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# Comments and Casenotes

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## THE CONSTITUTIONAL RIGHTS OF PRIVACY — “A SIZABLE HUNK OF LIBERTY”

By FRANK R. GOLDSTEIN

They are lonely; the spirit of their writing and conversation is lonely; they repel influences; they shun general society; they incline to shut themselves in their chamber in the house, to live in the country rather than in the town, and to find their tasks and amusements in solitude. Society, to be sure, does not take this very well; it saith, Whoso goes to walk alone, accuses the whole world; he declares all to be unfit to be his companions; it is very uncivil, nay, insulting; Society will retaliate.<sup>1</sup>

“It has been said that each generation gets about as much liberty as it deserves.”<sup>2</sup>

### PRIVACY IN THE CONSTITUTION

The proposition is simply this: in a system of government attuned to the freedom and liberty of the individual man, where those rights not delegated are “retained by the people,”<sup>3</sup> where one can sing of himself and elect his leaders, surely, there must be a right “to be let alone,”<sup>4</sup> “to be oneself.”<sup>5</sup> In a government whose powers and functions are divided, partly for efficiency but mostly as a system of checks and balances, the rights of the individual must weigh heavily in the scheme of things. And, unquestionably, in the American system of government personal liberties have always received the highest consideration — the Bill of Rights itself epitomizes our early concern for personal freedoms. When a government tells you what to publish in your newspaper, we know where to turn; there is a Constitution and an amendment to that Constitution which in rather certain terms deals with the problem. Likewise, when a government refuses to allow you to vote because of your color, we can look to this constitution and

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1. EMERSON, *The Transcendentalist*, in SELECTIONS FROM RALPH WALDO EMERSON 198-99 (Whicher ed. 1960).

2. Griswald, *The Right to be Let Alone*, 55 NW. U.L. REV. 216, 226 (1960).

3. U.S. CONST. amend. IX.

4. This phrase was evidently first articulated by Judge Cooley in his work on torts. See COOLEY, *TORTS* § 18 (4th ed. 1932).

5. See King, *Electronic Surveillance and Constitutional Rights: Some Recent Developments and Observations*, 33 GEO. WASH. L. REV. 240, 268 (1964): “This basic and indivisible liberty may be found under a number of names. It may be termed the ‘right to privacy’ . . . ‘the right to be let alone’ . . . the ‘right to express oneself secretly’ or ‘freedom from surveillance’. In a positive view, it might be said to be ‘the right to be oneself.’”

seek enforcement of a right that is guaranteed. But when that which is violated is the concept we call privacy, we may, as Professor Redlich points out, find ourselves "saying, 'The law is unconstitutional — but why?'"<sup>6</sup>

The reason why we ask this question is because privacy, as a viable legal concept, is relatively new. It is true that some right "to be let alone" was recognized early in the common law,<sup>7</sup> but any recognition of the right of the individual to effectively insure this liberty in America must date to the now-famous article of Warren and Brandeis in 1890.<sup>8</sup> It was in this period of history bordering on the twentieth century, when sensational journalism in the United States was first making its mark,<sup>9</sup> that the theory of a cause of action for violation of one's privacy was born. And here is the essence of the problem: since it is not until the 1890's that the impact of the privacy concept began to be felt, where, in a constitution drafted a hundred years earlier, can we look for a protection of that concept?

Nowhere in the Constitution is a general right of privacy mentioned, but several facets of the privacy idea were given effect throughout. The first, third, fourth, fifth, ninth, and fourteenth amendments have all at one time or another been considered by some member of the Supreme Court as protecting a right of privacy. Thus, to determine the scope of the Constitution's protection of privacy, we must begin with those portions of privacy which are in fact enumerated in or traceable to a specific provision.

The fourth amendment is the closest thing we have to an express right of privacy:<sup>10</sup> the people shall be secure in their homes and persons "against unreasonable searches and seizures." In protecting against unreasonable intrusions, the fourth amendment manifests the drafters' early awareness of the privacy concept. It is an amendment which has received significant constitutional interpretation. The basic exclusionary rule which emanated from the fourth amendment — that illegally obtained evidence may not be used against the defendant — was enunciated first in *Weeks v. United States*<sup>11</sup> against the federal government.

*Wolf v. Colorado*<sup>12</sup> held that the *Weeks* exclusionary rule was not mandatory to the states by the fourteenth amendment. In *Mapp v. Ohio*<sup>13</sup> this principle was changed and the Court did extend the fourth

6. Redlich, *Are There "Certain Rights . . . Retained By The People"?*, 37 N.Y.U.L. REV. 787, 798 (1962).

7. See 4 BLACKSTONE, COMMENTARIES 168 (Lewis ed. 1900): "Eavesdroppers, or such as listen under walls or windows, or the eaves of a house, to hearken after discourse . . . are a common nuisance, and presentable at the court-leet . . . or are indictable at the sessions. . . ."

8. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

9. Dean Pound feels that the advent of sensational journalism was a significant factor in the development of a privacy concept in 1890. See Pound, *The Fourteenth Amendment and the Right of Privacy*, 13 W. RES. L. REV. 34, 36 (1961).

10. Beane, *The Constitutional Right to Privacy in the Supreme Court*, 1962 SUP. CT. REV. 212, 215.

11. 232 U.S. 383 (1914).

12. 338 U.S. 25 (1949).

13. 367 U.S. 643 (1961).

amendment's search and seizure protection to the states via the due process clause of the fourteenth amendment. Not only was this decision of immense importance in the administration of criminal justice throughout the nation,<sup>14</sup> but also it manifested a keener concern by the Court for the significance of the privacy idea. As the rate of crime increases, the temptation to abridge or narrow the fourth amendment's protection becomes more inviting. But the inference from *Mapp* is that the Court has responded to the temptation by avoiding it altogether; the Court has re-interpreted its own stand and, thereby, enlarged the scope of the fourth amendment principle. However, in *Olmstead v. United States*<sup>15</sup> it was determined that wiretapping was not a search and seizure because there was no physical trespass. This physical trespass test became the one used for determining whether there was an illegal search and seizure. It is a test subject to much criticism, the main objection being that it makes the rights of the people turn on technicalities.<sup>16</sup>

Moreover, the Supreme Court has indicated that there are limitations on the scope of the protection to be afforded the right of privacy as it derives from the fourth amendment. It is not all searches and seizures that are prohibited, but only unreasonable ones.<sup>17</sup> Privacy, like every other basic right, is not absolutely guaranteed. Other interests must be considered. In the tort for invasion of privacy this idea is evidenced by the fact that the public has a legitimate right to know certain facts about certain people, and, if this is one of these facts and you are one of those people, you will not recover.<sup>18</sup> In the constitutional area the case of *Frank v. Maryland*<sup>19</sup> is a good example of the balancing process that must be undertaken. In *Frank*, the Court upheld a statute<sup>20</sup> permitting a health inspector without a warrant to demand admission to a home. The Court, through Mr. Justice Frankfurter, felt that any right to privacy involved was outweighed by the state's legitimate interest in the health of the community. The principle being articulated was clear: privacy is only one concept to be considered, and

14. See Traynor, *Mapp v. Ohio At Large In The Fifty States*, 1962 DUKE L.J. 319.

15. 277 U.S. 438 (1928).

16. Compare *Goldman v. United States*, 316 U.S. 129 (1942), where using a "detectaphone" listening device did not constitute a technical trespass, with *Silverman v. United States*, 365 U.S. 505 (1961), where the court found a technical trespass in a spike microphone. King, *supra* note 5, at 248-50, finds four basic difficulties with the physical trespass test: "a 'fraction of an inch' may determine whether . . . rights have been violated"; it fails to "take into account the technological advances in . . . electronic surveillance"; it does not look to the basic liberty involved; and it over-emphasizes the fourth amendment.

In *Lanza v. New York*, 370 U.S. 139 (1962), a new test was suggested: the constitutionally protected area. The Court said that a visiting room in a jail was not an area where the fourth amendment rights were protected. This decision's precedent value is somewhat diminished, however, by the fact that there were two non-participating justices and three dissenters. Also, the holding, an affirmation of defendant's conviction for failing to answer questions of a legislative committee, could have rested on other grounds. See discussion in King, *supra* note 5, at 251-57.

17. For discussion of the various factors which can make a search reasonable, see Beane, *supra* note 10, at 234-46.

18. See PROSSER, TORTS § 112 (3d ed. 1964); Warren & Brandeis, *supra* note 8, at 215.

19. 359 U.S. 360 (1959).

20. BALTO. CITY CODE art. 12, § 120 (1950).

it must be weighed against other legitimate interests with which it conflicts.<sup>21</sup>

The privacy principle of the fourth amendment, although clear and forthright standing alone, is only one half of a team. The fifth amendment's privilege against self-incrimination is the other half,<sup>22</sup> and, when read together, even without any legal interpretations, these two amendments demonstrate the founders' commitment to an adversary-accusatorial system. Similarly to its fourth amendment stand, the Court first held that the fifth amendment's privilege against self-incrimination is not protected against state action by the fourteenth amendment.<sup>23</sup> But in *Malloy v. Hogan*<sup>24</sup> the Court again reconsidered its position, and changed its mind. Through Mr. Justice Brennan, the Court held that the fifth amendment privilege against self-incrimination applies to the states through the fourteenth amendment.

The fifth amendment has been the subject of much abuse and distrust through the years. It is usually conceded that more guilty people will fall back on the fifth amendment's self-incrimination clause than innocent ones. But not everyone who pleads the fifth amendment is guilty. In a sense, the fifth amendment is the last bastion of the individual against the state. It is the essence of an accusatorial system. Its justification rests not on its contribution to a fair trial, but rather on the sanctity and dignity to be afforded the privacy of the individual man. In England, it is "largely a matter of atmosphere."<sup>25</sup> America has made it a part of the Constitution.

What is today probably the least important of the constitutional rights of privacy is that guaranteed in the third amendment's prohibition of quartering soldiers without the owner's consent — an insignificant freedom today, perhaps, but an indication of the overall intent of the founding fathers.

The first amendment, on the other hand, has presented some significant and rather unusual aspects of the privacy concept. For one thing, the amendment protects the right of the people to peaceably assemble. The Court has recognized in this right a freedom of association, which, to be meaningful, requires a correlative right to privacy in the associational relationship.<sup>26</sup> Despite the sweeping language in

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21. See also *Ohio ex rel. Eaton v. Price*, 364 U.S. 263 (1960), where a divided court upheld a search by a building inspector when there was no visible health hazard and no complaint. For a discussion of the dangers inherent in searches by administrative officers, rather than policy, see Mr. Justice Douglas's dissent in *Abel v. United States*, 362 U.S. 217, 241 (1959).

22. See, e.g., Mr. Justice Black's concurring opinion in *Mapp v. Ohio*, 367 U.S. 643, 661 (1961), for the view that the exclusionary rule is not dictated by the fourth amendment *per se*, but by the fourth considered with the fifth. See also *Boyd v. United States*, 116 U.S. 616 (1886), for an example of the broad scope afforded the fourth and fifth amendments when viewed together before *Olmstead*.

23. *Cohen v. Hurley*, 366 U.S. 117 (1961); *Adamson v. California*, 332 U.S. 46 (1947); *Twining v. New Jersey*, 211 U.S. 78 (1908).

24. 378 U.S. 1 (1964).

25. *Griswald*, *supra* note 2, at 223.

26. See discussion in Robison, *Protection of Associations From Compulsory Disclosure of Membership*, 58 COLUM. L. REV. 614, 619-20 and n.22 (1958), that the drafters actually intended only a right to meet for protest purposes, and not a freedom of association. At any rate, the Court has now protected the distinct freedom of association. See, e.g., *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 141 (1951).

*Prudential Ins. Co. v. Cheek*<sup>27</sup> that there is no provision in the Constitution conferring any right of privacy on people or corporations,<sup>28</sup> in *De Jonge v. Oregon*<sup>29</sup> the Court conferred a right of privacy on associations which had a lawful purpose. Again, however, the right to privacy in this area was qualified by the necessity of balancing it with other interests. In *New York ex rel. Bryant v. Zimmerman*<sup>30</sup> the Court upheld a registration and disclosure statute against the Ku Klux Klan. The nature and purpose of the organization out-weighed any claims to privacy its members may have had. On the other hand, the NAACP has generally been successful in having disclosure statutes declared inapplicable.<sup>31</sup> The result is that the right to keep private the fact of membership in an association depends on the goals of the organization, as well as the extent and effect of government infringement.<sup>32</sup>

At the same time, the first amendment may limit, as well as support, a right of privacy; free speech may actually conflict with the privacy principle. In *Kovacs v. Cooper*<sup>33</sup> a statute prohibiting loud-speakers from emitting "loud and raucous" noises was upheld. The Court held that the right of free speech does not mean that one can unduly infringe upon another's right of privacy and that the statute protecting privacy was valid in that case. But, in *Public Utilities Comm'n of the District of Columbia v. Pollak*, the Court upheld the right of a private company to install loud-speakers providing "music as you ride" in its buses and streetcars.<sup>34</sup> The Court, while recognizing a right to be free from noise, felt that in this instance that right was outweighed by the interest of the public in general, which did not seem to object to the music.<sup>35</sup> In weighing the factors in *Breard v.*

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27. 259 U.S. 530 (1922).

28. The Court has reaffirmed the idea that corporations do not have constitutional rights or privacy. See, e.g., *United States v. Morton Salt Co.*, 338 U.S. 632 (1950).

29. 299 U.S. 353 (1937).

30. 278 U.S. 63 (1928).

31. See *Louisiana v. NAACP*, 366 U.S. 293 (1961); *Bates v. City of Little Rock*, 361 U.S. 516 (1960); *NAACP v. Alabama*, 357 U.S. 449 (1958). See also *Shelton v. Tucker*, 364 U.S. 479 (1960), where the Court invalidated a state statute requiring teachers to disclose all organizations to which they belonged.

32. The registration provisions of the Subversive Activities Control Act, 64 Stat. 987 (1950), 50 U.S.C. §§ 781-97 (1958), have presented some troublesome problems for the Supreme Court. In *Communist Party of the United States v. Subversive Activities Control Board*, 367 U.S. 1 (1961), the Court held that the registration provisions did not violate the first amendment and that the Party must register. But in a case just recently decided, *Albertson v. Subversive Activities Control Board*, 382 U.S. 70 (1965), the Court held that registration was inconsistent with the fifth amendment's privilege against self-incrimination, since admission of membership in the Party can be used for prosecution purposes under several federal criminal statutes. This result may mean that the fifth amendment's right of privacy is to be weighed more heavily in consideration against other interests than the first amendment's privacy in associational relationship.

For general discussion of the right of privacy in associational relationships see *RICE, FREEDOM OF ASSOCIATION* (1962); Robison, *supra* note 26; Comment, 40 N.C.L. Rev. 788 (1962).

33. 336 U.S. 77 (1949).

34. 343 U.S. 451 (1952).

35. Compare *Saia v. New York*, 334 U.S. 558 (1948), where the Court invalidated an ordinance which, without setting up guidelines, required permission from the police chief in order to operate loud-speakers on a public street.

*Alexandria*<sup>36</sup> the Court concluded that the individual homeowner's right to privacy outweighed a publisher's right to distribute publications and upheld a Virginia statute prohibiting salesmen from going on private property without the owner's consent.<sup>37</sup>

#### THE PRIVACY PRINCIPLE IN THE SUPREME COURT TODAY

In *Barron v. Baltimore*<sup>38</sup> the Court decided that the Bill of Rights was not a limitation on the powers of the states. But since 1868 and the enactment of the fourteenth amendment, the Court has been concerned with which provisions in the Bill of Rights are in fact to be applied to the states via the fourteenth amendment's due process clause. By whatever means the various justices have decided to utilize — absorption, "ordered liberty", or a form of incorporation — the end result has been that virtually all of the major rights guaranteed in the Bill of Rights have been applied to the states.<sup>39</sup> The method of inclusion by which the Bill of Rights is applied through the Fourteenth Amendment to the states is quite relevant to the privacy idea. We have seen how the first, third, fourth, and fifth amendments offer enough of their faces to reflect facets of privacy protection. But privacy itself is not mentioned in the Bill of Rights. What is mentioned instead are these rights protecting against unreasonable searches and seizures, self-incrimination, and so on. Such liberties encompass a large segment of what we regard as personal rights. But they do not encompass all. A most difficult question of constitutional interpretation arises when there is a clear, unwarranted invasion of privacy which is not expressly or impliedly protected by a particular amendment. Such was the case in *Griswold v. Connecticut*.<sup>40</sup>

A Connecticut statute forbade using any drug, medicinal article, or instrument to prevent conception. The defendants were convicted as accessories for giving advice to married couples as to means of preventing conception. The defendants claimed a violation of the fourteenth amendment. The problem with declaring the birth control law void was that there did not appear to be a specific provision of the Constitution which it violated. Surely, it was "an uncommonly silly law",<sup>41</sup> a bad law, an invasion of privacy; but where was it prohibited in the Constitution? Mr. Justice Douglas, delivering the plurality opinion, found that the "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life

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36. 341 U.S. 622 (1951).

37. Compare *Martin v. City of Struthers*, 319 U.S. 341 (1943), where the free speech interest was combined with the free exercise of religion. The Court found unconstitutional, as applied to a Jehovah's Witness, an ordinance making it a crime to summon people to their door to receive circulars.

38. 32 U.S. (Pet.) 242 (1833).

39. Some guarantees which have not in fact been incorporated by the Court and which are unlikely to be applied to the states are: the third amendment's quartering of soldiers clause, the seventh's right to jury trial in civil cases involving more than twenty dollars, and the fifth's grand jury and double jeopardy guarantees.

40. 381 U.S. 479 (1965).

41. *Id.* at 527 (Stewart, J., dissenting).

and substance."<sup>42</sup> The present case lay within the "zone of privacy created by several fundamental guarantees."<sup>43</sup>

Justices Harlan and White, in concurring opinions, found the statute invalid not because of a Bill of Rights violation, but because it violated the "ordered liberty"<sup>44</sup> concept of the fourteenth amendment. In essence, this view of the Constitution's due process clauses says: due process protects rights which are fundamental. Marital privacy is a fundamental right. Therefore, this right is protected against federal infringement by the fifth amendment's due process clause, and against state action by the fourteenth's.<sup>45</sup> This interpretation seems to have upheld at least one other unenunciated right of privacy in the past — the secret ballot.<sup>46</sup>

Mr. Justice Black's dissenting opinion emphasized the lack of a specific constitutional provision which could be pointed to. Believing in a strict incorporation theory which includes no more and no less than the first eight amendments,<sup>46</sup> Mr. Justice Black expressed great concern over the ability of the Court to read natural law theories into the Constitution to invalidate legislation. Likewise, Mr. Justice Stewart dissented on the ground that there is no express guarantee of privacy in the Constitution.

Mr. Justice Goldberg's concurring opinion suggested a more novel approach to the problem. Mr. Justice Goldberg felt that the ninth amendment, which says that the enumeration of certain rights should not be construed to disparage other rights "retained by the people" manifests the existence in the Constitution of fundamental rights not expressly stated. Reciting the history of the amendment, Goldberg finds an intent in the founders to recognize the inability of language to convey every concept, and to emphasize that there are additional fundamental rights existing alongside those specifically listed.<sup>47</sup> The tenth amendment was also cited as a back-up argument for the proposition that the Constitution protects rights not enumerated.

The result of the *Griswold* case has far-reaching implications. The Court has recognized a certain type of privacy, marital privacy, which is not expressly mentioned in the Constitution. In so doing, the Court did not expand any specific guarantee, but instead looked to the spirit behind the Bill of Rights and found zones of protected freedoms, into which marital privacy fell. There is some reason to fear, along with Justices Black and Stewart, the roads that may have been opened with this decision. The main cause of concern is with the possibility of a natural law technique permitting legislation to be voided at the whim and caprice of the justices. Certainly, the dangers of this method in

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42. *Id.* at 484.

43. *Id.* at 485.

44. See *Palko v. Connecticut*, 302 U.S. 319 (1937).

45. See Nutting, *Freedom of Silence: Constitutional Protection Against Governmental Intrusions in Political Affairs*, 47 MICH. L. REV. 181 (1948), for the history of the evolution of the secret ballot into a constitutionally protected right of privacy through the fourteenth amendment.

46. See *Adamson v. California*, 332 U.S. 46, 68 (1946) (Black, J., dissenting).

47. The Supreme Court has yet to rest a decision solely on the grounds of the ninth amendment. See generally PATTERSON, *THE FORGOTTEN NINTH AMENDMENT* (1955); Redlich, *supra* note 6.



the area of economic legislation have been proven.<sup>48</sup> But when we leave the area of economic regulation and turn instead to the realm of individual liberties, the dangers of the natural law theories seem lessened.

It does not bother us so much that the Court, with the Constitution as a basic guide, will apply the standards when personal liberties are infringed upon. In fact, it seems desirable; surely, it is one of the Court's functions to protect rights. On the other hand, it seems equally desirable for the Court to give economic legislation a wide scope. Many factors coalesce in creating this distinction. For one thing, there is the question of facilities. The Supreme Court simply is not as well-equipped as Congress to deal with matters of economic policy, since the Court, by the nature of the adversary system, deals only with data brought to it.

But, more significantly, history has taught us that the subject matter of economics does not lend itself readily to judicial determination. Economic policy is an area best determined by a body hypersensitive to the majoritarian will. Flexibility and responsiveness play crucial roles in enabling a changing society to grow economically. However, personal rights should not depend on the will of the majority. Personal freedom is an area which needs as its protector a body with skin thick enough to withstand high degrees of public displeasure. The judiciary, and especially the Supreme Court, fits this role. While the Court is certainly not entirely unresponsive to the will of the people, its independence from the voting process affords it the necessary stability to protect personal freedoms particularly in the face of adverse public opinion. Also, the Constitution itself makes the protection of personal freedom an easier task for the judiciary than promulgating economic policy. The personal liberties stand on a somewhat clearer textual footing than the nebulous power over interstate commerce: they are a little more specialized and there are more of them from which to gauge the spirit of their meaning. Thus, the constitutional text, the judicial method, and the degree of responsiveness to the people, all combine to make the Supreme Court the protector of individual freedom, but not the promulgator of economic policy.

To make such a distinction in the Court's function requires a view of the Constitution as a flexible document which intimates as well as expresses and acts more as an outline than the last word. We are saying, in effect, that as a matter of policy the Court should enter this area but not that one. The reasons for the Court's involvement in one sphere and not another can be based on the Court's ability to deal with the problems and the nature of the problems themselves. But there is another factor to consider: when our system of government was created, was the Supreme Court meant to be given this discretion? And, in resolving this issue, we must simultaneously resolve another: to what extent must we, in the second half of the twentieth century, depend and manipulate our system on the basis of the ideas of those who lived

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48. See, *e.g.*, *Hammer v. Dagenhart*, 247 U.S. 251 (1918); *Lochner v. New York*, 198 U.S. 45 (1905).

in the eighteenth century, or even in the 1860s? These are questions without answers, but questions which must constantly be asked.

As Mr. Justice Black points out in his *Griswold* dissent, the Constitution contains its own method for change — the amending process. Consequently, Mr. Justice Black sees the Constitution as a collection of words from the past in which it is the Court's function to determine the meanings of the drafters; it is not the Court's function to legislate. But in many ways the skeletal terms of the Constitution will unavoidably cast the Court into the role of quasi-legislature. The amending process is too unwieldy to constantly fall back on when change is needed. Nor would we want frequent amendments. If we could change the Constitution easily it would lose its stability and become self-destroying. The more we must renovate, the less firm becomes the superstructure. It is judicial legislation which prevents this. The judiciary and legislature are not mutually exclusive, nor can they be. Both are aspects of the political system; and "a 'constitution' is a matter of purest politics, a structure of power."<sup>49</sup> The line between the Court and the Congress can only be approximately drawn. Thus, it is pointless to lay down a blanket rule that the Supreme Court should not legislate at all: the issue is, to what extent and in what areas should the Court make legislative policy decisions? In the area of personal rights, it seems that the Court should indeed be the legislator.

The Court's "penumbra" technique in *Griswold* permits just such a process, as does Goldberg's ninth amendment technique. Both techniques agree that there is a right to marital privacy which should be protected even though the right is not mentioned in the Constitution. And the method for determining what rights are there but not mentioned is the same by both techniques: look to those rights which are mentioned and search out the underlying principles. Also, Mr. Justice Harlan's view of due process presents the same result. But Harlan's view, by failing to incorporate the Bill of Rights into the fourteenth amendment, suffers from the lack of any textual standard. This method makes each judge bound only by his own notions of reasonableness and fairness — notions nurtured by training in the legal method, to be sure, but still lacking any written guide from which to draw sustenance.

### THE LIBERTY WE DESERVE

We have seen then that there are many constitutional rights of privacy and many facets to each right. The fourth amendment is our most vivid example. On its face the fourth amendment prohibits unreasonable searches and seizures. This may range from stomach-pumping<sup>50</sup> to spike microphones.<sup>51</sup> But, this may not include wire-tapping<sup>52</sup> or other non-physical trespassing eavesdropping devices.<sup>53</sup> But when we look beyond the literal language of the fourth amendment

49. BLACK, PERSPECTIVES IN CONSTITUTIONAL LAW 1 (1963).

50. *Rochin v. California*, 342 U.S. 165 (1952).

51. *Silverman v. United States*, 365 U.S. 505 (1961).

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

53. See, e.g., *On Lee v. United States*, 343 U.S. 747 (1952); *Goldman v. United States*, 316 U.S. 129 (1942).

and try to determine the principle behind the words, there does not seem to be a justification for the distinctions the cases have drawn. What the words are protecting is privacy, not merely physical trespass. Judge Frank, in his dissenting opinion in *United States v. On Lee*,<sup>54</sup> captured the essence of the principle:

A man can still control a small part of his environment, his house; he can retreat thence from outsiders, secure in the knowledge that they cannot get at him without disobeying the constitution. That is still a sizable hunk of liberty — worth protecting from encroachment. A sane, decent, civilized society must provide some such oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man's castle.

In addition to the fourth amendment, we have seen that the first, third, and fifth amendments all have zones of privacy within their scope. And, we have seen the arguments made that the ninth and fourteenth amendments manifest a constitutional recognition of privacy since such a right is fundamental. Few would disagree that privacy, to at least some degree, is a desirable element in society. As modern technology improves the methods for invading our privacy,<sup>55</sup> as we march closer toward Orwellian regimentation and transparency, our awareness of a need to protect certain aspects of individual selfhood becomes more acute. But we can not merely say: "It is a desirable thing to protect; therefore, the Supreme Court can protect it." "[W]e must never forget, that it is a constitution we are expounding."<sup>56</sup>

But this Constitution has been an amazingly durable document. Over the years, it has adapted itself, though judicial construction as well as amendments, to the vital needs of the people. The bulkiness of the amending procedure has necessitated flexible interpretations to accommodate the document to a changing society. The result has been the functioning of the Supreme Court as a maker of policy as well as interpreter of words. And, in this role, the Court can find within this constitution the underlying principles to meet the ever-growing attack on privacy. As Mr. Justice McKenna said in *Weems v. United States*:

Times works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions . . . In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be.<sup>57</sup>

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54. 193 F.2d 306, 315-16 (2d Cir. 1951).

55. Mr. Justice Brandeis, dissenting in *Olmstead v. United States*, 277 U.S. 438, 474 (1928), prognosticated the onslaught of the scientific eavesdropping advances: "Ways may someday 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." To determine just how close we have come to this development see DASH, SCHWARTZ & KNOWLTON, *THE EAVESDROPPERS* (1959).

56. *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 407 (1819).

57. 217 U.S. 349, 373 (1910).

The changes time has worked since 1791 in the means for invading human privacy have truly been phenomenal. We worry now not so much about the State coming in and seizing our personal possessions, as we do about the State overhearing our every word and overseeing our marital relationships. The privacy principle existed in 1791, but was not viable, or perhaps not as needed. Today it is. Consequently, the Court has given the principle a "wider application than the mischief which gave it birth." Regardless of the theory used, there is little doubt that in the cases to come, that "sizable hunk of liberty" which is the right of privacy will find protection in the Constitution. Whether by specific guarantee, "ordered liberty", or "penumbra", the weapons for combating the invasion are there. Surely, a generation which has manifested such enormous scientific and sociological advances deserves at least this much liberty.

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