus is "viable"—that is, before the end of the first trimester—the mother's protected right to privacy must be considered the dominant interest.\(^4\)

Though the Court, through Justice Blackmun, delivered its principle decision in Wade, the companion case, Bolton, followed that ruling. Whereas Wade challenged the validity of a Texas statute prohibiting abortion except when necessary to save the mother's life, Bolton challenged certain restrictive provisions of the Georgia abortion statute. Declaratory judgments and injunctions were sought on grounds that the statutes abridged the woman's right of personal privacy protected by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. In Bolton, the Court held unconsti-

\(^3\) 410 U.S. 113, 155.
\(^4\) Ibid., 155, 163.
tutional also the provision of the Georgia statute that prohibited abortions before the ending of the first trimester and struck down other requirements of residency, hospital accreditation, hospital committee approval, and concurrence of two other physicians. 85

Some significant concurring thoughts in *Wade* that perhaps make the rationale of the *Griswold*, *Wade*, and *Bolton* decisions clearer were those of Justice Stewart, who had strongly dissented, along with Justice Black, in *Griswold*, and yet had concurred in *Eisenstadt*.

... it was clear to me then, and it is equally clear to me now, that the *Griswold* decision can be rationally understood only as a holding that the Connecticut statute substantively invaded the "liberty" that is protected by the Due Process Clause of the Fourteenth Amendment.... As so understood, *Griswold* stands as one in a long line of cases decided under the doctrine of substantive due process, and I now accept it as such.... The Constitution nowhere mentions a specific right of personal choice in matters of marriage and family life, but the "liberty" protected by the Due Process Clause of the Fourteenth Amendment covers more than those freedoms explicitly named in the Bill of Rights.... Clearly, therefore, the Court today is correct in holding that the right asserted by Jane Roe is embraced within the personal liberty protected by the Due Process Clause of the Fourteenth Amendment." 86

One observer of the 1972 term said that in *Wade* and *Bolton*, "when the Court had its most dramatic opportunity to express its supposed aversion to substantive due process, it carried that doctrine to lengths few

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85 Justices White and Rehnquist, who had dissented in *Wade*, dissented again in *Bolton*, arguing that the abortion issue should be left to the political processes of the state.

86 410 U.S. 113, 167-70.
observers had expected...". In fact, this same observer notes that Justice Rehnquist agrees in his dissent that the "liberty" protected by Fourteenth Amendment due process "embraces more than the rights found in the Bill of Rights," and Justice White would find abortions constitutionally protected when required to avoid "substantial hazards to either life or health." Therefore, the Court could be "considered unanimous in accepting a fairly sweeping concept of substantive due process, although various justices continue to resist that characterization."

In summary, the Court decided that the abortion decision was a right of the individual that the government could not abridge during the first trimester, since the woman's health was not at issue. The Court was not choosing simply between abortion per se and continued pregnancy. It was not making a moral or religious determination. "It was instead choosing among alternative allocations of decision-making authority...." It decided that it was the role of the woman to make such a personal decision, rather than an agency of the government. It was also the role of her doctor, and not the government, to make the decision after the first trimester. The Court was not, in other words, saying whether abortion is morally right or wrong. It did not consider the question. Instead, it decided that the question of abortion was within the role of the individual to decide for herself.

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Ibid., p. 11.
Whether or not the Court recognized that it was involved in role-allocation in the abortion decisions, it seems clear that in seeking to weigh only the benefits and detriments of early abortion as such, the Court limited and clouded the horizon of its inquiry by collapsing the considerations bearing on the Abortion Decision [which would involve an emotional and religious entanglement of the state in determining the sanctity of life and the rights of the fetus as a person] into those involved in the abortion decision [which required only that the Court transfer the role of decision-maker from the government to the woman herself].

The significance of Wade and Bolton was that they reached beyond the marital relationship identified in Griswold by extending the right to choose abortion to the woman herself, married or unmarried. Of course, Eisenstadt had already made the extension of the choice to beget to the unmarried woman. But the abortion cases also extended the Griswold right to include the decision to bear or abort. The abortion decisions, therefore, were an incremental development in constitutional doctrine in the line of decisions from Meyer through Eisenstadt.

When cases came before the Court in which public school teachers had been forced to resign after they had decided to bear, the Wade decision was obviously a determining influence on the Court's decision. In Cleveland Board of Education v. LaFleur and Cohen v. Chesterfield...

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89 Ibid., 51-2.

Co. School Board, 94 S. Ct. 791 (1974), the Court invalidated the maternity leave regulations in upholding a freedom of personal choice in matters of marriage and family life as a "liberty" protected by the due process clause.

Unconventional Sexual Conduct

The abortion decisions have also indicated that the Court is not adverse to using broad powers where necessary to protect fundamental privacy interests. This expansive use of judicial discretion was obvious in the Cleveland-Cohen cases, but has great potential in other areas of sexual conduct--those specifically considered "anti-social," "immoral," or "non-traditional" by society. If the Court follows the course of determining whether the state's interest in the protection of public morality or health justifies moral legislation or regulation, as it did in Village of Belle Terre, then non-traditional living arrangements may be subject to close scrutiny since they involve "public" interests. However, in more private interests, which involve the Stanley right to privacy in the home, such as homosexuality, extra-marital relations, sodomy, and adultery, the state's interest may not be deemed compelling enough to justify invasion of those private intimacies.

The constitutionality of a public employer's right to require employees to comply with moral codes is one area where the uncertainty of the right to privacy is evident. 91

One reason that it has been difficult for a determination to be made by courts in the area of moral conduct laws, whether pertaining to public employees or citizens in general, is that courts are seldom faced with litigation involving private sexual behavior. Private, consensual sexual behavior is rarely prosecuted, and when charges are brought, they are generally in addition to charges of criminal activities for which authorities initially invaded the citizen's privacy.

Two recent district court cases, however, have given perceptive discussion of the right to privacy as applied to private sexual behavior. In Acanfora v. Board of Education, 359 F. Supp. 343 (D. Md., 1973), a homosexual school teacher had been involuntarily transferred and eventually dismissed from employment. The district court, in applying the rulings of Griswold and Wade, held for the first time that private consenting homosexuality is explicitly included within the zones of interests protected by the constitutional right to privacy. In Lovisi v. Slavton, 363 F. Supp. 620 (E.D. Va. 1973), the Court was faced with a challenge to the conviction of a married couple and a third party for sodomy under Virginia law. Prosecution was precipitated when photographs taken by the participants in the acts came into the possession of authorities. The district judge accepted Wade's "candid approach" to substantive due process and declared that the due process clause protects fundamental human values "implicit in the concept of ordered liberty." Since the broad Virginia
sodomy law would apply to private, marital acts, the court found that the law "doubtless threatens an invasion of the right of privacy." The court concluded that the marital-non-marital distinction was no longer viable after Eisenstadt and therefore, the sodomy law could not be constitutionally applied to any private, consensual sexual behavior.92

By broadening the definition of the right of privacy beyond previous limits, Wade does seem to mean that a wide variety of morality statutes abridge the privacy right. However, the Wade opinion can be seen to distinguish abortion laws from other morality laws since it indicates that abortion laws were not fully established in the legal tradition of state regulation of personal matters.93 Regulations of moral conduct, however, may "form a pattern so deeply pressed into the substance of our social life that any constitutional doctrine in this area must build upon that basis."94 Wade, therefore, "leaves open the possibility that such laws may be entitled to more respect and less severe scrutiny ... if they reflect the predominant moral view of society."95

92363 F. Supp. 620, 624-5. The judge in Lovisi, ultimately held that since petitioners had carelessly treated the photographs of the acts, they forfeited any constitutional protection and were therefore without standing to challenge the law on privacy grounds. 363 F. Supp. 620, 629.
93410 U.S. 113, 132-46.
Physical Integrity and Other Autonomous Conduct

From the right to autonomy in the abortion decision announced in Wade, one might draw a right to "inviolability of the body" and "physical integrity." However, Justice Brennan, writing for the Court in Wade, did say that the Court was not clear as to whether the claim that "one has an unlimited right to do with one's body as one pleases" is related to the right of privacy articulated in Wade or in previous decisions. Thus, the question now is not "from whence did the right of privacy come?" but "where is it going and what are its bounds?" In Oliff v. East Side Union High School District, 404 U.S. 1042 (1972), cert. denied, the Court refused to hear the complaint raised against a school board's regulation of students' hairstyles as a violation of the First Amendment's guarantees of freedom of expression. Although not addressing the First Amendment claim, Justice Douglas, dissenting, said that although "... 'liberty' is not defined in the Constitution ... as we held in Griswold ... it includes at least the fundamental rights 'retained by the people' under the Ninth Amendment."97

The use of marijuana and other soft drugs may also be connected with other private rights involving autonomous conduct that does not affect others. To date, detailed inquiry into this area has not been made by the courts, and statutes are presumed to be constitutional.98 However,

96410 U.S. 113, 154.
97404 U.S. 1042, 1044.
it is important to note that decisions such as Griswold, Stanley, Eisenstadt, and Wade, which have gone beyond the first eight amendments in defining new rights through the concept of "liberty," have opened the door for the Court to develop other unenumerated rights.

Analysis of the Griswold Precedent Value and Radiating Effects

Before making conclusions concerning the status of the privacy right and discussing one final area of privacy which has not been adequately dealt with by the Court--government gathering and use of personal information--a supplementary analysis will be made of the post-Griswold decisions. Although a prediction of what the Burger Court's legacy will be with regard to the privacy right is too soon at this stage, there have been, as the previous analysis indicates, a substantial number of indications of where the Griswold right stands now. Especially since Wade, the scope of "marital privacy" is at least recognizable. But Stanley and Katz also give valid indications of the total scope of the constitutional privacy right at the present time. By looking at the crucial and dramatic decisions of the Court since Griswold, the future of the privacy doctrine cannot be positively determined, of course. But the analysis in this chapter of the important privacy cases does show the overall influence of the right to privacy doctrine on subsequent cases to have been substantial. The precedent value of the actual legal point involved in Griswold, the "penumbral" derivation of a right to privacy, can be determined in
order to see its effect on subsequent cases of the Supreme Court and other federal courts. Through the use of Shepard's Citations which comprehensively lists later citations of cases and classifies them by the legal point involved or precedent value, this determination can be made. Since Shepard's lists state court cases also, but does not classify them, the analysis here will be limited to the Supreme Court and other federal courts.

CITATIONS OF GRISWOLD BY THE COURTS

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From this chart it is apparent that the majority, or 27 out of the 47 citations made of Griswold by the Supreme Court since 1965 have been in dissenting opinions. A check of those cases revealed also that 8 of those were in dissenting opinions of Justice Black, where he was referring to his dissent in Griswold. The 20 other citations

were two references to Griswold in Wade (one by the Court, distinguishing Griswold from Wade, and the other in Justice Stewart's concurring opinion, explaining the Griswold case) and 18 sample citations of Griswold, where the case, decision, or any of the opinions were simply mentioned or referred to.

In the case of the other federal courts, the precedent value of Griswold improves, with 8 cases citing it as being the controlling factor, while in 40 other cases Griswold was more than sample cited, but was distinguished, limited, explained, or harmonized. Its appearance in dissenting opinions of federal judges occurred 24 times, even less than in the Supreme Court.

The conclusion that can be drawn from this analysis is that the Supreme Court and other federal courts have been slow to base decisions explicitly on the Griswold right to privacy. The Supreme Court has not cited Griswold as precedent, and the federal courts have a per-year-average of little over one citation of Griswold as precedent value. However, just as the foregoing discussion of the influence of Griswold was shown to have been more dramatic, so the radiating effect of Griswold has obviously also been strong since the federal courts have, in some way, cited Griswold on the average of 13.2 times per year.

With Wade, where the Court with greater unanimity based the right to abortion on the due process clause, the Court has obviously determined that the right to privacy is implicit in the concept of "ordered liberty" rather than in the "penumbras" of the First, Fourth, and Ninth Amendments.
Though the Griswold penumbral right to privacy was based too vaguely in "emanations" from the "totality of the Constitution," the recognition of that right there led to continuing "probing and refinement" to determine from what provisions that right is properly derived and what its dimensions are. Although the determination of legal point involved in dramatic cases such as Stanley, Eisenstadt, and Wade cannot be ignored, the cumulative influence of Griswold on judicial opinion-formation "highlight[s] the tendency of doctrine. Where the law is heading is, we may speculate, as good or better a focus for decision for lower judges than black-letter parsing." 100

Conclusions

Since Boyd in 1886, the Supreme Court has made it clear that individual privacy is an interest that the Constitution protects through the Fourth Amendment. In decisions since then, the Court has held that in areas from traditional police searches to electronic eavesdropping, the right to privacy is so important that government, on invading it, must show a very "compelling" interest.

Griswold has been the focal point for the development of a constitutional right of privacy in areas other than the Fourth Amendment. That decision established the constitutional right to privacy in terms much broader than the traditional Fourth Amendment terms. However, it has been left to decisions since Griswold to more closely define that right and to delineate its boundaries. The boundaries

of Griswold's specific privacy of the home, marriage, and family have been extended through Eisenstadt, Wade, and Cleveland - Cohen to include a woman's right, whether married or single, to determine, as Griswold also held, whether or not to beget or to bear children.

The constitutional right to privacy has become visibly separable into two branches since Griswold: one, dealing with the secrecy of one's home and personal possessions, including one's ideas and conduct, founded primarily in the First Amendment, Fourth Amendment, and the self-incrimination clause of the Fifth Amendment, and the other dealing with the solitude of certain personal intimacies and the autonomy of personal decision-making, primarily founded in the "liberty" clauses of the Fifth and Fourteenth Amendments. The scope and implications of neither the first branch, involving secrecy of the home and possessions, nor the second, involving personal intimacies, have been fully developed by the Court. However, it appears that the constitutional right to privacy is focused on protecting an inner core of personal life against unjustified invasion by laws and rules of society.

It is important also to see Griswold, Eisenstadt, Wade, and Stanley as part of a "rational continuum" of decisions protecting rights other than those enumerated in the Bill of Rights. The right to privacy protected by these decisions is a substantive, due process right. Although privacy protection after Griswold has been separated into two distinct areas for the purposes of this study, it should be emphasized that the Stanley decision makes the two areas of
"secrecy" and "solitude"—"autonomy" more easily associable under the general term "right to privacy." Where the Stanley "right to privacy in the home" intersects with the Griswold-Eisenstadt-Wade "right to privacy in sexual intimacies," there is an area common to both which suggests that privacy of sexual intimacies in the privacy of the home rates an especially high degree of protection. The fact that the Stanley-Griswold-Eisenstadt-Wade decisions are all developments of a substantive, due process right unenumerated in the Bill of Rights may also be precedent for the development of other such rights.

Since the focus of the right of privacy's development has been on the relatively short period of the Warren and Burger Courts, a comparison should be made of these Courts' progress in the development of a privacy right. The Warren Court had made rapid strides even before Griswold in developing a theory of privacy through First Amendment guarantees. In Berger and Katz it recognized that electronic surveillance had to be carefully supervised by the judiciary, and not left to determinations of administrative utility or efficiency by legislatures or law enforcement officers. Griswold and Stanley, of course, were the Warren Court's primary bulwarks for privacy. Nevertheless, the period of the Warren Court ended before the effect of Griswold and Stanley was clear.

The Burger Court can be dated from the seating of the third and fourth Nixon appointees, Lewis F. Powell, Jr. and William H. Rehnquist, in January 1972. In a short span
of time that Court has given a surprisingly broad interpretation in the area of rights associated with the Griswold decision, primarily in Eisenstadt and Wade. However, in cases following the Stanley decision, the Burger Court strictly limited the protection afforded to obscenity to the privacy of the home, and in the area of Fourth Amendment privacy rights, the Court has remained rather restrictive. A recent study of the Burger Court's record on privacy as of late-1973 said that the Burger Court

[n its attempt to resolve the question concerning a substantive definition of privacy, ... has provided an odd mixture of activism and self-restraint. The birth control case is clearly activist ... Likewise, the abortion decisions breathe of activism.... Earlier, in the Wyman v. James decision, the Court had taken a much more restraintist position....101

This apparent inconsistency of privacy protection on the Burger Court, the study proposes, is "consistent with a type of policy making approach ... characterize[d] as 'active incrementalism.'" Furthermore, the study asserts that "with the exception of Douglas, there has been a consistent lack of rationality in the development of a system of privacy."102

There is an area of privacy, however, with which neither the activist Warren Court nor the Burger Court has adequately dealt. This is the very controversial area of government gathering and use of personal information, including financial records, arrest records, and other data

102 Ibid., p. 28.
on millions of Americans. Although the Court has not defined the perimeters of privacy surrounding the Stanley and *Wade* decisions, perhaps the most important aspect of privacy which the Court has not protected is this area of personal information. Although it belongs most appropriately in the area discussed earlier as "secrecy in the home and personal possessions, including conduct and ideas," it is dealt with here, in conclusion to this study because it portends so much for the future protection of the right to privacy. By upholding the constitutionality of the Bank Secrecy Act in *California Bankers Association*, the Court has indicated that government access to personal information concerning citizens is necessary to control ever-increasing crime in America. However, government accumulation of information into computer dossiers has ranged further than the records of known criminals.

Either by choice or by legal requirements, most government agencies are avid data collectors. For example, the Civil Service Commission maintains a "security file" in electrically powered rotary cabinets containing 2,120,000 index cards. In its "security investigations index" the commission has 10,250,000 cards covering investigations since 1939. Still another file tabbed "investigative" consists of 625,000 folders containing reports of current investigations. In addition, 2,100,000 earlier files are held at the Washington National Records Center. This is only one agency. In similar fashion, data banks are maintained by the Department of Justice, Secret Service, Bureau

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103 See above, p.60.
of Customs, Federal Bureau of Investigations, National Science Foundation, Department of Health, Education and Welfare, Passport Office, Social Security Administration, and many more. 104

To date, the primary checks against abuse in information-gathering have been bureaucratic self-restraint and exposure by the press. Judicial relief has not been forthcoming in this area. An anti-war activist who sought relief against the Army's alleged surveillance of unlawful civilian political activity brought a class action suit to the Supreme Court in Laird v. Tatum, 408 U.S. 1 (1972). He claimed that the Army spying and accumulation of information on civilians had a "chilling effect" on their freedom of expression. The Court did not rule on the alleged invasion of privacy of expression and held that Tatum's claim was non-justiciable since he had suffered no actual harm or "threat of specific future harm." Furthermore, Chief Justice Warren Burger, writing the Court's opinion, said that deciding the question brought by Tatum "would have the federal courts as virtually continuing monitors of the wisdom and soundness of executive action." He said that role "is appropriate for the Congress acting through its committees and the 'power of the purse;' it is not the role of the judiciary, absent actual present or immediately threatened injury resulting from unlawful governmental action." 105

The realization in the sixties of the widespread surveillance and information-gathering activities of the FBI and Army Intelligence units pressed Congress into studying

105 408 U.S. 1, 14-15 (1972).
Uncovered by Congress and the press in 1970 was the "CONUS" operation of the Army which monitored and compiled information on organizations and individuals engaged in activities considered inimical to the national defense interests. Individuals included U.S. Senator Adlai Stevenson III, Representative Abner Mikva, Georgia State Representative Julian Bond, newsmen, university professors, and businessmen. Committees which held hearings on government surveillance and record-keeping activities and published their results and recommendations included the Senate Subcommittee on Constitutional Rights, the Senate Subcommittee on Administrative Practices and Procedures, the House Subcommittee on Government Operations; and the House Special Committee on the Invasion of Privacy. 106

Despite the hearings and studies beginning in 1965, there is still no legislatively produced protection for the collection and dissemination of information by government agencies. More studies are underway. Both the Nixon Administration and U.S. Senator Sam Ervin (D-N.C.) proposed bills to safeguard criminal records and intelligence information exchanged by law enforcement agencies. 107 Also, four bills aimed at protecting financial records are being considered by both the House and the Senate. The bills generally propose that banks disclose financial records of their customers only when the customer has consented in

writing, or upon an authorized subpoena or court order. 108

The Nixon Administration has initiated more studies of privacy invasion in government procedures. A year-long HEW study on the protection of citizens' rights with regard to computer compilations was made public in July 1973, giving broad recommendations. However, President Nixon, in his "Right to Privacy" radio address of February 23, 1974, announced that he was establishing a Cabinet-level committee to do more studying of the privacy problem. 109

The Supreme Court's prescriptive powers are limited when intrusion into personal privacy is caused by patterns of political and bureaucratic behavior. Respect for privacy in the area of personal information will undoubtedly have to come from congressional oversight of federal agencies, and more importantly, from greater sensitivity of governmental officials to the threats to privacy. Perhaps a new federal agency designed to deal with safeguarding the government data banks would help.110 The role of the Court has been a vital one in bringing constitutional recognition to the privacy concern. The future of that role, however, with regards to protecting the privacy of personal information was expressed in 1966 and is just as relevant today:

If Congress and governmental agencies develop a high degree of sensitivity to these threats of dignity and privacy, the need for judicial inter-


vention will decline, and if government becomes the model and preceptor of more decent behavior by those possessing power, it follows that private institutions will either voluntarily assume a more responsible attitude toward those into whose lives they intrude, or government, by law, will compel greater respect for the privacies of life.111

APPENDIX
APPENDIX

Amendments to the U.S. Constitution Relevant to
The Supreme Court's Development of a Right to Privacy

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

Amendment Three: "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, But in a manner to be prescribed by law."

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

Amendment Five: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment Nine: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment Fourteen, Section One: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."
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