North Dakota Law Review

Volume 43 | Number 2 Article 4

1967

A New Era for Privacy

Harrell R. Rodgers Jr.

A NEW ERA FOR PRIVACY

HARRELL R. RODGERS, JR.*

The right to privacy is nowhere specifically mentioned in the American Constitution. The term itself seems to have gained legal currency in a now-famous law review article written by Samual D. Warren and Louis D Brandeis in 1890, in which they argued that the law needed to provide protection against the invasion of an individual's privacy [1] The authors noted that in a democracy—a society which recognizes the concept of limited government—it has always been accepted that the "individual shall have full protection in person and property "[2] From time to time, however, it is necessary, they pointed out, to "define anew the exact nature and extent of such protection,"[3] for changes in political, social, and economic aspects of a society necessitate the recognition of new rights if established freedoms are to be maintained. They found that certain conditions existed in their society which threatened to destroy man's traditional feedoms if the law was not extended to give protection to the privacy of the individual. The effect of the article on the development of the right to privacy is now legal legend. It was virtually the beginning of judicial recognition of the right to privacy in American law

Today, some seventy years later, we are faced with a problem similar to that which stirred Warren and Brandeis to write their article. There is once again serious reason to suggest that the law must expand its protection if man's traditional freedoms are to be preserved. For at a time when the growth of mass society and spiraling technological advancements create an increased need for some sanctuary of privacy to be left to the individual, new and more sophisticated phenomena threaten to rob man of the defenses

* B.A.—Sam Houston State—1961, M.A.—University of Houston—1962 presently completing his dissertation for a PhD—University of Iowa, Instructor—University of Iowa. I would like to thank Professor Joseph Tanenhaus of the Department of Political Science at the University of Iowa whose advice and criticism helped me at various stages in the preparation of this article.

1. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).
2. *Id.* at 1.
3. *Ibid.*

with which he seeks to protect himself against the invasion of his privacy

Since the Warren and Brandeis article the courts have dealt with the right to privacy (the state of being in retirement from the company or observation of others[4]) in literally thousands of cases. Yet, after seventy years of litigation, the right to privacy is still an undeveloped concept of law By showing how the right to privacy as a concept of law has develped in the United States, we will demonstrate that it has grown in a patchwork fashion which, while giving the individual substantial protection in some areas (mostly from non-governmental sources), it has at the same time left him awkwardly exposed to the intrusive thrusts of governmental invasion in others, and that these points of vulnerability in the law are now subject to being exploited by new and never-even-dreamed-of revelations of the modern age. My argument, however, is not without a ray of hope. By centering some attention on a case, *Griswold v Connecticut*,[5] recently decided by the Supreme Court, I hope to prove that at long last the right to privacy is on the brink of legal maturity, that in this case the Supreme Court has finally taken the psychic plunge that will extend the right to privacy to a full-fledged fundamental right guaranteed by the Federal Constitution.

THE DEVELOPMENT OF PRIVACY IN AMERICAN LAW

We have noted that the framers of our Constitution did not specifically include the right to privacy in that document. This does not necessarily mean, however, that they did not seek to protect that right. Indeed, at least one author has argued that "the right to be let alone is the underlying theme of the Bill of Rights."[6] It can be demonstrated, as a matter of fact, that several provisions of the Bill of Rights do contain specific protection for the privacy of the individual. For example, the First Amendment guarantees individual privacy in matters of religion and protects the privacy of the individual in his beliefs and opinions. The Third Amendment seeks to protect the privacy of the home by forbidding that any soldier "shall, in time of peace be quartered in any house, without the consent of the owner, now in time of war, but in a manner to be prescribed by law" The Fourth Amendment contains the most specific provision designed to protect the privacy of the individual. It guarantees that the people shall be "secure in their persons,

4. State v. Powell County Third Judicial District Court, 85 Mont. 215, 278 Pac. 122 (1929).
5. 381 U.S. 479 (1965).
6. Griswold, *The Right to be Let Alone*, 55 Nw. U. L. REV. 216 (1960).

houses, papers, and effects, against unreasonable searches and seizures." And lastly, the Fifth Amendment protects the privacy of the individual in his conscience and dignity

It should be obvious that the specific protections contained in the Bill of Rights were designed to protect the privacy of the individual from those forms of invasion that were most prevalent before the adoption of the Bill of Rights. Viewed at this angle, one might agree that the founders had a broader purpose in mind than those specifically enumerated in the Bill of Rights. In addition, one might stretch a point and suggest that the Ninth Amendment reflects this inasmuch as it provides that "the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." In another sense it might be argued that in a society based on the concept of limited government, "all enumerated rights in the Constitution can be described as contributing to the right of privacy, if by the term is meant the integrity and freedom of the individual person and personality "[7]

At any rate, it is significant that the right to privacy was not specifically mentioned in the Constitution. For it caused the right to develop in a slow, piecemeal, cumbersome, and too-often inadequate fashion. Indeed, the Bill of Rights were approaching their one-hundredth year when Warren and Brandeis wrote their article which finally spurred the judicial conscience to recognition of the right to be let alone in American law The authors cited one American law treatise[8] and several English cases[9] in arguing that the law needed to provide protection against the invasion of an individual's privacy Their argument, essentially, was that the law should provide protection for an individual's personality and peace of mind as well as for his person. They found that the principle underlying the right to privacy was "that of an inviolate personality "[10] The authors traced the evolution of the law from its early design to provide protection against physical interference with life and property to its gradual recognition of the spiritual nature of man—his feeling and intellect—to include man's personal right to privacy and property, property including both man's tangible and intangible possessions. The latter recognition led to the law of assault, the law of nuisance, and the law of slander and libel. Warren and Brandeis tell us that the evolution of the law along these lines was inevitable:

7. Beaney, *The Constitutional Right to Privacy in the Supreme Court,* THE SUPREME COURT REVIEW, at 214 (1962).
8. COOLEY, TORTS 29 (2d Ed. 1888).
9. Parton v. Prang, 3 Clifford 537 (1872), Millar v. Taylor, 3 Burr. 2303, 98 L. R. 201 (1769), Jeffery v. Boosey, 4 H. L. C. 815, 10 Eng. Rep. 681 (1854).
10. Warren & Brandies, *Supra* note 1, at 205.
11. *Id.* at 195.

> The intense intellectual and emotional life, and the heightening of sensations which came with the advance of civilization, made it clear to men that only part of the pain, pleasure, and profit of life lay in physical things. Thoughts, emotions, and sensations demanded legal recognition.[11]

Development in the States

Prompted by this article the state courts began to recognize the invasion of privacy as a tort. In the first case involving the new tort in 1902 the New York Court of Appeals in a divided opinion (4-3) refused to recognize the invasion of privacy of a young lady whose picture had been used without her permission.[12] The Court's refusal led to a heated debate which resulted in a New York statute creating a right of action in such cases.[13] In 1905 the Georgia Supreme Court, citing the Warren-Brandeis article, allowed an individual to bring action against an agency which used his picture without his authority,[14] thus, establishing the first official judicial recognition of the right to privacy By 1944 thirteen states "had recognized a right of action protecting the right of privacy"[15] Today, although the right to privacy has not been written into any state constitution and a great deal of ambiguity still surrounds the specific interests which the right is designed to protect, "such a right is now recognized in most states, by judicial decision or legislation."[16]

Development on the Federal Level

On the federal level the court's response has not been quite so extended. It is true that for a good many years the United States Supreme Court had been willing to admit that there is such a thing as a right to privacy In 1949, for example, the Court held that the right to privacy—"the core of the Fourth Amendment"—was such a basic right as to be implicit in the concept of ordered liberty and therefore enforceable against the states.[17] Again in 1961 the Court went so far as to refer to the right to privacy as a right "no less important than any other right carefully and particularly reserved to the people."[18] But up until now in every case in which the Supreme Court has recognized specifically that the right to

12. Robertson v. Rochester Folding Box Co., 171 N.Y. 538, 64 N.E. 442 (1902).
13. N. Y. SESSION LAWS 1903, ch. 132, § 321-2.
14. Pavisch v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68, (1905).
15. R. H. Adams, *The Right to be Let Alone*, 17 U. FLA. L. REV. 598 (1965).
16. Brief for Appellants, pp. 84-85, Griswold v. Connecticut, 381 U.S. 479 (1964). I would like to thank Professor Thomas J. Emerson of the Yale Law School for providing me with a copy of the brief that he filed in behalf of the appellants in this case.
17. Wolf v. Colorado, 338 U.S. 25 (1949).
18. Mapp v. Ohio, 367 U.S. 643 (1961).

privacy exists and that it has been violated, the invasion of that right was by physical means. The Court has not been willing to find that the right has been violated by non-physical means. In a case in 1952 the Court did recognize that the liberty guaranteed by the due process clause embraced invasion of privacy by non-violent means. But in that case the Court refused to uphold the claim.[19]

It may very well be argued that the Court has long had the habit of protecting the privacy of the individual in cases involving First and Fifth Amendment rights. This may well be true, but in none of these cases has the Court been willing to recognize (or admit, whatever the case might be) that the right to privacy is what it is protecting. These cases have been firmly based on specific provisions of the Bill of Rights such as freedom of religion,[20] speech, association[21] or protection against self-incrimination.[22] The Court's reluctance to protect privacy from non-physical invasions is best illustrated by those cases in which the Court has dealt with wiretapping and electronic surveillance.

In the first case involving wiretapping the Supreme Court held (5-4) that messages passing over a telephone were not within the protection of the Fourth Amendment against unreasonable search and seizure.[23] Chief Justice Taft, in delivering the majority opinion, held that the Fourth Amendment applied only to physical invasions. Justice Holmes wrote a short dissent branding wiretapping a "dirty business" and declaring that he would rather see some criminals escape than see the government play "an ignoble part."[24] Justice Brandeis wrote a vigorous dissent reiterating the thesis of his 1890 Harvard Law Review Article. In part he said:

> The makers of our constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feeling and his intelligence. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.[25]

---

19. Public Utilities Commission v. Pollock, 343 U.S. 451 (1952).

20. See Engel v. Vitale, 370 U.S. 421 (1962), School District of Abbington Township v. Schenpp, 374 U.S. 203 (1963).

21. See NAACP v. Alabama, 357 U.S. 449 (1958), NAACP v. Button, 371 U.S. 415 (1963).

22. See Watkins v. United States, 354 U.S. 198 (1957) Sweeney v. New Hampshire, 354 U.S. 234 (1957), Barenblatt v. United States, 306 U.S. 109 (1959).

23. Olmstead v. United States, 277 U.S. 438 (1928).

24. *Id.* at 470. Taft was deeply hurt by Holmes' dissent which he called the "the hastiest opinion." See MURPHY, WIRETAPPING ON TRIAL, 124-125 (1965).

25. *Id.* at 478.

Brandeis further stated his belief that protections against governmental abuses must be adapted to changing conditions, and warned that modern science was increasingly capable of taking away man's privacy

In his majority opinion Chief Justice Taft had pointed out that Congress could pass a law excluding wiretap evidence from federal criminal trials. In 1934 Congress passed the Federal Communications Act, section 605 of which reads:

> No person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communications to any person.

A case coming before the Court in 1937 maintained that this statute made wiretapping a federal crime and therefore any evidence obtained by this method could not be used against him.[26] The Supreme Court agreed, stating that section 605 prohibited wiretapping without the consent of the sender [27] The individual was retried on technical grounds and convicted again. Once more the case reached the Supreme Court and this time the Court held not only that direct wiretap evidence was inadmissible "but also that evidence which had been obtained through leads secured by wiretapping was similarly barred."[28] The two *Nardone* cases did not have the effect of overruling *Olmstead* but as one author stated they put *Olmstead* "in a state of legal limbo."[29]

Since the *Nardone* cases dealt with federal officials and federal activities, it was not clear what effect the cases would have on the activities of state officials. The question was not answered until 1952 when the Court granted certiorari in the case of *Schwartz v Texas* to determine whether section 605 forbade the use of evidence obtained by wiretap in a state court.[30] The Court held that the states could follow the old common law rule of admitting evidence regardless of the method employed to secure it. The question that still remained to be answered was this: Would it be a federal crime for states to employ the wiretap? In 1957 the Court cleared up any doubt about this by ruling that state officials violated section 605 in tapping telephones, and such evidence could not be turned over to federal officials to be used in federal courts.[31] Even though *Mapp*

26. Nardone v. United States, 302 U.S. 379 (1937).
27. There is some doubt that Congress meant to prohibit wiretapping when it passed this act. See MURPHY, WIRETAPPING ON TRIAL, at 133 (1965).
28. *Id.* at 134.
29. *Id.* at 140.
30. 344 U.S. 199 (1952).
31. Benanti v. United States, 355 U.S. 96 (1957).

v Ohio obviously overruled the *Schwartz* case, to this date the Department of Justice has never prosecuted police for violating section 605, and there seems to be little evidence that they shall.

There seem to be other limitations on the sweep of section 605 besides those revealed so far As interpreted by the Courts, section 605 does not prohibit tapping when done with the consent of either of the parties to the phone conversation.[32] In addition, one not a party to the tapped conversation has no standing to object to the divulgence of its contents.[33] And, of course, section 605 does not provide protection from electronic eavesdropping, since the Federal Communications Act applies only when telephone, telegraph, or radiotelegraph conversations are overheard. It is sad but true that the Court's decisions have not provided much in the way of protection from electronic eavesdropping either The only instances in which the constitutional protections against unreasonable search and seizure have been applied to electronic snooping have been those instances in which the snooping is accomplished by some form of physical invasion of trespass.

The Court was faced with its first case involving electronic eavesdropping in 1940 in the case of *Goldman v United States*.[34] Here federal agents had obtained evidence against three lawyers for conspiring to violate the Federal Bankruptcy Act by the use of a detectaphone, a device capable of amplifying the sound of voices talking on the other side of a wall. By occupying an office adjacent to the office of the lawyers they were able to overhear a number of incriminating conversations. The court held (5-4) that this act did not violate section 605 of the Federal Communications Act.[35] In 1961 the court delivered the only opinion in which it has ever found that electronic surveillance was used in an unconstitutional manner As might be expected, the case involved an overt form of physical invasion. District of Columbia police had driven a device known as a spike mike (a small nail-like device) into a suspect's wall until it touched a heating unit, "which had the effect of permitting the police to overhear all that was said throughout the house for a nine-day period."[36] This the Court stated in a unanimous opinion violated the Fourth Amendment.[37] Justice Douglas was disturbed that the Court's decision was based on the fact that a physical invasion had occurred. He felt that

32. Rathburn v. United States, 355 U.S. 107 (1957).
33. Goldstein v. United States, 316 U.S. 114 (1942).
34. 316 U.S. 129 (1942).
35. On Lee v. United Sttaes, 343 U.S. 747 (1952).
36. Beaney, *Supra* note 7, at 233.
37. Silverman v. United States, 365 U.S. 505 (1961).

> the command of the Fourth Amendment [should not] be limited by nice distinctions turning on the kind of electronic equipment employed. Rather our sole concern should be whether the privacy of the home was invaded.[38]

In the most recent case involving electronic eavesdropping the Court held that the Fourth Amendment was not violated when an Internal Revenue agent recorded a bribe offer by means of a pocket wire recorder hidden on his person.[39] Justice Brennan wrote a dissenting opinion, in which Justices Goldberg and Douglas concurred, stating that he thought it

> an intolerable anomaly that while conventional searchers and seizures are regulated by the Fourth and Fourteenth Amendments and wiretapping is prohibited by federal statute, electronic surveillance as involed in the instant case, which poses the greatest danger to the right of private freedom, is wholly beyond the pale of federal law [40]

He further stated that he could not help

> but believe that if we continue to condone electronic surveillance we shall be contributing to a climate of official lawlessness and conceding the helplessness of the Constitution and this Court to protect rights "fundamental to a free society "[41]

In summary, the most obvious thing that we might say is that the Court's response (not to mention that of the national legislature) to the challenges presented to individual privacy by wiretapping and electronic surveillance has been less than adequate. This survey also highlights two of our previous points. First, that because the right to privacy has had to develop in a piecemeal fashion it has not provided adequate protection for the individual in all areas. In fact, the development of the law has been such that the individual is better protected from non-governmental sources than governmental sources. Secondly, the cases point out the Court's reluctance to recognize that privacy can be invaded in more subtle fashion than mere physical invasion.

The magnitude of the problem is increased considerably by the fact that modern science is now capable of invading the privacy of the individual in much more substantial form than any that we

38. *Id.* at 513.
39. Lepez v. United States, 373 U.S. 427 (1963).
40. *Id.* at 471.
41. *Ibid.*

have surveyed so far It is toward a consideration of this problem that we now turn.

BIG BROTHER IS WATCHING

The sophistication that science and technology have achieved in the twentieth century has raised the spectre of invasion of privacy to new and frightening heights. To some extent the public has been made aware of these advances through protest literature such as Aldous Huxley's *Brave New World* and George Orwell's *Nineteen Eighty-Four*, both of which portray societies stripped of of privacy Popular exposes, such as Vance Packard's *The Naked Society* and Myron Brenton's *The Privacy Invaders* have played a similar role.[42]

The hoary art of wiretapping is one of the most commonly understood forms of privacy invasion and one, as we have seen, that has been dealt with by both Congress and the courts. Substantial evidence indicates that it is in wide use. In 1962 a House Committee reported that at least 5,000 telephones in federal offices in Washington were bugged, not by Russians, but by bureaucrats spying on each other [43] The same report revealed that over 10,000 snooping devices were being used by private businesses.[44] And another author reported that in the years 1953 and 1954 police in New York City were tapping over 3,500 telephones, almost half of which were public telephone booths.[45] Wiretapping's progeny—electronic surveillance—is poorly understood, virtually unregulated by the law, little restrained by the courts, and, as we have seen, capable of taking various and ingenious forms. *The Eavesdroppers*,[46] a book written in that ancient year 1959 revealed the following forms of electronic snooping:

> Any telephone can quickly be transformed into a microphone which transmits every sound in the room when the receiver is on the hook. Tiny microphones can be secreted behind a picture or in some other inconspicuous location. Highly directive microphones known as "parabolic microphones" are capable of eavesdropping on a conversation taking place in an office on the opposite side of a hundred-foot-wide busy street or on a conversation in a restaurant from, say, a darkened balcony in the building. A small, continuously

42. Westin, Surveillance, Privacy, and the Free Society, 14 Sept. 1965, (A paper prepared for delivery at the annual meeting of the American Political Science Association.)
43. *Hearings Before the Senate Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, Hearing on the Invasions of Privacy*, 89th Cong., 1st Sess., at 16 (1965).
44. *Ibid.*
45. MURPHY, *Supra* note 27, at 150.
46. DASH, SCHWARTZ & KNOWLTON, THE EAVESDROPPERS (1959).

> operating transmitter can be placed beneath the fender of an automobile and its signal picked up by a receiver in another car or in a fixed plant.[47]

Even though each of these devices is devilishly ingenious, in comparison to some of the newer forms of electronic surveillance, as we shall see, they are child's play

In the last couple of years Congress has begun to show signs of concern over increasing threats to privacy In 1964 the Senate Subcommittee on Administrative Practice and Procedure began a preliminary investigation of the use of surveillance devices by federal agencies. Subcommittee chairman Edward V Long (D., Mo.) revealed that he met with less than complete candor in his preliminary investigation and that two federal agencies refused to turn information over to him.[48] Nevertheless, he found that on the basis of a questionnaire sent out by his committee numerous federal agencies not involved in security work had purchased a considerable quantity of surveillance equipment.[49] When the new session of Congress convened (89th) investigations into federal invasion of privacy were resumed. Hearings were opened on electronic eavesdroppings, wiretapping, peepholes, mail covers, censorship, and psychiatric testing. Chairman Long stated that the Subcommittee sought to obtain as complete a picture as possible of the techniques of surveillance made possible by modern electronics in order to determine whether their use was "beginning seriously to infringe on the privacy of individuals everywhere in this land."[50] He expressed concern over the "literally thousands" of non-security law enforcement agencies which were using "more and more methods of surveillance upon the individual."[51] He noted that:

> [I]n the hands of a competent operator, these insidious devices spell an end to the personal and business privacy of anyone brought into their range. They are neither science fiction pipedreams nor are they solely for the use of the technically skilled or rich. Many are uncomplicated in operation, virtually incapable of detection and widely available at relatively low cost.[52]

Long also pointed out that existing laws in the field of privacy were few and conflicting. As an example, he pointed out that even though wiretapping had been outlawed by Congress, the law was

47. DODD'S CASES ON CONSTITUTIONAL LAW, at 691 (Supp. 1963).
48. *Hearings on Invasion of Privacy, Supra* note 43, at 3.
49. *Ibid.*
50. *Ibid.*
51. *Ibid.*
52. *Ibid.*

not enforced and several states had enacted laws in direct conflict with the federal law [53] Needless to say, the states have suffered no repercussion from federal authorities for their errant behavior

During the course of the two-week investigation numerous electronic snooping devices were demonstrated to the Committee (seemingly with glee) by private detectives, electronic manufacturing and sales representatives, and several electronic engineers. Some of the snooping devices took the form of tie clasps, packages of cigarettes, cigarette lighters, picture frames, women's purses, men's briefcases, etc. One of the witnesses before the committee demonstrated a device that could be hooked to a telephone and when activated by a direct-dialing call conversations could be monitored from, say, a room in Washington from as far away as Hawaii.[54] Another witness demonstrated a tiny microphone that was cotton-coated so that it could be dyed with Tintex to match the interior of a room.[55] A private detective demonstrated probably the cruelest device of them all. It was a transmitter and antenna in the form of a cocktail olive and toothpick which could be placed in a martini.[56] One can only imagine the disadvantage an individual would be placed in when subjected to the twin effects of the ancient lubricant of the tongue in combination with the latest in electronic ingenuity Lastly, a retired Bell Telephone Laboratories engineer reported that a laser was being developed which could be aimed at a room several blocks away to obtain a television picture of everything happening in the room—complete with sound.[57]

Modern technology has produced techniques that go far beyond these examples of physical surveillance including various forms of psychological surveillance. The polygraph is the most familiar form of psychological surveillance designed to probe the interiors of the mind, and it is today widely used not only by those involved in police work, but also by numerous private corporation and government agencies. On the horizon of technological perfection are several forms of psychological probing which could have extraordinary implications for privacy Listen to what one author tells us:

> Advances in drug research indicate that we may be approaching the point at which the administration of a drug (with or without the subject's knowledge) may render him a truth-

53. *Ibid.* It should be noted that in suggesting that the law is not enforced chairman Long is referring to the Department of Justice. We have seen that the federal courts enforce the law when it comes before them, but the courts can only wait for the cases since they have no self-starter.
54. *Id.* at 24-25.
55. *Id.* at 32.
56. *Id.* at 14.
57. *Id.* at 21-22.

> ful person under questioning; already, arguments in favor of such narcoanalysis under new drugs have appeared in police and legal journals. Finally, research in brain-wave analysis established that "reading" certain signals of the brain is now possible; if this progresses in the coming decades to the ability to distinguish the more complex messages involved in thought and emotions, direct interrogation of the mind may become the "ultimate weapon" in penetration of privacy [58]

These are just some of the challenges that mass society and modern science have imposed upon individual privacy Some of them, indeed, are awesome. It hardly takes a legal scholar to recognize that our law has not and is not maintaining the same pace as our technology In the future if the Supreme Court fails to protect the individual against those forms of non-physical invasions of privacy that we have surveyed here, the right itself will be nothing more than an empty promise. It is obvious that Brandeis' prophetic fears expressed in his dissent in the *Olmstead* case have come true. Thus he warned us that:

> [T]he progress of science in furnishing the government with means of espionage is not likely to stop with wiretapping. Ways may some day be developed by which the government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home. Advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts, and emotions. Can it be that the Constitution affords no protection against such invasions of individual security?[59]

Amazing as it may seem, nearly four decades later we would have to say that the question still remains unanswered or that it has been answered in the negative. But now we are ready to take a look at the recent case of *Griswold v Connecticut* which I have promised has nestled within it new and important implications for the right to privacy.

THE GRISWOLD CASE AND ITS HISTORY

Four times citizens of the state of Connecticut have reached the United States Supreme Court in an effort to have sections 53-32 and 54-196 of the General Statutes of Connecticut (1938) declared unconstitutional. The first three efforts were abortive. Now, in June of 1965, success was theirs. The Court held that a Connecticut law

58. Westin, *Supra* note 42, at 3.
59. Olmstead v. United States, 217 U.S. 474 (1928).

forbidding the dissemination and use of contraceptives was a violation of the constitutionally protected right to privacy of married couples. In the first three cases, *Tilston v Ullman*,[60] *Trubek v Ullman*,[61] and *Poe v Ullman*,[62] the plaintiffs sought declaratory judgments that the Connecticut statutes violated the Fourteenth Amendment by depriving them of life and property without due process. In the first case the plaintiff (a physician) tried to bring a class action, but the Court was in agreement that he did not have standing to raise the constitutional rights of his patients. In the second case a young married couple brought a declaratory judgment on the grounds that the statutes denied them of their rights without due process of law, because it denied them the ability to obtain medical advice on proper methods of contraception so that they could avoid parenthood until they were psychologically and economically prepared for such responsibilities. The Supreme Court denied the petition for certiorari. In the third case the Court showed some discontent among its members. The case involved several citizens of Connecticut who thought the law denied them due process, but the court held (5-4) that the case did not present a controversy justifying the adjudication of a constitutional issue. Justice Frankfurter wrote the majority opinion upholding dismissal and he was joined by Chief Justice Warren and Justices Clark and Whittaker Justice Brennan concurred in the result. Justice Douglas wrote a dissenting opinion stating that "liberty within the purview of the Fifth Amendment includes the right of privacy" and the "liberty is a concept that sometimes gains content from the emanation of other specific guarantees or from experience with the requirements of a free society"[63] Justice Harlan, usually acknowledged as the most consistent practioner of self-restraint on the Court, wrote a vigorous dissent based on the "Palko rule" in which he stated his belief that the "Constitution protect(ed) the privacy of the home against all unreasonable intrusion of whatever character."[64] Justices Black and Stewart dissented without opinion.

With this background it seemed obvious that the Court would not consider the constitutionality of the statutes unless it could be proven that they were enforceable. In other words, someone would have to be prosecuted under the law Such an occurrence took place in 1961 when the Executive Director of the Planned Parenthood League of Connecticut and a physician-professor who served as

60. 318 U.S. 44 (1942).
61. 367 U.S. 907 (1961).
62. 367 U.S. 497 (1961).
63. *Id.* at 517.
64. *Id.* at 550.

Medical Director for the league were arrested and fined $100 each. The contested statutes read thus:[65]

Section 53-32 *provides*:

> 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 or imprisoned.

Section 54-196 *provides*:

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

The plaintiffs were found guilty as accessories. They contested their conviction in the state courts on the grounds that the accessory statute as applied violated the Fourteenth Amendment. After failing to gain relief in the state courts they applied to the Supreme Court. This time the Court found that the plaintiffs had a judiciable cause. Justice Douglas stated:

> The rights of husband and wife, pressed here, are likely to be diluted or adversely affected unless those rights are considered in a suit involving those who have this kind of confidential relation to them.[66]

The decision of the Court was divided 7 to 2. Even a perfunctory reading of the case reveals numerous indications that the Court had a difficult time deciding the case. Besides the majority opinion there were three concurring opinions and two separate dissenting opinions. Consider chart I-A below

Griswold v. Connecticut

Douglas Clark	+ +	Majority opinion, joined by Justice Clark (They found a general right to privacy arising out of the totality of the Bill of Rights).
Goldberg Warren Brennan	+ + +	Concurring in the opinion and judgment, joined by Chief Justice Warren, and Justice Brennan (They found that the concept of liberty protects those personal rights that are fundamental, and the right to privacy is a fundamental personal right).
Harlan	+	Concurring in the judgment (He found a right to privacy in the guarantees of liberty under the due process clause of the Fourteenth Amendment).
White	+	Concurring the judgment (He found a right to privacy in the guarantees of liberty under the due process clause of the Fourteenth Amendment).
Black	—	Dissenting opinion, joined by Justice Stewart.
Stewart	—	Dissenting opinion, joined by Justice Black.

65. Griswold v. Connecticut, 381 U.S. 479.
66. *Id.* at 1680.

In the majority opinion Justice Douglas returned to his thesis in the *Poe* case that there is a general right to privacy arising out of the totality of the Bill of Rights. In part he reasoned that:

> The Bill of Rights have penumbras, formed by emanations from these guarantees that help give them life and substance. Various guarantees create zones of privacy The right of association contained in the penumbra of the First Amendment is one. 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 searchers and seizures. The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: The ennumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.[67]

The concurring opinion of Justice Goldberg has receive more attention than any other part of the decision; primarily, because of the mistaken belief that he found a right to privacy in the Ninth Amendment. Actually, this is not true. Justice Goldberg's opinion is based on three points: (1) that the concept of liberty contained in the Fourteenth Amendment protects those personal rights of the individual that are fundamental; (2) that the fundamental rights of the individual are broader than those specifically enumerated in the Bill of Rights; and (3) that this interpretation is backed up not only by numerous decisions of the Court, but also by the particular wording of the Ninth Amendment. He is not suggesting that the Fourteenth Amendment incorporates the Ninth Amendment or that the Ninth Amendment contains a store of individual rights. He is simply saying that the Ninth Amendment shows a

> [b]elief of the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there is not exhaustive.[68]

In what must be the single most pungent sentence in the whole opinion Justice Goldberg states:

> I agree fully with the Court that the right of privacy is a fundamental personal right, emanating from the totality of the Constitutional scheme under which we live.[69]

---

67. *Id.* at 1681.
68. *Id.* at 1686.
69. *Id.* at 1687.

Justice Harlan concurred in the judgment of the Court but not the opinion because he could not agree with what he believed to be Justice Douglas' conclusion that the

> Due Process clause of the Fourteenth Amendment does not touch this Connecticut statute unless the enactment is found to violate some right assured by the letter or penumbra of the Bill of Rights.[70]

Instead Justice Harlan preferred to apply the "Palko rule" to the case to see if the statutes infringed the due process clause of the Fourteenth Amendment because the enactments violated basic values "implicit in the concept of ordered liberty" He found that it did; for reasons, he said, already enumerated in his dissenting opinion in *Poe v Ullman*. There he had maintained that the "Constitution protects the privacy of the home against all unreasonable intrusion of whatever character"[71] He further stated that

> it would surely be an extreme instance of sacrificing substance to form were it held that the constitutional principle of privacy against arbitrary official intrusion comprehends only physical invasion by the police.[72]

Justice White wrote a concurring opinion simply stating that in his opinion the statute as applied deprived married couples of liberty without due process of law Justice Black and Stewart dissented on the grounds that even though they thought the law "uncommonly silly" they did not believe that there was a constitutional right to privacy that had been invaded by the state statute.

The opinions of the Court in this case have been the subject of some criticism. One professor of constitutional law, for example, paid his rather caustic respects to the case by suggesting that the Supreme Court had played "scrabble" with the Bill of Rights, taking a letter here, a letter there, until it had formulated the right to privacy[73] Another suggested that the opinions "were not entirely persuasive as either constitutional history or sound doctrinal development of newly emerging substantial rights."[74] The latter argument is, of course, true. The former is, of course, ludicrous and one assumes and hopes that it was meant to be. But, at any rate, the case itself has a more profound significance. For not only have seven judges found that the Constitution protects privacy, *but, for*

70. *Id.* at 1690.
71. Poe v. Ullman, 367 U.S. 550 (1960).
72. *Id.* at 551.
73. Address by Professor John Roche, American Political Science Association Annual Meeting, Sept. 8-11, 1965.
74. Westin, *Supra* note 42, at 24.

the first time, the Court has specifically ruled that the right to privacy has been violated by non-physical means.

TOMORROW AND TOMORROW

Where does the right to privacy go from here? Possibly a long way For even though the struggle over the development of the right to privacy has been long by the standards of a man's years, it still has a long way to go. But in finally recognizing that the right to privacy can be violated by non-physical as well as by physical means, the Supreme Court has finally accepted the fundamental thesis of the Warren-Brandeis article. That is that "the invasion of privacy involves a spiritual wrong, an injury to a man's estimate of himself and an assault upon his own feelings."[75] In other words, that what is protected by privacy is the right to an "inviolate personality"[76] For all these years the Court has mouthed platitudes about a man's home being his castle. Yet, all the Court has been willing to protect is the castle door, not the sanctity within.

There have been many instances in which individual members of the Supreme Court have recognized the irony of this. Some of the most obvious being Brandeis' dissent in the *Olmstead* case; Harlan's dissent in *Poe v Ullman*; and both Douglas' dissent in the *Poe* case, and his opinion in the *Silverman*[77] case. Indeed, four years before Warren and Brandeis wrote their celebrated article, Justice Bradley, referring to a celebrated English decision,[78] wrote in *Boyd v United States* that:

> [T]he principles laid down in this opinion affect the very essence of Constitutional liberty and security They reach father than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence —it is the invasion of this sacred right which underlies and constitutes the essence of Lord Canden's judgment.[79]

Having finally recognized this point, the Supreme Court has taken

75. Bloustein, *Privacy as an Aspect of Human Dignity*, 39 N. Y. U. L. REV. 33 (1964).
76. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).
77. Olmstead v. United Sttaes, 277 U.S. 438 (1928), Poe v. Ullman, 367 U.S. 497 (1961), Silverman v. United States, 365 U.S. 505 (1961).
78. Entick v. Carrington, 19 Howell's St. Rr. 1029, 95 Eng. Rep. 807 (1765).
79. 116 U.S. 630 (1885).

that necessary and last vital step which should allow the right to privacy to develop into a full-fledged fundamental right guaranteed by the Constitution.

One cannot help but wonder if the Court could now still uphold a case such as *Goldman*, or even whether *Olmstead* is not now subject to being overruled. At the very least the particular nature of our legal system should make *Griswold* a very important case. Professor Edward H. Levi, Dean of Law at the University of Chicago, tells us that the

> basic pattern of legal reasoning is reasoning by example. It is reasoning from case to case. It is a three-step process described by the doctrine of precedent in which a proposition descriptive of the first case is made into a rule of law and then applied to a next similar situtation. The steps are these: Similarity is seen between cases; next the rule of law inherent in the first case is announced; then the rule of law is made applicable to the second case.[80]

In a system of law of this nature, surely *Griswold* will become an important precedent by which the court can expand the right of privacy to new areas. If so, we may well be on the brink of a new era for privacy

If the right to privacy develops as I have suggested and the Supreme Court does in the future declare that the right to privacy is a fundamental right guaranteed by our Constitution the result, no doubt, would be quite dramatic. Although the right to privacy, like any constitutional right, would not be absolute, it would be raised to the level of other fundamental rights such as freedom of speech, press, and association. Its violation could take place only under those circumstances where the interest of society outweigh those of the individual. No doubt a rash of litigation would result from such a ruling, and surely the fine lines of the right would develop only after extended interpretation. Hopefully, however, the final product would represent the best reasoning of many efforts and the right to privacy would be elevated to the privileged heights that the preservation of individual dignity demands.

80. LEVI, AN INTRODUCTION TO LEGAL REASONING at 7, (1948).