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Griswold v. Connecticut: The Justices and Connecticut's Uncommonly Silly Law

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GRISWOLD V. CONNECTICUT: THE JUSTICES AND CONNECTICUT'S "UNCOMMONLY SILLY LAW"

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> The lawyers will be arguing about this one for a long time. Not since Justice Holmes upheld the right of sterilization, on the ground that two generations of idiots are enough, has there been such a connection of legal controversy and sex.
>
> James Reston[1]

I. Introduction

Griswold v. Connecticut,[2] which held unconstitutional the Connecticut birth control statute prohibiting the use of contraceptives by married couples, is pregnant with legal significance for the development of constitutional law, the study of judicial behavior, and the function of legal institutions.

After having previously evaded the constitutional issue on jurisdictional grounds,[3] in 1965 the United States Supreme Court finally confronted the merits of the controversy. The difficulties the justices encountered in deciding the case were manifested by the number of opinions they wrote. Although Mr. Justice Douglas's opinion is designated as "the opinion of the Court," Mr. Justice Goldberg wrote a concurring opinion in which he was joined by the Chief Justice and Mr. Justice Brennan, while Justices Harlan and White each wrote separate opinions concurring in the judgment, and Justices Black and Stewart each handed down dissenting opinions.

The case culminated a bitter, forty-five-year legislative struggle[4] to eliminate Connecticut's birth control statute,[5] which, unlike similar statutes in other states,[6] forbade the use of any drug, medicinal article, or instrument for the purpose of preventing conception and assisting or counseling anyone to commit such offense. Because the state legislature had consistently frustrated all efforts

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1 *Washington: Brother Douglas, Brother Black, O Brother!* N.Y. Times, June 9, 1965, p. 46, col. 6 (late city ed.).

2 381 U.S. 479 (1965).

3 Poe v. Ullman, 367 U.S. 497 (1961); Tileston v. Ullman, 318 U.S. 44 (1943).

4 Cogley, *Controversy in Connecticut*, 67 COMMONWEAL 657 (1958); Comment, 49 CORNELL L.Q. 275 (1964). The Connecticut statute was enacted in 1873, but efforts for repeal had been pursued in the legislature continuously since 1923. Comment, 70 YALE L.J. 322 (1960).

5 CONN. GEN. STAT. ANN. §§ 53-32, 54-196 (1960). 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 and 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.

6 Brief for Appellants, p. 24, Griswold v. Connecticut, 381 U.S. 479 (1965); Comment, 49 CORNELL L.Q. 275 (1964). Some abortion laws could have a similar effect with regard to certain types of contraception. Meloy, *Pre-Implementation Fertility Control and the Abortion Laws*, 41 CHI.-KENT L. REV. 183 (1964).

to repeal or amend the statute and the Connecticut courts had strictly interpreted its provisions,[7] opponents of the statute regarded an attack on its constitutionality as the only recourse. In 1961 the Supreme Court, in denying jurisdiction in a declaratory judgment action, held that the law had been nullified through nonenforcement.[8] The Planned Parenthood League proceeded on this assumption to open a New Haven birth control clinic, which gave information, instruction, and medical advice on the means for preventing conception. Following a complaint filed by a private citizen, Connecticut authorities raided the clinic, and the executive director and attending physician were later found guilty of violating the statute and fined one hundred dollars each.[9] After their convictions were upheld by the courts of Connecticut, the defendants petitioned the Supreme Court for certiorari, contending that the statute denied them their liberty and property under the due process clause of the fourteenth amendment, denied them their freedom of speech under the first and fourteenth amendments, and constituted an unreasonable and unjustifiable invasion of their privacy contrary to the fourth, ninth, and fourteenth amendments.[10]

Since the justices agreed that no specific provision of the Bill of Rights was applicable, the Court was compelled to wrestle with the question of whether an unenumerated constitutional right was violated. A majority of the justices had held that the due process clause of the fourteenth amendment "absorbed" or "incorporated" various guarantees of the first eight amendments,[11] but that it did not confer any independent substantive rights.[12] Therefore, the justices had to determine whether a right was violated that could be encompassed within one or more of the enumerated rights or whether the Constitution confers rights that are not enumerated.

This article evaluates the judicial opinions, considers other constitutional arguments not considered in the opinions, discusses the future implications of this decision, and notes its significance in the current debate regarding legislation affecting public morals.

II. The Opinions

A. Mr. Justice Douglas

Mr. Justice Douglas, in presenting the opinion of the Court, first disposed of the question of standing[13] and then insisted that the Court

> does not sit as a super-legislature to determine the wisdom, need, and

7 Comment, 49 CORNELL L.Q. 275, 287-88 (1964).
8 Poe v. Ullman, 367 U.S. 497, 501-03 (1961).
9 Griswold v. Connecticut, 381 U.S. 479, 480 (1965).
10 Brief for Appellants, pp. 11-13.
11 *E.g.*, Griffin v. California 380 U.S. 609 (1965); Pointer v. Texas, 380 U.S. 400 (1965); Malloy v. Hogan, 378 U.S. 1 (1964); Gideon v. Wainwright, 372 U.S. 335 (1963); Mapp v. Ohio, 367 U.S. 643 (1961).
12 Ferguson v. Skrupa, 372 U.S. 728 (1963); Daniel v. Family Security Life Ins. Co., 336 U.S. 220 (1949); Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949); Railway Express Agency v. New York, 336 U.S. 106 (1949); Gossert v. Cleary, 335 U.S. 464 (1948); Olson v. Nebraska *ex rel.* Western Reference & Bond Ass'n, 313 U.S. 236 (1941); United States v. Carolene Prods. Co., 304 U.S. 144 (1938).
13 Douglas, in finding that the defendants had standing to assert the constitutional rights

> propriety of laws that touch economic problems, business affairs, or social conditions. This law, however, operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation.[14]

This view accords with his dissent in *Poe v. Ullman,*[15] where he supported the need for social experimentation but contended that

> to say that a legislature may do anything not within a specific guarantee of the Constitution may be as crippling to a free society as to allow it to override specific guarantees so long as what it does fails to shock the sensibilities of a majority of the Court.[16]

In that opinion, Mr. Justice Douglas distinguished the economic regulation of the sale or distribution of contraceptives from the personal regulation of the use of contraceptives; and he contended that the error of the Court in the era when it struck down social legislation lay not in inquiring into constitutionality, but in applying its own standard of reasonableness to questions that touched no particular provisions of the Constitution.[17]

In *Poe* Douglas derived a right to privacy from the "totality of the constitutional scheme"; and he read the right into the due process clause of the fourteenth amendment, contending that this clause included the first eight amendments, but was not restricted to them. In *Griswold,* however, he contended that a constitutional right of privacy exists, which is derived from

> specific guarantees in the Bill of Rights [which] have penumbras, formed by emanations from those 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, 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 Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[18]

Douglas noted that the Court had a number of controversies regarding these penumbral rights of "privacy and repose."[19] The Connecticut statute,

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of the married couples with whom they had a professional relationship, noted that they had been convicted for serving married couples in violation of an aiding and abetting statute, as distinguished from the more strict requirements of representing others in a declaratory judgment action. The accessory is deemed to have standing to assert that the offense that he is charged with assisting is not, or cannot constitutionally be, a crime. The rights of husband and wife were likely to be diluted or adversely affected unless considered in a suit involving the defendants, who had the confidential relation here involved. Griswold v. Connecticut, 381 U.S. 479 (1965).

14 *Id.* at 482.

15 367 U.S. 497 (1961) (dissenting opinion).

16 *Id.* at 518.

17 *Id.* at 519-21.

18 *Id.* at 484.

19 *Ibid.*, citing Lanza v. New York, 370 U.S. 139 (1962); Monroe v. Pape, 365 U.S. 167 (1961); Frank v. Maryland, 359 U.S. 360 (1959); Public Util. Comm'n v. Pollak, 343 U.S. 451 (1952); Breard v. Alexandria, 341 U.S. 622 (1951); Skinner v. Oklahoma, 316 U.S. 535 (1942).

by prohibiting the use of contraceptives rather than regulating their sale or manufacture, invaded a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. The evil of the statute was that it sought to achieve its goals by means having a maximum destructive impact on private human relationships. In striking down the law, Douglas invoked the principle 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."[20]

In mentioning the enumerated rights from which he derived the right of privacy, Douglas concluded by quoting the ninth amendment but did not explicitly state its relevance. His reference to the marriage relationship and its antiquity suggests notions of "rights retained by the people."[21] In his subsequent dissenting opinion in *Osborn v. United States*[22] in referring to *Griswold,* he again alluded to the ninth amendment, quoting a student note on point:

> The ninth amendment should be permitted to occupy its rightful place in the Constitution as a reminder at the end of the Bill of Rights that there exist rights other than those set out in the first eight amendments. It was intended to preserve the underlying theory of the Constitutional Convention that individual rights exist independently of government, and to negate the Federalist argument that the enumeration of certain rights would imply the forfeiture of all others. The ninth is simply a rule of construction, applicable to the entire constitution.[23]

Douglas apparently holds that although the right of privacy may be induced from the enumerated rights, it exists independently by virtue of the ninth amendment. The role that the fourteenth amendment assumed in the *Poe* dissent is now assumed by the ninth. But Douglas has now attempted to be more explicit in inducing the right of privacy from the rights specified in the first eight amendments.

The precedents Douglas used to establish a "penumbral" right of privacy involved fact situations where actual, enumerated rights were infringed and a finding of "penumbral" rights was not necessary. For example, the right of association, which Douglas referred to as a facet of the right of privacy within the penumbra of the first amendment, is actually an aspect of free speech. When an individual who expresses, or becomes identified with the expression of, certain utterances is compelled to endure retribution by public exposure or discharge from employment, his speech is abridged.[24] Similarly, the precedents

20 Griswold v. Connecticut, 381 U.S. 479, 485 (1965).
21 *Id.* at 485-86.
22 385 U.S. 323 (1966).
23 *Id.* at 352 n.15, referring to Comment, 33 U. CHI. L. REV. 814, 835 (1966).
24 NAACP v. Button, 371 U.S. 415 (1963); Shelton v. Tucker, 364 U.S. 479 (1960); Talley v. California, 362 U.S. 60 (1960); Bates v. Little Rock, 361 U.S. 516 (1960); NAACP v. Alabama, 357 U.S. 449 (1958); Wieman v. Updegraff, 344 U.S. 183 (1952). Some of these cases may be regarded as involving procedural rights in making a determination whether an individual may retain employment. United Pub. Workers v. Mitchell, 330 U.S. 75 (1947). The issue of statutory vagueness is also involved. Baggett v. Bullitt, 377 U.S. 360 (1964); Cramp v. Board of Pub. Instruction, 368 U.S. 278 (1961). Or the sanction may constitute a bill of attainder. United States v. Brown, 381 U.S. 437 (1965). The cases are discussed

involving the fourth and fifth amendments where the Court alluded to a right of privacy actually involved search or seizure or self-incrimination.[25] Mr. Justice Brandeis's dissenting opinion in *Olmstead v. United States*[26] referred to an infringement of privacy through wire tapping,[27] which was related to a "constructive" search and seizure;[28] but no search and seizure whatever was involved in *Griswold*.

Douglas's opinion in *Griswold* may have differed from his dissent in *Poe* because he was writing an "opinion of the Court," in which he attempted, though unsuccessfully, to achieve a majority consensus. Some of the justices would not agree that the fourteenth amendment could be used to confer other rights as well as to incorporate the first eight amendments.[29] Also, by attempting to rely as much as possible on specific constitutional provisions and the ninth amendment, Douglas may have attempted to meet the dissenters' objection that the Court assumed the role of a super-legislature. A general right of privacy that the court can apply at its discretion by virtue of the ninth amendment, however, bears implications similar to substantive due process.

Another significant departure from his *Poe* dissent was Douglas's failure to claim a first amendment infringement. In *Poe* Douglas contended that the Connecticut statute, as applied to the physician, constituted an abridgement of free speech because he was prevented from disseminating information on birth control. Douglas might have decided not to invoke the first amendment in *Griswold* because the physician, by prescribing birth control methods, was engaged in action and not merely in the exercise of speech.[30] The entire conduct of the appellants, in organizing the clinic and in violating the law, involved activities encompassing more than the mere utterance or conveyance of information.[31]

The appellants, however, argued that by abridging the freedom to practice medicine, the statute impeded the pursuit of experimentation and investigation, involving elements of free speech, and that it was difficult to draw the line between speech and action. The brief argued that this action was similar

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generally in KALVEN, THE NEGRO AND THE FIRST AMENDMENT (1965); Emerson, *Freedom of Association and Freedom of Expression*, 74 YALE L.J. 1 (1964).

25 *E.g.*, Mapp v. Ohio, 367 U.S. 643 (1961); Boyd v. United States, 116 U.S. 616 (1886).

26 277 U.S. 438 (1928) (dissenting opinion).

27 *Id.* at 473, 478.

28 People v. Grossman, 45 Misc. 2d 557, 257 N.Y.S.2d 266 (Sup. Ct. 1965).

29 Redlich, *Are There "Certain Rights . . . Retained by the People"?* 37 N.Y.U.L. REV. 787, 794-95 (1962).

30 A confusing element is Mr. Justice Black's statement in dissent that "my disagreement with the Court's opinion [Douglas] . . . here is a narrow one, relating to the application of the First Amendment to the facts and circumstances of this case. But my disagreement with brothers Harlan, White and Goldberg is more basic." Griswold v. Connecticut, 381 U.S. 479, 511 (1965). Kauper, *Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The Griswold Case*, 64 MICH. L. REV. 235 (1965), suggests Douglas may have derived the right of privacy from first amendment freedoms, although conceding this is not apparent. However, Douglas clearly does not regard the Connecticut statute as denying free speech, the position he had taken in *Poe*.

31 In a footnote to his dissenting opinion, Mr. Justice Stewart stated:

> If all the appellants had done was to advise people that they thought the use of contraceptives was desirable, or even counsel their use, the appellants would, of course, have a substantial First Amendment claim. But their activities went far beyond mere advocacy. They prescribed specific contraceptive devices and furnished patients with the prescribed contraceptive materials. 381 U.S. 479, 529 n.3 (1965).

to expression in that the pursuit of scientific knowledge involves the same values and includes the facilitation of social change by means not harmful to others.[32] Professor Emerson, who wrote the brief and presented this argument, later admitted that this rationale was weak.[33] One commentator has argued that first amendment rights may have been infringed in that the denial to married couples of access to birth control information constituted an abridgement of the exercise of free speech.[34] Only a few weeks earlier, however, the Court had rejected a somewhat similar rationale for invoking the first amendment in relation to the freedom to travel as curtailed by the refusal to issue passports.[35] Furthermore, to apply the first amendment in *Griswold* probably would have adversely affected the state's authority to regulate the practice of medicine.

B. Mr. Justice Goldberg

In an opinion concurred in by the Chief Justice and Mr. Justice Brennan, Mr. Justice Goldberg agreed with Mr. Justice Douglas but was more explicit in relying on the ninth amendment. His view was that, by virtue of the ninth amendment, the Court is not limited by the rights specified in the first eight amendments in upholding fundamental rights against both federal and state authority. The Court must determine what rights are fundamental by referring to the constitutional scheme and the collective conscience of the people. One such fundamental right is the right of privacy in marriage, which was encroached by the Connecticut birth control statute. The ban on the use of contraceptives by married persons cannot be justified as serving any compelling state interest.

Goldberg's approach in applying the ninth amendment has been characterized as a philosophically idealist conception, reminiscent of Savigny's anti-natural law *Volksgeist* theory of the law as the revelation of the spirit of the *Volk*. In contrast, the contention is made that Douglas applied a legal method that is opposed to arbitrariness because it is grounded in analogy justified by the texts of the first eight amendments. While Goldberg's legal method was secretive and subjective, Douglas applied the Roman Law method of closing gaps in constitutionally protected rights by use of analogy in developing the force of the first eight amendments and other constitutional provisions to control and determine novel legal problems.[36]

Regardless of the methodology, however, the subjective role of the judge cannot be ignored. Whether a right of privacy is derived from the enumerated rights or from notions of *Volksgeist*, there must be an appeal to the underlying values of the first eight amendments, and such appeal involves a subjective determination. Moreover, the concept of a right of privacy is of such breadth that, once constitutionally established, it can be made to encompass whatever the judge may choose.

32 Brief for Appellants, pp. 67-69.
33 Emerson, *Nine Justices in Search of a Doctrine*, 64 MICH. L. REV. 219, 221 (1965).
34 Dixon, *The Griswold Penumbra: Constitutional Charter for an Expanded Law of Privacy?* 64 MICH. L. REV. 197 (1965).
35 Zemel v. Rusk, 381 U.S. 1 (1965).
36 Franklin, *The Ninth Amendment as Civil Law Method and Its Implications for Republican Form of Government: Griswold v. Connecticut; South Carolina v. Katzenbach*, 40 TULANE L. REV. 487, 489 (1966).

The use of the ninth amendment in this case is a novel development, for it has been generally ignored by the Court, lawyers and scholars.[37] Writers have supported a broader application than is indicated in Goldberg's opinion, contending that the amendment was originally intended to apply to the states as well as the federal government. Its wording, the enumerated rights are "retained by the *people*," suggests a limitation upon the states when read with the tenth amendment's reservation of power "to the states respectively or to the people"; the theory is that the ninth amendment suggests a limitation upon the tenth.[38] When originally proposed, the two amendments were in one article and later separated.[39] Chief Justice Marshall, in *Barron v. Baltimore*,[40] did not specifically hold the ninth amendment inapplicable to the states, referring only to the "Bill of Rights." Mr. Justice Cardozo, in *Palko v. Connecticut*,[41] stated that the first eight amendments are not incorporated into the fourteenth. The implication from these cases is that the ninth amendment may be an independent source for asserting rights not mentioned elsewhere in the Constitution.

Goldberg may have limited the scope of the ninth amendment merely to broadening the use of the due process clause of the fourteenth amendment partly to answer Justice Black's objection that its use would make the Court a "day-to-day constitutional convention."[42] Moreover, Goldberg's approach accords with previous Supreme Court practice, whereas the approach of the commentators would constitute a radical break. Apparently Goldberg felt he could not rely solely on the fourteenth amendment, because the Court had denuded its substantive content by deferring to the legislature the determination of the reasonableness of regulatory legislation[43] and by tending to limit the application of the due process clause to the incorporation or absorption of the specific rights of the first eight amendments.[44] By coupling the ninth amendment to the fourteenth, Goldberg apparently attempted to revive some of the latter's substantive content and invoke the precedents upholding the right of family privacy.

According to Goldberg and Douglas, the states are free to engage in social experimentation and regulation as long as fundamental personal rights are not infringed. Of course, all regulation affects personal freedom, and the complexity of industrial society requires the Court to allow governmental authorities the widest discretion in economic regulation and experimentation.[45] Many economic and social matters involve an expertise the Court may lack,

37 PATTERSON, THE FORGOTTEN NINTH AMENDMENT 2 (1955); Redlich, *Are There "Certain Rights . . . Retained by the People"?* 37 N.Y.U.L. REV. 787 (1962).

38 PATTERSON, THE FORGOTTEN NINTH AMENDMENT (1955); Redlich, *supra* note 37, at 807.

39 Redlich, *supra* note 37.

40 32 U.S. (7 Pet.) 243 (1833).

41 302 U.S. 319 (1937). Mr. Justice Miller stated for the first time that only the first eight amendments to the Constitution had reference to the powers exercised by the Government of the United States and not to the states. Eilenbecher v. District Ct. Plymouth County, 134 U.S. 31 (1890).

42 381 U.S. 479, 520 (1965).

43 See note 12 *supra.*

44 See note 11 *supra.*

45 Moynihan, *Behind Los Angeles: Jobless Negroes and the Boom,* Reporter, Sept. 9, Oct. 7, 1965; *The Moynihan Report,* Christ. Century, Dec. 15, 1965, p. 1531; Langer, *Birth Control: Academy Report Stresses Burden of High Birth Rate Among Impoverished Here,* 148 SCIENCE 1205 (1965).

and in these cases it should defer to administrative discretion and the wisdom of the legislature. However, when basic human relationships are involved, the Court will feel compelled to protect individual rights. Questions of privacy may touch vital issues of justice and public order that cannot be answered by mere verbal definitions, but call for the Court's delicate judgment.

C. Mr. Justice Harlan

Mr. Justice Harlan contended, as did Justices Douglas and Goldberg, that the Connecticut statute encroached upon the privacy of the marital relationship, but he invoked the fourteenth amendment, which to him, however, does not incorporate or absorb the specific provisions of the first eight amendments. For him, the proper constitutional inquiry "is whether this Connecticut statute infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values 'implicit in the concept of ordered liberty.' "[46] While the relevant inquiry may be aided by resort to the provisions of the Bill of Rights, "it is not dependent on them or any of their radiations. The Due Process Clause of the Fourteenth Amendment stands, in my opinion, on its own bottom."[47] Disagreeing with the dissenters, Harlan contended that reliance upon the specific provisions of the Constitution rather than the due process clause will not achieve judicial restraint by precluding personal interpretations.

Harlan referred to his dissent in *Poe* for further elaboration of his position. There he argued that the state intruded upon the most intimate details of the marital relationship with the full power of the criminal law and that the statute "allows the State to inquire into, prove and punish married people for the private use of their marital intimacy."[48] He argued that this violated the fourth amendment, as applied to the states through the fourteenth.

> It would surely be an extreme instance of sacrificing substance to form were it to be held that the Constitutional principle of privacy against arbitrary official intrusion comprehends only physical invasion by the police. To be sure, the times presented the Framers with two particular threats to that principle, the general warrant . . . and the quartering of soldiers in private homes. But though "Legislation, both statutory and constitutional, is enacted, . . . from an experience of evils, . . . its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. . . . [A] principle to be vital must be capable of wider application than the mischief which gave it birth. . . ."
>
> Although the form of intrusion here — the enactment of a substantive offense — does not, in my opinion, preclude the making of a claim based on the right of privacy embraced in the "liberty" of the Due Process Clause, it must be acknowledged that there is another sense in which it could be argued that this intrusion on privacy differs from what the Fourth Amendment, and the similar concept of the Fourteenth, were intended to protect: here we have not an intrusion into the home so much as on the life which characteristically has its place in the home. But to my mind such a distinction is so insubstantial as to be captious: if the physical curtilage of the home is protected, it is surely as a result of solicitude to

46 381 U.S. 498, 500 (1965).
47 *Ibid.*
48 367 U.S. 497, 548 (1961).

> protect the privacies of the life within. Certainly the safeguarding of the home does not follow merely from the sanctity of property rights. The home derives its pre-eminence as the seat of family life.[49]

In contrast to the approaches of Douglas and Goldberg, Harlan's does not require the use of the ninth amendment or the "penumbras" of enumerated rights. His position indicates that, although the incorporation doctrine may be identified with those seeking more zealously to protect individual rights, cases may arise where this approach is limited and the Frankfurter-Harlan approach can prove more useful.

D. Mr. Justice White

Mr. Justice White said that although the Court will defer to legislative discretion in matters involving economic regulation, statutes encroaching upon certain sensitive areas are subject to judicial scrutiny under the due process or equal protection clauses of the fourteenth amendment.[50] These areas, as indicated by the precedents cited in the opinion, include the family,[51] freedom of speech[52] and association,[53] the right to travel[54] and to engage in a profession,[55] and classifications based on racial distinctions.[56] But even where a statute encroaches in these areas, it will be deemed constitutional where it can be justified as "reasonably necessary for the effectuation of a legitimate and substantial state interest and not arbitrary or capricious in application."[57] The Connecticut ban on the use of contraceptives by married persons did not meet these conditions, because it was not shown to be "reasonably necessary for the effectuation of a legitimate and substantial state interest"; further, the opinion hints, the law was "arbitrary or capricious in application," because its most serious use had been against birth control clinics rendering advice to married rather than unmarried couples.[58]

However, this approach contradicts White's dissent in *Robinson v. California*,[59] where the Court held the conviction of a narcotics addict constituted cruel and unusual punishment under the eighth amendment.[60] In that dissent, he noted the "present Court's allergy to substantive due process" in economic matters, and failed "to see why the Court deems it more appropriate to write into the Constitution its own abstract notions on how best to handle the narcotics problem, for it obviously cannot match either the States or Congress in expert understanding."[61] It would seem, however, that in family matters as well, the Court cannot "exceed the States or Congress in expert understanding," and

49 *Id.* at 551.
50 Griswold v. Connecticut, 381 U.S. 479, 502-03 (1965) (concurring opinion).
51 Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).
52 Kovacs v. Cooper, 336 U.S. 77 (1949).
53 Shelton v. Tucker, 364 U.S. 479 (1960); Bates v. Little Rock, 361 U.S. 516 (1960).
54 Zemel v. Rusk, 381 U.S. 1 (1965).
55 Schware v. Board of Bar Examiners, 353 U.S. 232 (1957).
56 McLaughlin v. Florida, 379 U.S. 184 (1964).
57 Griswold v. Connecticut, 381 U.S. 479, 504 (1965) (concurring opinion).
58 *Id.* at 506.
59 370 U.S. 660 (1962) (dissenting opinion).
60 *Id.* at 666-67.
61 *Id.* at 689.

the same may be said about the other "sensitive" areas. Justice White's view of the due process clause is especially subject to challenge, because he does not invoke the first eight amendments to contend that certain matters should be subject to judicial scrutiny within the concept of due process as encroachments upon enumerated rights or their underlying values as differentiated from economic relations.

E. The Dissenting Opinions

Justices Stewart and Black, while deeming the Connecticut statute an "uncommonly silly"[62] and "offensive"[63] law, filed vigorous dissenting opinions, asserting that the Court had no authority to invalidate the Connecticut law. Differing with Douglas, they found no constitutional right of privacy created by the first eight amendments. They did not construe the ninth amendment as empowering the Court to uphold rights not specified in the first eight amendments, but regarded it like the tenth, as a mere "truism" reaffirming that the federal government has only limited powers. To hold otherwise, they contended, would be to "play somersaults with history"[64] and would greatly broaden the power of the judiciary by making the Court "a day-to-day constitutional convention."[65] The dissenters also objected to the substantive due process approach of Harlan and White, contending that the Court had wisely abandoned this approach by deferring to legislative determination and refusing to sit as a supervisory agency over a duly constituted legislative body.

Black would limit the fourteenth amendment due process clause to the incorporation of the Bill of Rights and limit the Court to the interpretation of specific constitutional provisions. However, in tracing the concept of a right of privacy only to the article by Brandeis and Warren[66] and in implying that the Framers intended no such constitutionally protected right, Black is subject to challenge. The contention has been made that the protection of privacy was at issue at the time the Constitution itself was adopted, and that the Constitution would not have been ratified without an assurance that the privacy of American citizens would be protected from arbitrary invasion by governmental authorities.[67] The Bill of Rights was adopted against the background of so-called "writs of assistance," which authorized revenue officers to enter suspected places and search for smuggled goods. Such writs were denounced by James Otis in 1761 as an infringement of the Englishman's "right of House."[68] Mr. Justice Story asserted in 1833 that the guarantees of free speech, press, assembly, and religion were intended to secure the rights of "private sentiment" and "private judgment."[69] Francis Lieber asserted in 1853 that the first amendment was intended to protect "freedom of communion," including "liberty of silence" — the right not to speak — which was crucial to civil liberty, since no one could enjoy liberty or exercise his "inextinguishable individuality" if "his

62 Griswold v. Connecticut, 381 U.S. 479, 527 (1965) (dissenting opinion).
63 *Id.* at 507.
64 *Id.* at 529.
65 *Id.* at 520.
66 Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).
67 113 CONG. REC. S1386 (daily ed. Feb. 2, 1967) (remarks of Senator Morse).
68 *Ibid.*
69 2 STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 628, 631 (5th ed. 1891).

communion with his fellows is interrupted or submitted to surveillance."[70] Private communication was protected by the federal mail statute of 1825[71] and by the judicial doctrine of privacy in unpublished letters, which provided that the recipient or holder of a letter had no right to publish it.[72] The legal doctrines protecting privacy against unreasonable invasion were clear and sophisticated, and the security of individuals and organizations in their right to privacy generally received firm judicial enforcement even during the early years of the Republic.[73]

Black's false admonition that it is not the function of the Court to adapt the Constitution to changing circumstances was, in part, the rationale that caused the judiciary to fail to meet the challenge to privacy posed by such modern devices as the telephone, eavesdropping and wiretapping equipment, and instantaneous photography used in photographic surveillance. Because judicial concepts were limited to property concepts and physical searches and seizures, the courts failed to provide an effective tort or constitutional remedy when nothing tangible was seized or there was no physical intrusion. This rigid approach was illustrated in *Olmstead v. United States,*[74] where the Court held that the absence of a physical intrusion and the failure to take something tangible put government wiretapping outside the rule of the fourth amendment. Eavesdropping by a microphone from an adjoining room was held not forbidden by the fourth amendment, because there had been no trespass onto the victim's property.[75]

To assert that the fourth amendment protects privacy does not necessarily "give it a niggardly interpretation,"[76] as claimed by Black. The protection of privacy does not mean that a public arrest or search and seizure is precluded from protection. The fourth amendment may protect property and curtail arbitrary governmental action as an aspect of, or in addition to, protecting the right of privacy. An intrusion upon privacy, contrary to Black, involves more than a hurting of feelings; it constitutes the denial of an individual right.

Brandeis and Warren, though presenting the right of privacy in the context of tort law, regarded it as a fundamental human right, the core of all civil liberties.[77] Subsequently, Brandeis, as a member of the Supreme Court, invoked the right of privacy in his dissenting opinion in *Olmstead v. United States*[78] in arguing that the fourth amendment be applied to the tapping of telephones. In his dissent in *Gilbert v. Minnesota,*[79] he anticipated the principle of family

70 LIEBER, ON CIVIL LIBERTY AND SELF GOVERNMENT viii, 44-47, 71-75, 224 (1853). The history of privacy in American law is traced in Westin, *Science, Privacy, and Freedom: Issues and Proposals for the 1970's, Part II: Balancing and Conflicting Demands of Privacy, Disclosure, and Surveillance,* 66 COLUM. L. REV. 1205, 1232 (1966).

71 Act of March 3, 1825, ch. 64, § 22, 4 Stat. 108.

72 Denis v. Leclerc, 1 Mart. (O.S.) 297, 5 Am. Dec. 712 (La. Super. Ct. 1811).

73 Westin, *supra* note 70, at 1235.

74 277 U.S. 438 (1928).

75 On Lee v. United States, 343 U.S. 747 (1952); Goldman v. United States, 316 U.S. 129 (1942).

76 Griswold v. Connecticut, 381 U.S. 479, 509 (1965) (dissenting opinion).

77 Warren & Brandeis, *supra* note 66.

78 277 U.S. 438, 475, 478 (1928) (dissenting opinion).

79 254 U.S. 325 (1920) (dissenting opinion), where, in referring to the constitutionality of a state law curtailing the expression of opposition to military conscription, Brandeis noted

privacy upheld in *Griswold* by asserting that governmental authorities may not prevent communication between members of a family. If a right of privacy is recognized in tort law regarding action by private individuals, it logically follows that such a right must be recognized where a public official or the Government is the intruder.

As a living document, the Constitution must be interpreted within the context of contemporary concepts and problems. Since privacy, rather than property, is presently regarded as the "core of our civil liberties," the Court could properly deduce a general constitutional right of privacy from the Bill of Rights, or from the ninth or fourteenth amendments.[80] The analogy of recent common-law tort cases[81] could establish constitutional protection for privacy in marital relations.

Black, however, refused to recognize an independent, constitutional right of privacy, upholding only those facets of privacy contained in specific constitutional provisions. Conceivably, he might regard wiretapping and eavesdropping as constituting constructive searches and seizures within the protection of the fourth amendment, although this would contradict his contention that it is not the function of the Court to adapt the Constitution to the needs of changing times. He would also encounter difficulty in resolving *York v. Story*,[82] where a police officer privately distributed the photograph of a nude housewife taken while she was detained and action was brought under the Civil Rights Act.[83] In that case, Judge Hamley of the Ninth Circuit found the fourth amendment inapplicable but held that the plaintiff's right of privacy, deduced from the fourteenth amendment due process clause, was encroached.[84] If Black holds that there is no independent constitutional right of privacy as conceived by Douglas, limits the application of the fourteenth amendment due process clause to incorporating the enumerated rights, narrowly interprets the fourth amendment, and denies the applicability of the ninth amendment, his inflexible position would compel him to deny the plaintiff a remedy. Black's rationale would tie the hands of the Court, because all denials of fundamental rights cannot be fit into specific legal categories.

Black's contention that the ninth amendment is merely a limitation on the federal government is contradicted by his claim that the fourteenth amendment due process clause had subsequently made the Bill of Rights applicable to the states. In *Adamson v. California*[85] he referred to the "first ten amendments" as binding on the states, thus including the ninth, and urged extending to all the people the complete protection of the Bill of Rights.[86] In *Griswold,*

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that, if broadly interpreted, the law could be construed to invade the privacy of the home, involving conversation between parents and children. *Id.* at 335.

80 Dykstra, *The Right Most Valued by Civilized Man*, 6 UTAH L. REV. 305 (1959); Griswold, *Right To Be Let Alone*, 55 NW. U.L. REV. 216 (1960); Pound, *The Fourteenth Amendment and the Right of Privacy*, 13 W. RES. L. REV. 34 (1961); Note, 40 N.C.L. REV. 788 (1962).

81 Hamberger v. Eastman, 106 N.H. 107, 206 A.2d 239 (1964).

82 324 F.2d 450 (9th Cir. 1963), *cert. denied*, 376 U.S. 939 (1964).

83 REV. STAT. § 1979 (1875), 42 U.S.C. § 1983 (1964).

84 York v. Story, 324 F.2d 450, 456 (9th Cir. 1963), *cert. denied*, 376 U.S. 939 (1964).

85 332 U.S. 46 (1947) (dissenting opinion).

86 *Id.* at 70-71.

however, he claims the Court was not given the authority to construe the ninth amendment, yet he presented no convincing historical or other reasons why the ninth amendment should be construed differently from other constitutional provisions.

Dean Pound seems to support Stewart's position that the ninth amendment like the tenth, states a truism, that the power of the federal government is limited to what is expressed and implied. Pound suggested that if the ninth amendment is read with the tenth, those rights not expressly set forth are not forever excluded but are left to be secured by the states or by the people through formal constitutional amendment.[87] However, granted that the ninth amendment as originally proposed was coupled in one article with the tenth, the fact remains that they were separated.[88] The ninth resulted from the concern expressed by Hamilton and other Federalists that if a Bill of Rights were adopted enumerating specific rights, other rights not enumerated would be precluded.[89] At the time the Constitution was adopted, the notion of inherent rights prevailed, however distasteful that doctrine is to Justice Black today. The rights stated in the Constitution were considered natural rights and did not exist merely because they were granted by governmental authority or stated in a document.[90] Apparently, the ninth amendment was intended to indicate that, in construing the Constitution, the Court is not precluded from upholding individual rights merely because they are not specified in the Constitution. Today the ninth amendment can be reasonably construed to mean that the Framers did not intend the Bill of Rights to codify the protection of individual liberty under all circumstances, and that the Court, as its interpreter, is authorized to fill in the gaps.

Black's antipathy toward the recognition of a constitutional right of privacy, the use of the ninth amendment, or the application of the due process clause of the fourteenth amendment stems from his opposition to natural-law concepts, which he equates with subjective judicial judgment.[91] For Black the Constitution is the fundamental law, and the Court, exercising the power of

87 [T]he Ninth Amendment is a solemn declaration that natural rights are not a fixed category of reasonable human expectations in civilized society laid down once for all in the several sections of the Constitution. Those not expressly set forth are not forever excluded but are, if the Ninth Amendment is read with the Tenth, left to be secured by the states or by the people of the whole land by constitutional change, as was done, for example, by the Fourteenth Amendment. Pound, *Introduction* to PATTERSON, *op. cit. supra* note 38, at iv.

88 Redlich, *Are There "Certain Rights . . . Retained by the People"?* 37 N.Y.U.L. REV. 787, 804-05 (1962).

89 *Id.* at 805-06.

90 PATTERSON, THE FORGOTTEN NINTH AMENDMENT 1-2 (1955):
The Ninth Amendment announces and acknowledges in a single sentence that (1) the individual, and not the State, is the source and basis of our social compact and that sovereignty now resides and has always resided in the individual; (2) that our Government exists through the surrender by the individual of a portion of his naturally endowed and inherent rights; (3) that everyone of the people of the United States owns a residue of individual rights and liberties which have never been, and which are never to be surrendered to the State, but which are still to be recognized, protected and secured; and (4) that individual liberty and rights are inherent, and that such rights are not derived from the Constitution, but belong to the individual by natural endowment.

91 International Shoe Co. v. Washington, 326 U.S. 310, 324-26 (1945) (concurring opinion).

judicial review, must determine if a statute accords with the specific provisions of this fundamental law. Since the Connecticut statute banning the use of contraceptives by married persons did not violate any specific provision of the Constitution, it cannot be deemed unconstitutional. The role of the judge is to interpret only within the clearly marked policies of the Constitution.[92]

But the difficulty with Black's approach is that even the so-called "specific" constitutional provisions do not provide clear guidance for most problems. For example, Black bases his "absolutist" interpretation of the first amendment on what he regards as its plain meaning, although he admits that this coincides with his policy beliefs.[93] However, there is great uncertainty about the meaning of "speech" and "abridge,"[94] and history is by no means clear enough to indicate that Black's interpretation accords with that of the Framers.[95] Similarly, the eighth amendment provision regarding "cruel and unusual punishment" may be broadly or narrowly applied in differing contexts.[96] Clearly the interpretation of the specific provisions of the Constitution must ultimately be based on the judge's own subjective value judgments. Black admitted this by conceding that "since words can have many meanings, interpretation obviously may result in contraction or expansion of the original purpose of a constitutional provision, thereby affecting policy."[97] The text of the Constitution is merely the starting point of judicial review. "If a constitution purports to settle, in detail and for all time, most of the issues that are likely to be the grist of the political mill, it invites either abandonment or frequent amendment."[98]

III. Denouement

Contrary to the dissenters' contention, the Court did not, in striking down the Connecticut statute, sit as a supervisory agency over acts of legislative bodies. This statute was enacted in 1873, when religious and moral attitudes differed from those prevailing today[99] and when medical knowledge of contraceptive devices was limited.[100] Perhaps when the law was enacted it could have been presumed to accomplish a sane and rational purpose, but this purpose no longer exists. Elsewhere such statutes have been construed to meet changing needs. The federal courts have construed the obscenity statutes, despite their

92 *Cf.* Adamson v. California, 332 U.S. 46 (1946) (dissenting opinion).

93 Black, *The Bill of Rights and the Federal Government,* in THE GREAT RIGHTS 45-46 (1963); Cahn, *Justice Black and the First Amendment Absolutes: A Public Interview,* 37 N.Y.U.L. REV. 549 (1962).

94 See BICKEL, THE LEAST DANGEROUS BRANCH 88-98 (1962); LEVY, LEGACY OF SUPPRESSION (1962).

95 LEVY, *op. cit. supra* note 94.

96 *E.g.,* Robinson v. California, 370 U.S. 660 (1962).

97 332 U.S. 46 (1947) (dissenting opinion). Braden, *The Search for Objectivity in Constitutional Law,* 57 YALE L.J. 571 (1948), presents a critical analysis of the inconsistencies in Black's position.

98 BICKEL, *op. cit. supra* note 94, at 105.

99 See Brief for Appellants, p. 24, Griswold v. Connecticut, 381 U.S. 479 (1965).

100 DICKENSON, TECHNIQUES OF CONTRACEPTION CONTROL (3d ed. 1950); ROCK, THE TIME HAS COME (1963); Dorsey, *Changing Attitudes Toward Massachusetts Birth Control Law,* 271 NEW ENGLAND J. MEDICINE 826 (1964); Stone, *The Teaching of Contraception in Medical Schools,* 7 HUMAN FERTILITY 108 (1942). For a collection of statements by medical authorities see Brief for Appellants, pp. 40-47. On religious attitudes see *id.* at 49-56.

plain wording,[101] as not barring the importation of contraceptives for medical purposes nor preventing their mailing or interstate shipment for such purposes.[102] The constitutional issue arose because the Connecticut courts failed to interpret the statute to accord with changing needs,[103] and efforts to have the statute amended by legislation had been frustrated by pressures from a religious group, although one house of the legislature had supported change.[104] Clearly, the Court could hardly be said to have overruled the majority will of the Connecticut electorate nor to have substituted its will for that of the legislature. Although the Court has adopted the practice of deferring to the discretion of the legislature on the justification or rationality of legislation, and it refrains from substituting its own determination, such an approach is absurd in determining the constitutionality of an eighty-three-year-old statute having no contemporary relevance.

The problem with both the majority and dissenting opinions lies in trying to develop or apply general or neutral principles.[105] To apply the dissenting approach of assuming a rational purpose that does not exist is unreal. However, the principle of family privacy enunciated by the majority opinions conflicts with the principle that the Court will refrain from examining the rational basis of nondiscriminatory legislation and formulates a principle incapable of consistent application.

Although in the vast majority of instances the Court may refrain from considering the rationality or justification of legislation, on certain occasions, where the liberty and dignity of the individual is so arbitrarily infringed, judicial intervention is required.[106] Where the state compels certain individuals who have been convicted of a crime to be sterilized,[107] imposes a criminal conviction on persons afflicted with narcotics addiction,[108] compels teachers to reveal all the organizations in which they may have held membership,[109] or requires public employees to swear that they did not belong to certain organizations,[110] the Court has intervened. Even in economic matters the Court will invalidate action

101 62 Stat. 718 (1948), U.S.C. § 552 (1964); 62 Stat. 768 (1948), as amended, 18 U.S.C. § 1461 (1964); 62 Stat. 768 (1948), as amended, 18 U.S.C. § 1462 (1964).

102 United States v. One Package, 86 F.2d 737 (2d Cir. 1936); Davis v. United States, 62 F.2d 473 (6th Cir. 1933); Youngs Rubber Corp. v. Lee, 45 F.2d 103 (2d Cir. 1930); United States v. Dennett, 39 F.2d 564 (2d Cir. 1930).

103 Connecticut v. Griswold, 151 Conn. 544, 200 A.2d 479 (1964), *rev'd,* 381 U.S. 479 (1965); Trubek v. Ullman, 147 Conn. 633, 165 A.2d 158 (1960), *app. denied,* 367 U.S. 907 (1961); Buxton v. Ullman, 147 Conn. 48, 156 A.2d 508 (1959), *app. denied sub nom.* Poe v. Ullman, 367 U.S. 497 (1961); Tileston v. Ullman, 129 Conn. 84, 26 A.2d 582 (1942), *app. denied,* 318 U.S. 44 (1943); State v. Nelson, 126 Conn. 412, 11 A.2d 856 (1940). Stone & Pilpul, *The Social and Legal Status of Contraception,* 22 N.C.L. Rev. 212 (1944), discusses court rulings in other jurisdictions indicating a more liberal interpretation of state statutes and showing that these statutes were amended by judicial construction rather than legislative action.

104 Comment, 70 Yale L.J. 322 (1960).

105 *Cf.* Wechsler, *The Courts and the Constitution,* 65 Colum. L. Rev. 1001 (1965); Wechsler, *Toward Neutral Principles of Constitutional Law,* 73 Harv. L. Rev. 1 (1959).

106 Hyman & Newhouse, *Standards for Preferred Freedoms: Beyond the First,* 60 Nw. U.L. Rev. 1, 44-92 (1965).

107 Skinner v. Oklahoma, 316 U.S. 535 (1942).

108 Robinson v. California, 370 U.S. 660 (1962).

109 Shelton v. Tucker, 364 U.S. 479 (1960).

110 Wieman v. Updegraff, 344 U.S. 183 (1952).

where the effect is a taking of property without just compensation.[111] Although legislative authorities generally may be deemed to have acted rationally, occasions arise where zealousness leads to enactments exceeding intended purposes, as has happened with efforts to assure the loyalty of public employees or in regulating subversion.[112] The Connecticut legislature, even in 1873, may have acted excessively in attempting to maintain public morality. The courts may interpret a statute to limit its effect, but where judicial construction cannot apply, the Court must then determine its constitutionality. A hard-core situation has then arisen where individual liberty is restricted in a manner that offends the judge's sense of injustice. Despite any self-imposed doctrine of judicial restraint, the Court is compelled to intervene, because the governmental action is so patently capricious and arbitrary.

The Connecticut statute, in banning the use of contraceptives by married couples and forbidding physicians to prescribe such use, was precisely such a situation. The only statute of its kind, it arbitrarily and capriciously interfered with the intimacies of the marital relationship. Its irrationality was manifested in that prophylactics were dispensed openly in drugstores throughout the state on the assumption that such drugs and devices prevent disease. Even unmarried persons could purchase and use them, while married couples were prevented from obtaining professional assistance in family planning.[113] Although couples with economic means could obtain professional assistance outside the state, the lower-income groups, who were most in need of help, were effectively cut off from aid. Adopted in 1873, the statute bore no relevance for the present. To such a situation, previously established constitutional principles were inapplicable, and only the narrowest formulation of new principles was required.

Although White's opinion was the most limiting, his placing of family matters in a separate category from economic regulation is questionable. His suggested approach was enunciated by Chief Justice Stone in *United States v. Carolene Prods. Co.*:[114]

> [R]egulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.[115]

This formulation, extended to regulation of moral and social behavior, would

111 Griggs v. Allegheny County, 369 U.S. 84 (1962); United States v. Kansas City Life Ins. Co., 339 U.S. 799 (1950); United States v. Causby, 328 U.S. 256 (1946); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) (opinion by Holmes, J.); LOCKHART, KAMISAR & CHOPER, CONSTITUTIONAL LAW 613-41 (1964).

112 Wieman v. Updegraff, 344 U.S. 183 (1952).

113 Brief for Appellants, pp. 70-71. Connecticut statutes also permit abortions in certain instances and allow for sterilization. CONN. GEN. STAT. ANN. §§ 17-19 (Supp. 1966), 53-30 (1960). The ban on the use of contraceptives cannot be justified as aiding in the prevention of the spread of venereal disease, because married couples must undergo a test before they are given a marriage license while unmarried couples are never subject to such test. Brief for Appellants, p. 71.

114 304 U.S. 144 (1938).

115 *Id.* at 152. A similar approach was taken in Goldblatt v. Hempstead, 369 U.S. 590 (1962).

enable the Court to declare the Connecticut statute unconstitutional through application of the fourteenth amendment's due process clause. While the Court would continue to refrain from considering the rationality or wisdom of substantive legislation, leaving such matters to legislative determination, it would not be precluded from striking down a statute that was patently arbitrary and capricious, restricting individual liberty without any present conceivable justification. There was no need to induce a constitutional right of privacy nor to invoke the ninth amendment. Although judicial review was needed in *Griswold,* the sweeping principles formulated by the majority opinions were unnecessary.

IV. Alternative Approaches

The amicus curiae brief for the American Civil Liberties Union invoked the equal protection clause in arguing (1) that the Connecticut statute imposed an arbitrary and unfair classification by prohibiting contraception by use of "devices" while allowing contraception by other methods not employing "devices," for example, rhythm and withdrawal; (2) that the law discriminated against women in that if they married, they were compelled to have children and could not develop a career; and (3) that the law was discriminatory in punishing users of the devices, but not the manufacturers or sellers.[116] But equal protection, like due process, has seldom been used in recent years to strike down substantive legislation,[117] although legislative apportionment[118] and racial discrimination[119] are two major exceptions.

In a footnote the ACLU brief hinted that the Connecticut statute may also be regarded as running afoul of the religious establishment clause of the first amendment:

> It may also be noted that prohibition against the use of contraceptive devices, and allowance of contraception without any device, is a distinction created and maintained by religious dogma, notably Orthodox Jewry and Roman Catholicism. Guttmacher, Alan, M.D., *Babies by Choice or by Chance* (Avon Books, 1961) pp. 79-86. A statute enacted pursuant to a Puritan theology, which believed that idiocy, epilepsy, and damnation were the fruits of sexual activity, and which is supported in this century largely by other religious dogmas, breeches [*sic*] the wall of separation between church and state, and violates the First Amendment. See, for example, *Engel v. Vitale,* 370 U.S. 421 (1962); *Abington School Dist. v. Schempp,* 374 U.S. 203 (1963). Undoubtedly the state can legislate in the field of morals, but it cannot seek to impose on all its diverse citizenry a morality which is preached and pursued only in the dogma of some religions.[120]

Stewart, in a footnote to his dissenting opinion, replied to this argument:

> To be sure, the injunction contained in the Connecticut statute co-

116 Amicus Curiae Brief for American Civil Liberties Union, pp. 15-16.
117 Railway Express Agency v. New York, 336 U.S. 106 (1949).
118 Baker v. Carr, 369 U.S. 186 (1962).
119 Brown v. Board of Educ., 347 U.S. 483 (1954).
120 Amicus Curiae Brief for the American Civil Liberties Union, p. 17 n.12. The assertion that Orthodox Judaism is unalterably opposed to birth control is not quite correct. See Brief for Appellants, p. 53.

> incides with the doctrine of certain religious faiths. But if that were enough to invalidate a law under the provisions of the First Amendment relating to religion, then most criminal laws would be invalidated. See, *e.g.*, the Ten Commandments. The Bible, Exodus 20:2-17 (King James).[121]

Stewart's argument appears somewhat weak. Most criminal statutes have the secular purpose of maintaining peace and order or social well-being, and the Court has held that even though a statute may have been enacted as part of a religious establishment and its continued enforcement may serve religious needs, it will be upheld if deemed to serve a valid secular purpose.[122] The controversy arises only with respect to legislation that proscribes individual moral behavior without relevance to public peace and well-being, because such laws are, in effect, expressions of religious dogma.[123] In most instances the Court has strained to find a secular purpose to uphold the constitutionality of the statute,[124] but this would be very difficult with the Connecticut statute, which served no conceivable secular purpose.[125] Thus, it could be reasonably argued that the Connecticut statute breached the wall of separation between church and state by using state authority to impose the practices of certain religious groups. The Court in this instance would not be required to go beyond the wording of the statute and psychoanalyze the legislature,[126] because it would not examine the intent or motives of the lawmakers, but only the effect of the statute. Perhaps the justices refused to take this approach because it would have involved them in matters of an extremely sensitive nature, namely, the constitutionality of legislation involving morals, particularly abortion.[127]

V. The General Implications of *Griswold*

The significance of this decision may be somewhat clouded by the lack of a real majority opinion, for the use of the ninth amendment breaks new ground in the development of constitutional law. The opinions indicate that a majority of the Court limits the application of the due process clause to the absorption, if not total incorporation, of the Bill of Rights, which now encompasses only the first eight amendments. The Court is not, however, precluded from protecting rights that have not been specified in those eight amendments.

The decision indicates a particular concern by the Court for legislation and government action affecting the family relationship. The protection of the family within the context of a right of privacy is a position significantly in accordance with article twelve of the Universal Declaration of Human Rights as adopted

121 Griswold v. Connecticut, 381 U.S. 479, 529 n.2 (1965).
122 Gallagher v. Crown Kosher Super Market, 366 U.S. 617 (1961); Two Guys From Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582 (1961); McGowan v. Maryland, 366 U.S. 420 (1961).
123 DEVLIN, ENFORCEMENT OF MORALS (1961); Henkin, *Morals and the Constitution: The Sin of Obscenity,* 63 COLUM. L. REV. 391 (1963); Schwartz, *Morals Offenses and the Model Penal Code,* 63 COLUM. L. REV. 669 (1963).
124 *E.g.*, McGowan v. Maryland, 366 U.S. 420 (1961).
125 Cogley, *Controversy in Connecticut,* 67 COMMONWEAL 657 (1958).
126 LOCKHART, KAMISAR & CHOPER, *op. cit. supra* note 111, at 1196.
127 See generally BICKEL, *op. cit. supra* note 94, at 143-56.

by the General Assembly of the United Nations.[128] *Griswold* is in line with the precedents of *Meyer v. Nebraska,*[129] holding that a state may not forbid the schooling of a child in a foreign language; *Pierce v. Society of Sisters,*[130] holding that a state may not compel a child to attend a public school and not a private or parochial school; *West Virginia State Bd. of Educ. v. Barnette,*[131] holding that a child may not be compelled to salute the flag in a public school classroom; *Engel v. Vitale,*[132] holding that the state may not prescribe prayers for utterance in a classroom; *School Dist. of Abington Township v. Schempp,*[133] holding that the state may not require the reading of the Bible or the saying of prayers in a classroom; and *Skinner v. Oklahoma,*[134] holding that the state may not compel the sterilization of persons convicted of a crime. Although these cases may have been decided under the due process clause, the equal protection clause, or the first amendment, they are also embodied within the right of privacy and the protection of the family. But, as indicated in *Griswold,* the state could regulate family relations, where reasonably necessary to further an overriding state interest.

In *Jacobson v. Massachusetts*[135] the Court upheld compulsory vaccination, and in *Prince v. Massachusetts*[136] a child-labor law was unheld, even though the free exercise of religion was involved. As the Court stated in *Prince:*

> It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter.
>
> But the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. And neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways. Its authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience. . . . It is sufficient to show what indeed appellant hardly disputes, that the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and that this includes, to some extent, matters of conscience and religious conviction.[137] (Citations omitted.)

In scrutinizing a given statute or state action, the Court has the alternative of stressing the primacy of the family relationship, as expressed in the *Meyer-Pierce-Skinner-Griswold* precedents, and calling upon the state to adopt less

128 "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attack." Analyzed in ROBINSON, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 117-18 (1958).
129 262 U.S. 390 (1923).
130 268 U.S. 510 (1925).
131 319 U.S. 624 (1943).
132 370 U.S. 421 (1962).
133 374 U.S. 203 (1963).
134 316 U.S. 535 (1943).
135 197 U.S. 11 (1905).
136 321 U.S. 158 (1944).
137 *Id.* at 166-67.

objectionable means to achieve its purpose; or it may follow the *Jacobson-Prince* approach and focus on the need for acting in the public interest and subordinate the privacy of the family relationship. The approach selected will depend on the interests to be protected, the availability of alternatives, and the extent of interference with the family relationship.[138] But since the stability of the family so directly affects the public interest and involves considerable social-science expertise, the Court will intervene only where the nature of state infringement is arbitrary, is based on race, or constitutes a religious establishment.

Griswold indicates judicial sensitivity to state efforts to regulate family size. If government authorities may not forbid the use of drugs and devices by married couples, a total prohibition upon the sale or distribution of such drugs may be of questionable validity. Following the decision, New York's statute was amended to eliminate such a total prohibition and to permit contraceptives to be dispensed by prescription.[139] On the very day after the decision in *Griswold,* the Corporation Counsel for the City Council of Chicago declared that the decision provided ample legal basis for approving the city's contract to purchase contraceptive supplies for the board of health.[140] Several states have repealed or amended their birth control laws, and thirty-nine states are "active in providing birth control information and/or services."[141]

Currently, the issue is the extent to which the Government may act to promote birth control. Although there is dicta in Goldberg's opinion that the state may not limit family size,[142] this does not preclude federal or local authorities from advising public-assistance recipients and others about the use of birth control drugs and devices or in making contraceptive devices available. The contention has been made that *Griswold* confers a constitutional right on married couples to determine family size, and governmental authorities are thus obligated to provide couples having limited incomes with the means for exercising this right.[143] The fear has been expressed that a welfare recipient, because of his dependence on welfare officials, would inevitably be coerced, even though the policy was to distribute the means and information for birth control on a voluntary basis.[144] Proper administration, however, could assure that the program would be voluntary. Generally, the underlying policy has been to provide birth control assistance only to those women who desire it; since most mothers of low-income families desire to limit the size of their families, the problem of forcing compliance does not really exist.[145] There have, however, been instances where

138 Wormuth & Mirkin, *The Doctrine of the Reasonable Alternative,* 9 UTAH L. REV. 254 (1964). Also suggestive of the stress on public interest is Reynolds v. United States, 98 U.S. 145 (1873).

139 N.Y. PEN. LAW § 1142.

140 Chicago Sun Times, June 9, 1965.

141 American Civil Liberties Union, *Feature Press Service* (Feb. 14, 1966).

142 Griswold v. Connecticut, 381 U.S. 479, 497 (1965) (concurring opinion):

> [I]f upon a showing of a slender basis of rationality, a law outlawing voluntary birth control by married persons is valid, then, by the same reasoning, a law requiring compulsory birth control also would seem to be valid. In my view, however, both types of law would unjustifiably intrude upon rights of marital privacy which are constitutionally protected.

143 111 CONG. REC. 23427 (daily ed. Sept. 17, 1965) (sermon by Archbishop O'Boyle).

144 *Ibid.*

145 New Republic, Sept. 25, 1965, p. 5; Greene, *Federal Birth Control: Progress Without Policy,* Reporter, Nov. 18, 1965, p. 35.

attempts were made to deny welfare assistance to mothers having illegitimate children or to impose penal sanctions on them.[146] If the underlying policy is to discourage premarital or extramarital relations, equal-protection rights may be infringed, since only those women who become pregnant and have children are punished.

Griswold may well begin a new era of constitutional protection for the right of privacy. For the first time, the Court specifically ruled that the right to privacy had been violated by nonphysical means.[147] Previously the Court had recognized the right of privacy within the context of the fourth amendment. In *Boyd v. United States*,[148] the Court upset a statute requiring production of personal papers and providing that facts would be taken as confessed upon a failure to produce the required papers. The Court there stressed that it was "not the breaking of his doors and the rummaging of his drawers, that constituted the essence of the offense"; but rather, the "invasion of his indefeasible right of personal security, personal liberty and private property . . . ."[149] However, absent a physical penetration or the taking of property, the Court has failed to extend the protection of the fourth amendment to the tapping of telephones and eavesdropping. *Griswold*, along with other decisions indicating the recognition of a constitutional right of privacy, may mean an extension of the application of the fourth amendment to wiretapping and eavesdropping or the invocation of a constitutional right of privacy to these situations.[150] However, the Court has failed to apply a right of privacy to exclude evidence obtained through the use of an informer present in the defendant's hotel suite,[151] where he buys narcotics at his home,[152] or uses a tape recorder to record a confidential conversation.[153]

The first amendment has also served as a ground for enforcing the individual's right of privacy. Under that amendment's aegis, the Court had previously recognized a right to anonymity in the dissemination of ideas and in belonging to organizations or associations.[154] The Court has also recognized the right of privacy in the sense of the right of the individual to remain silent.[155]

The right of privacy is premised on the assumption that, although man is a social animal, he seeks to protect a certain area of his life from scrutiny and control. By retaining this private area the individual is enabled to develop his personality through the opportunity for emotional release and the satisfaction of other physical and psychological needs. He is freed from the restraints of

146 Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1247 (1965).
147 Rodgers, *A New Era for Privacy*, 43 N.D.L. REV. 253 (1967).
148 116 U.S. 616 (1886).
149 *Id.* at 630.
150 Statement attributed to Thomas Emerson, counsel for appellants in *Griswold*. N.Y. Times, June 15, 1965, p. 25, cols. 2, 3; LOCKHART, KAMISAR & CHOPER, CONSTITUTIONAL LAW (Supp. 1965, at 114).
151 Hoffa v. United States, 385 U.S. 293 1966).
152 Lewis v. United States, 385 U.S. 206 (1966).
153 Osborn v. United States, 385 U.S. 323 (1966).
154 Talley v. California, 362 U.S. 60 (1960); Bates v. Little Rock, 361 U.S. 516 (1960).
155 Watkins v. United States, 354 U.S. 178 (1957).

social conformity and able to exercise his creativity.[156] But privacy cannot be tolerated merely as a selfish right. The complexity of modern society, resulting in the interaction of individuals and groups and requiring social planning, limits the area of privacy. As with the common-law tort,[157] the constitutional right of privacy must balance individual rights with the public interest.

The right of privacy has received extensive public attention as a result of the exposures by congressional investigations into the investigative techniques of governmental agencies, such as the Internal Revenue Service, the Narcotics Bureau, and the Food and Drug Administration.[158] Congressional investigations have also revealed surveillance of government employees by testing and questionnaires regarding intimate aspects of their lives.[159] The proposal for a data-control center to contain information on almost every American has caused concern over whether such information could be used to invade individual privacy.[160] Psychological testing, particularly when undertaken by government authorities, may infringe the constitutional right of privacy.[161]

Griswold is particularly applicable with regard to the invasion of privacy in the administration of public assistance. In dispensing assistance, welfare officials often require recipients to reveal intimate details of their personal and family life — an infringement of the primacy of the family relationship. The granting of assistance has been conditioned on adherence to prescribed moral standards, and mothers have been threatened with the denial of the custody of their children.[162] Living quarters have been subjected to arbitrary checking.[163] The financial means test and the administration of the welfare programs make the individual's privacy peculiarly vulnerable to infringement. The problem becomes more complex as welfare programs are expanded beyond the efficient dispensation of aid to encompass an effort to eliminate the causes of poverty.[164]

156 The role and function of privacy is discussed and analyzed in Westin, *Science, Privacy and Freedom: Issues and Proposals for the 1970's, Part I — The Current Impact of Surveillance on Privacy,* 66 COLUM. L. REV. 1003 (1966); *Symposium — Privacy,* 31 LAW & CONTEMP. PROB. 251 (1966). The term "breathing space," is derived from Mr. Justice Brennan's opinion in NAACP v. Button, 371 U.S. 415, 433 (1963).

157 Note, *Right of Privacy,* 11 N.Y.L.F. 120 (1965).

158 *Hearings on Invasions of Privacy (Government Agencies) Before Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary,* 89th Cong., 1st Sess., pts. 2, 3 (1965). The Internal Revenue Service has actually trained agents to pick locks. 113 CONG. REC. S1387 (daily ed. Feb. 2, 1967) (remarks of Senator Morse).

159 *Hearings on Psychological Testing Procedures and the Rights of Federal Employees Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary,* 89th Cong., 1st Sess. (1965); *Hearings on the Use of Polygraphs as "Lie Detectors" by the Federal Government Before a Subcommittee of the House Committee on Government Operations,* 88th Cong., 2d Sess. (1964); *Hearings on Invasion of Privacy Before a Subcommittee of the House Committee on Government Operations,* 89th Cong., 1st Sess. (1965); Creech, *The Privacy of Government Employees,* 31 LAW & CONTEMP. PROB. 413 (1966).

160 Karst, *"The Files": Legal Controls Over the Accuracy and Accessibility of Stored Personal Data,* 31 LAW & CONTEMP. PROB. 342 (1966); *A Government Watch on 200 Million Americans?* U.S. News & World Report, May 16, 1966, p. 56; 112 CONG. REC. 27521 (daily ed. Oct. 21, 1966).

161 Mirel, *The Limits of Governmental Inquiry Into the Private Lives of Government Employees,* 46 B.U.L. REV. 1 (1966); Ruebhausen & Brim, *Privacy and Behavioral Research,* 65 COLUM. L. REV. 1184 (1965).

162 Reich, *supra* note 146.

163 Reich, *Midnight Welfare Searches and the Social Security Act,* 72 YALE L.J. 1347 (1963).

164 Handler & Rosenheim, *Privacy in Welfare: Public Assistance and Juvenile Justice,* 31 LAW & CONTEMP. PROB. 377 (1966).

The price for rehabilitating the welfare recipient results in greater involvement by public officials in the recipient's personal life.

The nature of the relationship between the recipient and the agency requires protection from arbitrary action so the dignity of the individual may be maintained. Courts, however, have been reluctant to intervene in the dispensation of welfare, deferring to administrative discretion.[165] One area where judicial intervention may be suitable is in the practice of conducting mass predawn inspections of the homes of welfare recipients to determine the presence of "absent parents" or unauthorized males.[166] Although the Court has refused to apply the fourth amendment to the enforcement of administrative regulations,[167] the right of privacy as enunciated in *Griswold* would appear to protect the recipient from such an infringement. To claim that the recipient consents to the inspection by letting the social worker enter is illusory, since a refusal to admit may result in a denial of welfare benefits. In the relationship between recipient and official, the former is in a peculiarly subordinate position.[168]

VI. Implications for Moral Legislation

The Connecticut statute banning married couples from using drugs or devices to prevent conception falls within the category of moral legislation, for it seeks to regulate aspects of individual behavior that do not affect social peace and well-being.[169] Other instances of such moral legislation include prohibitions against private fornication, homosexuality, adultery, and possibly, euthanasia.[170] Debated in Britain in relation to the Wolfendon Commission Report proposing to legalize homosexuality,[171] and in the United States in relation to the adoption of the American Law Institute's Model Penal Code,[172] the issue is the extent to which legal sanction should be used to regulate such behavior. While the legal prohibition of open prostitution, fornication, and homosexuality may be justified as curtailing a public nuisance and as limiting the spread of venereal disease, it is questionable whether the law should interfere where two adult individuals

165 Parrish v. Civil Service Comm'n, 242 Cal. App. 2d 665, 51 Cal. Rptr. 589 (Dist. Ct. App. 1966).

166 Comment, 44 J. URBAN LAW 119 (1966).

167 Ohio *ex rel.* Eaton v. Price, 364 U.S. 263 (1960); Frank v. Maryland, 359 U.S. 360 (1959).

168 Comment, *supra* note 166. Perhaps the protection of privacy *vis-à-vis* government agencies could be best assured through the institution of the Ombudsman, which was adopted in Sweden to check upon arbitrary official actions. Citizens with specific grievances may turn to the Ombudsman, a specially appointed official, to inquire into allegations of bureaucratic misbehavior. The institution has also been adopted in the British Isles and New Zealand and has been proposed in Congress. Where resort to the judiciary would be too cumbersome, the Ombudsman would constitute an effective tool for the protection of the individual. Anderson, *The Ombudsman Abroad,* 113 CONG. REC. A238 (daily ed. Jan. 24, 1967).

169 Brief for Appellants, p. 31, Griswold v. Connecticut, 381 U.S. 479 (1965).

170 HART, LAW, LIBERTY AND MORALITY (1962); Schwartz, *supra* note 123. WILLIAMS, THE SANCTITY OF LIFE AND THE CRIMINAL LAW (1956), would include mercy killing in this category; but Kamisar, *Some Non-Religious Views Against Proposed 'Mercy Killing' Legislation,* 42 MINN. L. REV. 969 (1958), takes a different position.

171 Devlin, *Mill on Liberty in Morals,* 32 U. CHI. L. REV. 215 (1965); Devlin, *Law, Democracy, and Morality,* 110 U. PA. L. REV. 635 (1962); Hughes, *Morals and the Criminal Law,* 71 YALE L.J. 662 (1962).

172 MODEL PENAL CODE § 207.5, comment, apps. A-E (Tent. Draft No. 4, 1955).

voluntarily agree to engage in private heterosexual or homosexual relations. Public policy considerations have been advanced on this issue, but aside from considering the desirability of such laws, a constitutional question is involved.[173]

Although the Court did not face this issue in *Griswold*, the question was raised in the appellants' brief and the oral arguments.[174] Arguing that the Court cannot take the position that the simple claim of a moral aid by the legislature satisfied the requirement of due process since that would immunize all legislation from the mandate of the due process clause, the appellants urged:

> We submit that the standard in such cases should at least be that (1) the moral practices regulated by the statute must be objectively related to the public welfare, or (2) in the event no such relationship can be demonstrated, the regulation must conform to the predominant view of morality prevailing in the community. In other words, if the legislature cannot establish that the law promotes the public welfare in a material sense, it cannot enforce the morality of a minority group in the community upon other members of the community.[175]

Stewart, referring to this argument, stated that "it is not the function of this Court to decide cases on the basis of community standards."[176]

Although appellants urged that the legislature cannot enforce the morality of a minority group in the community, they did not explain why it may enforce the morality of the majority assuming the Connecticut birth control law did reflect the will of the majority. To compel adherence to a set moral pattern does not accord with the notions of a free society nor with notions of privacy. Freedom for moral experimentation should be encouraged. Furthermore, the brief does not indicate what the predominant moral view is, although it does establish, by reference to public opinion surveys and the views of medical authorities, that the majority view does not advocate forbidding the use of contraceptives. Nevertheless, there is no clear indication of what constitutes the predominant opinion on a particular moral issue and how it should be determined. The difficulties in making such a determination seem to preclude the application of this approach.

In supporting their standard, the appellants quoted Harlan's dissent in *Poe* that "the mere assertion that the action of the State finds justification in the controversial realm of morals cannot justify alone any and every restriction it imposes."[177] But Harlan went on to state:

> Yet the very inclusion of the category of morality among state concerns indicates that society is not limited in its objects only to the physical well-being of the community, but has traditionally concerned itself with the moral soundness of its people as well. Indeed to attempt a line between

173 The policy issues may indeed become intertwined with the constitutional issues. The arguments against the legal regulation of private consensual behavior include the difficulty of enforcement, the possibility that enforcement may be arbitrary, the likelihood of blackmail, the combining of what should be moral regulations with legal sanction, and the invasion of privacy. See PLOSCOWE, SEX AND THE LAW (rev. ed. 1962).

174 Brief for Appellants, pp. 36-39. The reference to the oral argument is made in Stewart's dissenting opinion. Griswold v. Connecticut, 381 U.S. 479, 530 (1965).

175 Brief for Appellants, p. 37.

176 Griswold v. Connecticut, 381 U.S. 479, 530 (1965) (dissenting opinion).

177 Poe v. Ullman, 367 U.S. 497, 545 (1961).

> public behavior and that which is purely consensual or solitary would be to withdraw from community concern a range of subjects with which every society in civilized times has found it necessary to deal. The laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up, as well as laws forbidding adultery, fornication and homosexual practices which express the negative of the proposition, confine sexuality to lawful marriage, 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.[178]
>
> Adultery, homosexuality and the like are sexual intimacies which the State forbids *altogether,* but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected. It is one thing when the State exerts its power either to forbid extra-marital sexuality *altogether,* or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy.
>
> In sum, even though the State has determined that the use of contraceptives is as iniquitous as any act of extra-marital sexual immorality, the intrusion of the whole machinery of the criminal law into the very heart of marital privacy, requiring husband and wife to render account before a criminal tribunal of their uses of that intimacy, is surely a very different thing indeed from punishing those who establish intimacies which the law has always forbidden and which can have no claim to social protection.[179] (Emphasis added.)

Harlan's position is inapplicable to contemporary American society. Although the "moral soundness of the people" may be a legitimate legislative concern in a society where religious homogeneity provides a consensus on what is proper moral behavior, it is hardly legitimate in a pluralistic society where over half the population has engaged in nonmarital sexual relations.[180] Contrary to Harlan, the common law[181] and the legal systems of other civilized societies[182] do distinguish between public and private morality. The United States is among a minority of nations prohibiting private homosexual relationships between con-

178 *Id.* at 545-46.

179 *Id.* at 553.

180 Eighty-five percent of the male population have had premarital intercourse while 30% to 45% have had extramarital relations and 70% have had relations with prostitutes. Thirty-seven percent have had homosexual relations. KINSEY, POMEROY & MARTIN, SEXUAL BEHAVIOR IN THE HUMAN MALE (1948). For criticism of the implications of this survey, *cf.* Schwartz, *Book Review,* 97 U. PA. L. REV. 914 (1948). *Cf.* KINSEY, POMEROY & MARTIN, SEXUAL BEHAVIOR IN THE HUMAN FEMALE (1952). Another survey revealing promiscuity is Reiss, *Social Class and Premarital Sexual Permissiveness,* 30 AM. SOCIAL REV. 347 (1965).

181 PLOSCOWE, *op. cit. supra* note 173, at 131.

182 Ploscowe, *Report to the Hague: Suggested Revisions of Penal Laws Relating to Sex Crimes and Crimes Against the Family,* 50 CORNELL L.Q. 425 (1965), noting that in 1964 at the *Association Internationale de Droit Pénal,* comprised of six hundred delegates from fifty countries, there was unanimous agreement that a single act of sexual intercourse between persons above the age of consent as fixed by the penal law should not be a crime. There was also agreement that the crime of adultery should be eliminated from the penal code. The conference also opposed the prohibition of the dissemination of birth control information and drugs and articles, except where in violation of pornography and obscenity laws or to keep them from juveniles.

senting adults.[183] The tendency in a number of American jurisdictions has been to adopt or construe statutes regulating sexual behavior as not applying to adult consensual relationships.[184]

The right of privacy should not be limited to the marital relationship. Freedom is premised on the notion that the individual should be allowed to live as he chooses, to the extent that he does not infringe the rights of others. The state may properly inflict punishment only when such infringement occurs and regulation will result in the greatest happiness for the greatest number.[185] Although in contemporary society the area of activity in which the individual may be free from state regulation is considerably more limited than in the nineteenth century, the right of privacy and the upholding of personal rights assume such areas remain. In a pluralistic society one such area of personal freedom is in the realm of morals. The individual may properly be permitted to determine his own morality, including his sexual behavior, to the extent that he does not disturb the public peace or adversely affect the social well-being. A pluralistic society is premised on the notion that it is not the function of the state to prescribe the individual's moral behavior, and to the extent that it so engages, it impinges upon the right of privacy.

In most instances the constitutional issue will not arise, as the statute is likely to be construed as not applying to private, consensual activity; and where such laws exist, they are rarely enforced.[186] The constitutional issue will arise from the rare, hard-core invasion of individual liberty of the kind that occurred in *Griswold*. Conceivably, one such area may involve the application of the Mann Act,[187] involving the transportation of women across state lines for immoral purposes. The Supreme Court has held the law applicable even where an adult couple had voluntarily agreed to cross state lines to engage in private sexual activity.[188]

VII. Conclusion

In *Griswold v. Connecticut* the Court, in deciding the constitutionality of an extraordinary statute, for the first time asserted an independent constitutional right of privacy derived from the enumerated rights of the first eight amendments, the ninth amendment, or the due process clause of the fourteenth amendment — depending upon which opinion is selected — to protect family and marital relations.[189] The decision may be limited only to the facts of the par-

183 Chicago Daily News, Aug. 18, 1966. The other nations are Austria, Czechoslovakia, Finland, Germany, Ireland, the Soviet Union, and Yugoslavia. In the United States homosexuality is illegal in forty-nine states, with Illinois the sole exception.

184 Rittenour v. District of Columbia, 163 A.2d 558 (D.C. Mun. Ct. App. 1960); Note, *Private Consensual Homosexual Behavior: The Crime and Its Enforcement*, 70 YALE L.J. 623 (1961).

185 BENTHAM, INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1789). HART, *op. cit. supra* note 170; MILL, ON LIBERTY (1849).

186 See note 184 *supra*.

187 62 Stat. 812 (1948), as amended, 18 U.S.C. §§ 2421-24 (1964).

188 Caminetti v. United States, 242 U.S. 470 (1917).

189 Rodgers, *supra* note 147, at 255, aptly summarizes the constitutional status of the right of privacy:

> It should be obvious that the specific protections contained in the Bill of Rights

ticular case, or it may serve as a precedent to protect personal rights in a broad range of situations. The *Griswold* principles are virgin and subject to semination; the manner in which the seeds will germinate will depend upon judicial inclination.

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 personalty."