Consent, Not Morality, As The Proper Limitation On Sexual Privacy

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Introduction

This note explores the boundaries encompassing the right of sexual decisional privacy. The question analyzed is whether the recognized right of sexual privacy in marriage is capable of extension beyond the marriage relation; "the issue centers not around morality or decency, but the constitutional right of [sexual] privacy."[1] The vehicle for this analysis is *Lovisi v. Slayton*,[2] in which a husband and wife challenged, by means of a petition for habeas corpus, their convictions under Virginia's "crimes against nature" statute[3] for the wife's committing fellatio with her husband while in the presence of a third person in their bedroom.[4] Although the wife was also convicted of fellatio with the third party,[5] the statute was challenged in federal court only as it applied to the Lovisis' consensual sodomy with each other.[6] The district court acknowledged the existence of a right of privacy that might cover all three participants in this case,[7] but decided that they had lost the right of privacy by failing to prevent subsequent dissemination of pictures taken of their sexual activities.[8] The court of appeals similarly

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1. Doe v. Commonwealth's Attorney, 403 F. Supp. 1199, 1205 (E.D. Va. 1975) (Mehrige, J., dissenting) (declaratory judgment action unsuccessfully challenging Virginia's sodomy statute as applied to homosexuals), *aff'd mem.*, 425 U.S. 901 (1976).

2. 363 F. Supp. 620 (E.D. Va. 1973), *aff'd*, 539 F.2d 349 (4th Cir.), *cert. denied*, 97 S. Ct. 485 (1976).

3. VA. CODE ANN. § 18.1-212 (1960) (current version at VA. CODE ANN. § 18.2-361 (1975)): "Crimes against nature—If any person shall carnally know in any manner any brute animal, or carnally know any male or female person by the anus or by or with the mouth, or voluntarily submit to such carnal knowledge, he or she shall be guilty of a felony and shall be confined in the penitentiary not less than one year nor more than three years." Since the Lovisis' convictions, the statute has been amended to provide for a five year maximum penalty, and now provides for a separate penalty if force is employed. The statute makes no allowance either for the locus of the activity or the participants involved. See text accompanying notes 175-76 *infra*.

4. 363 F. Supp. at 622.

5. *Id.*

6. *Id.* at 621.

7. *Id.* at 626.

8. *Id.* at 627.

found that the couple had a right of privacy, but held that the presence of a third party destroyed the right by making their actions public.[9]

The Supreme Court's denial of certiorari[10] left unanswered several questions regarding the scope of the right of decisional privacy, which this note attempts to resolve. The discussion begins by tracing the genesis and evolution of this constitutional right of privacy from its original conception as a function of the marriage relation to its current status as an individual right. Then the author suggests that implicit in the present state of the law is a right of decisional privacy with respect to sexual matters. Finally this note reviews the *Lovisi* opinions and analyzes how the application of the proposed right of decisional privacy would have affected their outcome.

I. Privacy

A. Frontier Concept

In formulating the Bill of Rights, the founding fathers and the first Congress sought to provide protection for the individual against abusive intrusions by the new government.[11] In particular, the Third[12] and Fourth Amendments[13] were aimed at providing and protecting a measure of privacy for the homes of citizens.[14] In a population that was relatively homogeneous, with a large similarity of basic values within the communities, little more than protection of one's physical privacy was necessary.[15] Sheer

9. 539 F.2d at 351.

10. 97 S. Ct. 485 (1976).

11. "The significance of the specifically enumerated rights is that they are examples of the proper balance to be struck between the individual and society in areas in which the framers, because of their experience with the particular dangers to individual freedom in their time, could accommodate the competing interests." Wheeler & Kovar, *Roe v. Wade: The Right of Privacy Revisited*, 21 U. KAN. L. REV. 527, 538 (1973) [hereinafter cited as Wheeler & Kovar].

12. "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law." U.S. CONST., amend. III.

13. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST., amend. IV.

14. The Third Amendment sought to preserve the home-as-castle concept of the common law. In addition it was intended to give some effect to the English Petition of Right, 4 Charles I, June 7, 1628, which attempted to remedy the practice of forced quartering of soldiers. The Fourth Amendment protected against the General Warrant, which had been used, until ruled illegal in 1765, to arrest and search the premises of all persons suspected of being involved in a crime, though not named in the warrant. The new nation did not intend to give up this hard-won freedom from such persecution. 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 647-50 (5th ed. 1891); H. TAYLOR, THE ORIGIN AND GROWTH OF THE AMERICAN CONSTITUTION 233-34 (1911).

15. *See* A. Simmel, *Privacy is Not an Isolated Freedom*, in PRIVACY 71, 76-78 (J. Pennock & J. Chapman eds. 1971); Comment, *The Concept of Privacy and the Fourth Amendment*, 6 U. MICH. J.L. REF. 154, 158 (1972) [hereinafter cited as *Concept of Privacy*].

physical distance also helped insulate whatever conflicts in lifestyle that may have existed.[16] When this physical buffer proved inadequate to provide natural privacy for grossly disparate values, there existed the alternative of forging a new life in the expanding frontier. There the "mores of society forbade inquiry into a man's past."[17] With the trend toward urbanization at the end of the nineteenth century, the physical opportunity for isolating oneself diminished.[18] A need for some sort of artificial frontier began to be more acutely felt. Nowhere in the Constitution, however, could one find its explicit protection.[19]

B. Evolution of Personal Privacy

The first movement toward recognition of an implicit right of privacy came, quite naturally, in the area of the Fourth Amendment protection from unreasonable searches and seizures. An expansive interpretation of the amendment saw it as protecting the "sanctity of a man's home and the privacies of life."[20] The essence of a Fourth Amendment violation at that time was "the invasion of [a person's] indefeasible right of personal security, *personal liberty* and private property,"[21] a right held "sacred" by the Court.[22] Although the Fourth Amendment continued to be regarded largely in rigid terms of property interests,[23] more recognition was being given to the philosophical nature of this emerging artificial frontier of privacy. Justice Brandeis, in his famous dissent in *Olmstead v. United States*,[24] the first wiretapping case, viewed the Fourth Amendment as providing this expanded protection:

> The protection guaranteed by the [Fourth and Fifth] Amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his

16. *See Concept of Privacy, supra* note 15, at 158.

17. Dixon, *The Griswold Penumbra: Constitutional Charter for an Expanded Law of Privacy*, 64 MICH. L. REV. 197, 202 (1965).

18. *See* Towe, *A Growing Awareness of Privacy in America*, 37 MONT. L. REV. 39, 39-43 (1976); *Concept of Privacy, supra* note 15, at 161.

19. "[S]ince it is not until the 1890's that the impact of the privacy concept began to be felt, where, in a constitution drafted a hundred years earlier, can we look for a protection of that concept?" Comment, *The Constitutional Rights of Privacy—"A Sizeable Hunk of Liberty,"* 26 MD. L. REV. 249, 250 (1966).

20. Boyd v. United States, 116 U.S. 616, 630 (1886) (compelling production of personal papers in criminal trial held violative of Fourth and Fifth Amendments).

21. *Id.* (emphasis added).

22. *Id.*

23. In order for the Court to recognize a search as unreasonable under the Fourth Amendment it had to involve a search or seizure of tangible property and an actual trespass to obtain it. *See* Olmstead v. United States, 277 U.S. 438, 464 (1928) (unauthorized wiretapping by police upheld in absence of physical entry into defendant's home to effect "tap").

24. 277 U.S. 438, 471 (1928).

> feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their *emotions* and their *sensations*. They conferred, *as against the Government, the right to be let alone*—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the *individual*, whatever the means employed, must be deemed a violation of the Fourth Amendment.[25]

The Supreme Court did not explicitly recognize privacy as a value protected by the Fourth Amendment until 1967 in *Katz v. United States*.[26] *Katz* overturned a conviction based on evidence procured by recording, without a warrant, a conversation in a "bugged" telephone booth.[27] Despite the lack of physical trespass, previously essential to a finding of illegal search and seizure, the Court held that the Fourth Amendment protected "people, not places."[28] "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[29] Therefore, seclusion in its technical sense of "isolation" is no longer necessary for Fourth Amendment protection to attach. What is now determinative is whether the person has displayed a reasonable expectation of privacy.[30] As defined by Justice Harlan in his concurrence, this standard has two elements: "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.' "[31] *Katz* thus completed the transition of Fourth Amendment analysis from its original emphasis on locale to an emphasis on the parties themselves and whether there was a reasonable expectation of privacy.[32]

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25. *Id.* at 478 (Brandeis, J., dissenting) (emphasis added).

26. 389 U.S. 347 (1967).

27. *Id.* at 355-57.

28. *Id.* at 351. "The question, however, is what protection it affords to those people. Generally, as here, the answer to that question requires reference to a 'place.'. . . Thus a man's home is, for most purposes, a place where he expects privacy. . . . [Similarly, a telephone booth] is a temporarily private place whose monetary occupant's expectations of freedom from intrusion are recognized as reasonable." *Id.* at 361 (Harlan, J., concurring) (citation omitted).

29. *Id.* at 351-52 (citations omitted).

30. *Id.* at 360 (Harlan, J., concurring). *See generally* Note, *The Reasonable Expectation of Privacy—Katz v. United States, A Postscriptum*, 9 IND. L. REV. 468 (1976) [hereinafter cited as Katz, *A Postscriptum*].

31. 389 U.S. at 361 (Harlan, J., concurring).

32. *Katz* demonstrates that at least some activities formerly protected only within the home may now be eligible for protection outside the home: "[W]hat he sought to exclude when he entered the telephone booth was not the intruding eye—it was the uninvited ear." *Id.* at 352.

Two years after *Katz* the Court decided an important obscenity case, *Stanley v. Georgia*,[33] which also contributed to the developing concept of privacy. In *Stanley*, officers were executing a warrant to search for evidence of bookmaking, but instead they uncovered material considered obscene under local law.[34] The Court held that even though all the avenues of distribution of pornography could be regulated under the state police power,[35] mere private possession in the home could not.[36] The Court saw the state's interest as regulating morality: "Obscenity, at bottom, is not crime. Obscenity is sin."[37] While morality alone would suffice as a basis for regulating public suppression of obscenity, the Court rejected the state's asserted interest in morality as insufficient by itself to justify invading the privacy of the home.[38] *Stanley* and *Katz* together therefore provide potential double protection for privacy—protection of the home as well as the persons therein.

The protection given in *Stanley* to a person's "right to satisfy his intellectual and emotional needs in the privacy of his own home,"[39] by viewing material illegal elsewhere, is also capable of extension. Because this right is related to location, and is not necessarily personal, it may extend to adult visitors who consensually view such material.[40] Further, so long as

33. 394 U.S. 557 (1969).

34. *Id.* at 558.

35. *See, e.g.*, United States v. Orito, 413 U.S. 139 (1973) (transportation of obscene material by common carrier); United States v. 12 200-Ft. Reels, 413 U.S. 123 (1973) (confiscation by customs officials of imported obscene material intended for private use); United States v. Thirty-Seven Photographs, 402 U.S. 363 (1971) (confiscation of obscene material intended for commercial distribution); United States v. Reidel, 402 U.S. 351 (1971) (knowing use of mails for delivery of obscene materials).

36. 394 U.S. at 559. "[W]e do not think that the obscenity statutes reach into the privacy of one's own home." *Id.* at 565. "[T]here exists a 'myriad' of activities which may be lawfully conducted within the privacy and confines of the home, but may be prohibited in public." Ravin v. State, 537 P.2d 494, 503 (Alas. 1975) (private possession of marijuana in the home). Nevertheless, "even in connection with the penumbra of home-related rights, the right of privacy in the sense of immunity from prosecution is absolute only when the private activity will not endanger or harm the general public." *Id.* at 500. *See* Note, *Roe and Paris: Does Privacy Have a Principle*?, 26 STAN. L. REV. 1161, 1188 (1974) [hereinafter cited as *Roe and Paris* .

37. 394 U.S. at 565 n.8 (quoting Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391, 395 (1963)).

38. "For also fundamental is the right to be free, *except in very limited circumstances*, from unwanted governmental intrusions into one's privacy." *Id.* at 564 (emphasis added).

39. *Id.* at 565.

40. "The Constitution extends special safeguards to the privacy of the home, just as it protects other special privacy rights." United States v. Orito, 413 U.S. 139, 142 (1973) (transportation of obscene material by common carrier). Lacking a compelling interest in regulating consensual activity in the home, the state could not regulate a visitor any more than it could the resident. *See* 25 EMORY L.J. 959, 976 (1976); *Roe and Paris, supra* note 36, at 1185-89; *cf.* Village of Belle Terre v. Boraas, 416 U.S. U.S. 1, 15-18 (1974) (Marshall, J., dissenting) (zoning ordinance narrowly defining "family" upheld). "[T]he right to invite the stranger into one's

the activity does not conflict with a compelling state interest, other methods of fulfilling emotional needs, such as unconventional sexual practices, ought to be equally entitled to protection in the home.[41]

II. Decisional Privacy and its Application to Sexual Activity

Paralleling the *Katz* shift away from the home-oriented focus of the Fourth Amendment was the development of personal privacy rights under the "liberty" clause of the Fourteenth Amendment.[42] This clause protects those rights that are fundamental or "implicit in the concept of ordered liberty."[43] In order to determine whether a new right is to be protected, the Court must look to tradition and history to decide whether it is "so rooted in the [collective] conscience of our people as to be ranked as fundamental."[44] "Where there is a significant encroachment upon [a fundamental] personal liberty, the State may prevail only upon showing a subordinating interest which is compelling."[45] Further, the statute "must be narrowly drawn to express only the legitimate state interests at stake."[46]

The Court has recognized the family unit as always having been an essential part of our society: "Marriage and procreation are fundamental to the very existence and survival of the race."[47] To ensure the viability of the family unit, the Court has given great deference to basic decisional rights regarding procreation[48] and the raising of children.[49] These decisions

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home is too basic in our constitutional regime to deal with roughshod." United States Dep't of Agriculture v. Moreno, 413 U.S. 528, 543 (1973) (Douglas, J., concurring) (denial of food stamps due to arbitrary definition of "household").

41. "[S]ocially condemned activity, excepting that of demonstrable external effect, is and was intended by the Constitution to be beyond the scope of state regulation when conducted within the privacy of the home." Doe v. Commonwealth's Attorney, 403 F. Supp. 1199, 1205 (E.D. Va. 1975) (Mehrige, J., dissenting), *aff'd mem.*, 425 U.S. 901 (1976). "Recent Supreme Court decisions make it clear that even the states, which possess a general police power not granted to Congress, cannot in the name of morality infringe the rights to privacy . . . *in the home.*" Moreno v. United States Dep't of Agriculture, 345 F. Supp. 310, 314 (D.D.C.), *aff'd*, 413 U.S. 528 (1973) (emphasis in original). *See generally* W. BARNETT, SEXUAL FREEDOM AND THE CONSTITUTION 58-60 (1973) hereinafter cited as BARNETT .

42. "[N]or shall any State deprive any person of life, liberty or property, without due process of law . . . ." U.S. CONST., amend. XIV.

43. Roe v. Wade, 410 U.S. 113, 152 (1973) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)). *See generally* Heymann & Barzelay, *The Forest and the Trees: Roe v. Wade and Its Critics*, 53 B.U.L. REV. 763 (1973).

44. Griswold v. Connecticut, 381 U.S. 479, 493 (1965) (Goldberg, J., concurring) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).

45. *Id.* at 497 (Goldberg, J., concurring) (quoting Bates v. Little Rock, 361 U.S. 516, 524 (1960)); *see* Roe v. Wade, 410 U.S. 113, 155 (1973).

46. Roe v. Wade, 410 U.S. 113, 155 (1973).

47. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

48. *E.g.*, Skinner v. Oklahoma, 316 U.S. 535 (1942) (compulsory sterilization of certain classes of criminals).

49. *E.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972) (compulsory school attendance law

created a "private realm of family life which the state cannot enter"[50] without a compelling justification. The result of this expansion of the right of family autonomy was the affirmative recognition, in *Griswold v. Connecticut*,[51] of a fundamental right of privacy under the liberty clause of the Fourteenth Amendment.

A. *Griswold v. Connecticut*

The appellants in *Griswold*, the executive and medical directors of the local Planned Parenthood Leauge, provided married couples with information, instruction, and medical advice regarding contraception. For these services they were charged with aiding and abetting the violation of a Connecticut statute prohibiting the use of contraceptives.[52] Building on the recognized special protection given the family and home,[53] the Court held that the married couple could not be prosecuted under this statute because a zone of privacy insulated them from state regulation of their procreational decisions.[54] In so holding, the Court extended derivative privacy protection to the appellants, who had shared in the married couple's decision.[55] Without such protection, the couple would have been denied the means to effectuate their right of decisional privacy.

Locating the basis for this right proved difficult for the Court. The majority, in an opinion written by Justice Douglas, felt that associated with explicit guarantees in certain amendments to the Constitution were implicit peripheral rights that made the explicit rights more secure.[56] Surrounding these peripheral rights were penumbras protecting individual privacy from governmental intrusion.[57] These penumbras drew their "life and substance" from emanations of specific guarantees in the Bill of Rights.[58] Together, the emanations from the First, Third, Fourth, Fifth, and Ninth Amendments formed a zone of privacy, which in turn encompassed the marriage relationship.[59]

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inapplicable to Amish children); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (parochial education); Meyer v. Nebraska, 262 U.S. 390 (1923) (teaching of foreign language in school).

50. Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (distribution of religious material by minor).

51. 381 U.S. 479 (1965).

52. *Id.* at 480.

53. See text accompanying notes 47-50 *supra*.

54. 381 U.S. at 485.

55. "This law, however, operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation." *Id.* at 482.

56. *Id.* at 484-85.

57. *Id.*

58. *Id.*

59. *Id.* at 485.

The statute, by regulating the *use* rather than the less onerous alternatives of sale or distribution of contraceptives, had the greatest potential for intruding on the privacy surrounding the marital relationship.[60] Raising the specter of enforcement only by invasion of the marital bedroom, Justice Douglas held the means employed by the State impermissible as "repulsive to the notions of privacy."[61]

Justice Goldberg concurred, joined by Chief Justice Warren and Justice Brennan. Justice Goldberg argued that personal rights found to be fundamental were protected by the Fourteenth Amendment's concept of liberty.[62] Using the Ninth Amendment as support for his thesis that the Constitution protected rights not expressly stated,[63] he concluded that marital privacy was fundamental under the Fourteenth Amendment: "The entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to marry . . . are of similar order and magnitude as the fundamental rights specifically protected."[64] Because Justice Goldberg found the state's interest in discouraging extramarital relations insufficiently compelling, he agreed that the statute was unconstitutional.[65]

Justice Harlan concurred only in the result because he did not see the question as dependent on the "letter or penumbra of the Bill of Rights."[66] For him, the issue was whether the statute violated basic values "implicit in the concept of ordered liberty"[67] under the due process clause of the Fourteenth Amendment. Referring to and incorporating his dissent in *Poe v. Ullman*,[68] Justice Harlan reasoned that when morality alone was used to justify a statute, the choice of means became relevant.[69] In this instance, the

60. *Id.*

61. *Id.* at 485-86.

62. *Id.* at 486.

63. *Id.* at 487-96. *See generally* Bertelsman, *The Ninth Amendment and Due Process of Law—Toward a Viable Theory of Unenumerated Rights*, 37 U. CIN. L. REV. 777 (1968) [hereinafter cited as Bertelsman]; Redlich, *Are There "Certain Rights . . . Retained by the People"?*, 37 N.Y.U. L. REV. 787 (1962); Ringold, *The History of the Enactment of the Ninth Amendment and its Recent Development*, 8 TULSA L.J. 1 (1972).

64. 381 U.S. at 495 (Goldberg, J., concurring).

65. *Id.* at 497-99. Even if marital fidelity were perceived as a valid state interest, Justice Goldberg felt that it could "be served by a more discriminately tailored statute, which does not, like the present one, sweep unnecessarily broadly, reaching far beyond the evil sought to be dealt with and intruding upon the privacy of all married couples." *Id.* at 498.

66. *Id.* at 499 (Harlan, J., concurring in the judgment).

67. *Id.* at 500 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

68. 367 U.S. 497 (1961) (an earlier challenge to the statute struck down in *Griswold* dismissed for lack of justiciability).

69. "The secular state is not an examiner of consciences: it must operate in the realm of behavior, of overt actions, and where it does so operate, not only the underlying, moral purposes of its operations, but also the *choice of means* becomes relevant to any Constitutional judgment on what is done." *Id.* at 547 (Harlan, J., dissenting) (emphasis in original).

state sought to enforce its moral judgment regarding contraceptives by "intruding upon the most intimate details of the marital relation with the full power of the criminal law."[70] This involved what "must be granted to be a most fundamental aspect of 'liberty,' the privacy of the home in its most basic sense, and it is this which requires that the statute be subjected to 'strict scrutiny.' "[71] Justice Harlan concluded that the means were too intrusive: while the right of privacy was not an absolute,[72] due process prohibited regulating the details of marital intimacy by means of the criminal law.[73]

Justice White, concurring in the judgment, also relied on the Fourteenth Amendment. He felt that the right to be free from regulation of the marital relation "come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements."[74] He did not, however, adopt the privacy argument espoused in the other opinions.[75] Instead, he concluded that the statute, by its inclusion of married couples, impermissibly interfered with the "realm of family life."[76]

Justices Black and Stewart each dissented and joined the other's opinion. Justice Black could find the statute violative of no explicit constitutional guarantee,[77] and he was unwilling to read an implied protection into the Constitution.[78] He reproved the Court for using the due process clause to find an implicit right of privacy, for that allowed a statute's constitutionality to be measured "by our belief that legislation is arbitrary, capricious or unreasonable, or accomplishes no justifiable purpose, or is offensive to our

70. *Id.* at 548.

71. *Id.*

72. " '[T]he family . . . is not beyond regulation,' . . . and it would be an absurdity to suggest either that offenses may not be committed in the bosom of the family or that the home can be made a sanctuary for crime. The right of privacy most manifestly is not an absolute." *Id.* at 552 (citation omitted).

73. 381 U.S. at 500. "In sum, the statute allows the State to enquire [sic] into, prove and punish married people for the private use of their marital intimacy.

"[This involves what] must be granted to be a most fundamental aspect of, 'liberty,' the privacy of the home in its most basic sense, and it is this which requires that the statute be subjected to 'strict scrutiny.' " Poe v. Ullman, 367 U.S. at 548 (Harlan, J., dissenting). While Justice Harlan felt that "adultery, homosexuality, fornication and incest [were not] immune from criminal enquiry [sic], however privately practiced," *id.* at 552, he drew a protective line around marriage. *Id.* at 553. This recitation of conduct subject to state regulation did not include heterosexual sodomy, and it has been suggested that "[t]he logic of the analysis would . . . apparently protect [such] sexual conduct by married couples." *Roe and Paris, supra* note 36, at 1181.

74. 381 U.S. at 503 (White, J., concurring in the judgment) (quoting Kovacs v. Cooper, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring)).

75. *Id.* at 502-07 (White, J., concurring in the judgment); *see* Note, *On Privacy*, 48 N.Y.U.L. REV. 670, 684 (1973) [hereinafter cited as *On Privacy*].

76. *Id.* at 502 (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944)).

77. *Id.* at 510 (Black, J., dissenting).

78. *Id.* at 509-10.

own notions of 'civilized standards of conduct.' "[79] The Constitution, as Justice Black comprehended it, provided only one method of keeping "in tune with the times,"[80] and that was by constitutional amendment. Justice Stewart acknowledged that the statute was an "uncommonly silly law,"[81] but could not find it offensive to any constitutional provision.[82] He also felt that the due process clause provided only procedural, not substantive, protection, and that the Connecticut statute violated no procedural right.[83]

The majority and concurring opinions in *Griswold* indicate that there is a fundamental right to privacy regarding the intimate details of the marriage relationship,[84] deriving from the earlier protections of the "realm of family life."[85] Under the Fourteenth Amendment, this right is secure against all but a compelling state interest.[86] The cases that have since been decided follow this theory of privacy rather than the penumbral theory articulated by Justice Douglas.[87] *Griswold* fails, however, to delineate precisely the nature of this marital privacy.[88] Despite the observation by Justice Douglas that enforcement of the Connecticut statute would necessarily entail a violation of the Fourth Amendment,[89] this newly recognized right is far too broad to be justified solely on the basis of location.[90] Indeed, there are intimations in Justice Goldberg's concurrence that the protection of the home is, in part, a protection of the family life centered there.[91]

79. *Id.* at 513 (citations omitted). For a further discussion of "natural law" due process, see Bertelsman, *supra* note 63; *see also* Note, *Privacy After Griswold: Constitutional or Natural Law Right?*, 60 NW. U.L. REV. 813 (1966).

80. 381 U.S. at 522.

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

82. *Id.*

83. *Id.* at 528.

84. "Despite the philosophical differences of the majority . . . as to which constitutional provision encompasses the right to privacy, their agreement was complete as to the sanctity of the marital relationship." Lovisi v. Slayton, 363 F. Supp. 620, 624 (E.D. Va. 1973), *aff'd*, 539 F.2d 349 (4th Cir.), *cert. denied*, 97 S. Ct. 485 (1976).

85. Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

86. See text accompanying notes 42-50 *supra*.

87. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); Loving v. Virginia, 388 U.S. 1 (1967).

88. Even if *Griswold* is viewed as protecting nothing more than the "intimate medical problems" of family planning, United States v. 12 200-Ft. Reels, 413 U.S. 123, 127 n.4 (1973), the case may be applicable to the situation in *Lovisi*. "If, under *Griswold*, the state cannot prohibit a husband and wife from using artificial means [of birth control], on what basis can it prohibit them from using these natural means [*e.g.*, oral copulation]?" BARNETT, *supra* note 41, at 53.

89. 381 U.S. at 485-86.

90. "The marital right of privacy has a base broader than the Fourth Amendment alone and the cases recognizing the right pitch it on grounds that belie that secrecy is a necessary element." Lovisi v. Slayton, 539 F.2d 349, 354 (4th Cir.) (Winter, J., dissenting), *cert. denied*, 97 S. Ct. 485 (1976).

91. "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. And the integrity of that life is so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right." 381 U.S. at 495 (Goldberg, J., concurring) (quoting Poe v. Ullman, 367 U.S. 479, 551-52 (1961) (Harlan, J., dissenting)).

Griswold may be better understood as a first step toward recognition of decisional privacy. Although the basis of the decision was the impermissible means employed by the state, its effect was to protect the couple's decision to use contraceptives. A necessary ingredient in this decision was the inclusion of a third person, in this instance a physician, who supplied the information to effectuate their decision. By protecting the couple, the Court also extended protection beyond the relationship to a third person.[92]

B. *Eisenstadt v. Baird*

Seven years after *Griswold* the scope of sexual privacy was further expanded in *Eisenstadt v. Baird*.[93] Baird, who was not a doctor, was convicted under a Massachusetts law prohibiting distribution of contraceptives to unmarried persons but allowing such access to married persons.[94] At the conclusion of a lecture on birth control, Baird gave a young woman in the audience a sample of contraceptive vaginal foam, whereupon he was arrested for violating the statute. He was granted standing to assert the rights of unmarried persons in challenging the statute because unhindered distribution was necessary to effectuate a decision to use contraceptives.[95] The Court held that the statute's distinction between married and unmarried persons violated the equal protection clause of the Fourteenth Amendment.[96]

The Court reviewed the possible state objectives that would support such a distinction and decided that the state had articulated none that were

92. "[A] principle to be vital must be capable of wider application than the mischief which gave it birth." Weems v. United States, 217 U.S. 349, 373 (1910).

93. 405 U.S. 438 (1972).

94. *Id.* at 440-41.

95. The use of contraceptives was not itself unlawful; thus if the Court had not granted Baird standing to assert the rights of unmarried persons, the latter would have had no forum to challenge the statute. *Id.* at 446.

96. "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST., amend. XIV. The equal protection clause does not mandate that all persons be treated equally. When the state has the power to regulate, it may treat distinct classes of persons in different ways. It may not, however, classify individuals in a manner wholly inconsistent with the objectives of the regulation. Thus, persons similarly situated in the class must be treated in the same manner. Until recently there have been two fairly rigid levels of scrutiny employed by the Court when an equal protection challenge is brought. If fundamental values are implicated, then a statute is subject to strict scrutiny and must be shown to be necessary to accomplish a compelling state interest. In addition, there must be no less onerous method of achieving the same goal. If no fundamental interest is at stake, the statute is examined much more leniently and will be upheld unless it has no rational connection to any conceivable legitimate state concern. While the Court in *Eisenstadt* spoke in terms of this rational basis test, it actually applied a third, mid-range test, requiring a fair and substantial relation between the statute and the state's actual objective. *See* Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 17-48 (1972) [hereinafter cited as Gunther]; Note, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1076-82 (1969). *See also* San Antonio Independent School Dist. v. Rodriquez, 411 U.S. 1, 98-110 (1973) (Marshall, J., dissenting).

reasonably related to the statute.[97] The asserted state interest in deterring premarital sexual relations was dismissed because the statute was ineffective in achieving that end. Access to contraceptives for the prevention of disease, as distinguished from contraception, was not regulated, and nothing prevented the distribution and use of contraceptives by married persons who intended to engage in extramarital sexual activities.[98] It was apparent to the Court that this presented too large an exemption to allow the state to contend seriously that the statute deterred sexual activity. Moreover, the rationale of indirectly deterring fornication by regulating access to contraceptives was found to be "dubious,"[99] as the maximum punishment for violating this law was twenty times that for the actual act of fornication.[100] The Court also decided that the statute was unrelated to the purpose of protecting public health.[101] The statute regulated distribution of potentially harmful articles, yet the article in question had not been proven dangerous;[102] thus the statute was overbroad. Even had such a showing been made, the Court felt that the statute was unnecessary because federal and state laws already regulated distribution of dangerous drugs.[103] The state finally attempted to justify the statute "simply as a prohibition on contraception."[104] While the application of *Griswold* to this question was not directly considered,[105] the Court held that the distinction in the statute between married and unmarried persons was not rationally related to this asserted moral purpose.[106]

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97. 405 U.S. at 443. "Rather, it merely made what it thought to be the precise accommodation necessary to escape the *Griswold* ruling." *Id.* at 450 (quoting Baird v. Eisenstadt, 429 F.2d 1398, 1401 (1st Cir. 1972)).

98. *Id.* at 442 n.3, 448-49.

99. *Id.* at 448.

100. An offender convicted of fornication faced a possible ninety day sentence, whereas distribution of contraceptives to unmarried persons was punishable by a five year sentence. *Id.* at 449-50.

101. *Id.* at 450. "[T]he same devices the distribution of which the State purports to regulate when their asserted purpose is to forestall pregnancy are available without any controls whatsoever so long as their asserted purpose is to prevent the spread of disease. It is inconceivable that the need for health controls varies with the purpose for which the contraceptive is to be used when the physical act in all cases is one and the same." *Id.* at 451 n.8.

102. *Id.* at 451-52.

103. *Id.* at 452.

104. *Id.*

105. "[W]hatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike.

"If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. . . .

"On the other hand, if *Griswold* is no bar to a prohibition on the distribution of contraceptives, the State could not, consistently with the Equal Protection Clause, outlaw distribution to unmarried but not to married persons. In each case the evil, as perceived by the State, would be identical, and the underinclusion would be invidious." *Id.* at 453-54.

"Under-inclusion occurs when a state benefits or burdens persons in a manner that furthers a legitimate public purpose but does not confer this same benefit or place this same burden on others who are similarly situated." Note, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1084 (1969); *see* Gunther, *supra* note 96, at 116-22.

106. 405 U.S. at 447.

Eisenstadt, then, further strengthened the right of privacy in regard to procreational decisions by extending its protection to all individuals:

> It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.[107]

By thus clarifying the right of decisional privacy originally established in *Griswold, Eisenstadt* helped resolve some of the previous uncertainty to which lower courts had succumbed in their refusal to extend *Griswold* beyond its facts.[108] In several of the opinions in *Griswold* the right was seen as deriving either from the marriage relationship or the home-as-castle locus concept of the Fourth Amendment.[109] *Eisenstadt* made it clear that neither was the case.

It is also evident that in this case Baird, who was not a doctor, was protected as a function of the woman's right to seek contraceptive information because without such protection, the woman would have been unable to implement her decision to use contraceptives.[110] It is this voluntary sharing of her privacy that is the crux of the extension of the right, suggesting that the true limits on this right are consensual in nature. Strict adherence to technical concepts of "private" and "public" is no longer warranted, although the relative seclusion that is necessary may vary with the activity for which the person seeks protection.[111] *Eisenstadt* supports this theory by

107. *Id.* at 453. Thus, the impact of a decision on the individual making it will influence the protection given it by the Court. It has been suggested that the Court may have used this "impact" equal protection analysis as an alternative to extending the right of privacy directly in order to keep its options open in the abortion decisions that were imminent. *See* Gunther, *supra* note 96, at 122.

108. Tangential issues, such as force, *e.g.*, Towler v. Peyton, 303 F. Supp. 581 (W.D. Va. 1969) (force negating claim of marital privacy in sodomy conviction); Harris v. State, 457 P.2d 638 (Alas. 1969) (force negating privacy protection for sodomy), involvement of minors, *e.g.*, People v. Hurd, 5 Cal. App. 3d 865, 85 Cal. Rptr. 718 (1970) (father's sexual activities with his daughter); State v. Trejo, 83 N.M. 511, 494 P.2d 173 (1972) (sodomy with minor), and less than absolute privacy, *e.g.*, Wishart v. McDonald, 500 F.2d 1110 (1st Cir. 1974) (conduct in plain view of neighbors not private); United States v. Brewer, 363 F. Supp. 606 (M.D. Pa. 1973) (sodomy in prison not in private), prevented lower courts from focusing on the extent and the individual nature of this decisional right of privacy.

109. See text accompanying notes 59-76 *supra*.

110. While *Griswold* arguably may have some overlap with the doctor-patient privilege in its protection, such an application was impossible in *Eisenstadt* because Baird was not a doctor. Thus the decisional privacy of the individual must be clearly recognized. *See Roe and Paris, supra* note 36, at 1178-79. See note 88 *supra*.

111. "Certainly *Meyer v. Nebraska, Pierce v. Society of Sisters*, and *Skinner v. Oklahoma*, the foundations from which the right of marital privacy was developed, had nothing to do with secrecy. Their outcome depended upon the nature of the activity sought to be regulated and the relationship of that activity to a protected right." Lovisi v. Slayton, 539 F.2d 349, 354 (4th Cir.) (Winter, J., dissenting), *cert. denied*, 97 S. Ct. 485 (1976).

its protection of intimate decisions made in a setting such as a public lecture.[112]

C. *Roe v. Wade*

In *Roe v. Wade*,[113] the Supreme Court expanded the privacy concept delineated in *Griswold* to shield decisions between unmarried persons, and extended protection to third persons necessarily involved in the decision-making process.

Roe, an unmarried pregnant woman, challenged the abortion laws of Texas, which prohibited abortions except to save the life of the mother.[114] The Court held that the right of personal privacy under the Fourteenth Amendment was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy,"[115] and balanced this interest against the state's interests in both maternal health and protection of the potential life of the fetus.[116] The Court concluded that throughout the first trimester of pregnancy, the woman's fundamental right of privacy was superior to the state's interest, and the decision was to be left to her and her doctor.[117] During the second trimester, the state's interest in maternal health became compelling and the abortion was subject to some restriction.[118] In the third trimester, the state's interest in the potential life was also compelling, and at this point the state could even prohibit abortions.[119]

The Court accomplished more than it plainly stated in *Roe*: it reaffirmed and extended the consensual sharing of the individual's right of privacy countenanced in *Eisenstadt*. In protecting the woman's decision to terminate her pregnancy, the Court necessarily conferred derivative protection on others, such as the hospital support staff, with whom she shared her privacy.[120] Without such additional protection her right would be without substance, for she would be denied the means to transform her decision into actuality: the hospital's services could not be provided without fear of

112. 405 U.S. at 440.

113. 410 U.S. 113 (1973).

114. *Id.* at 117-18.

115. *Id.* at 153.

116. "[T]he State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman, . . . and . . . it has still *another* important and legitimate interest in protecting the potentiality of human life. These interests are separate and distinct. Each grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes 'compelling.' " *Id.* at 162-63 (emphasis in original).

117. *Id.* at 163. "This means . . . that, for the period of pregnancy prior to this 'compelling' point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State." *Id.*

118. *Id.* at 164.

119. *Id.* at 164-65.

120. See text accompanying note 134 *infra*.

prosecution.[121] The Court thus expressly recognized the protected right to be that of decisional privacy.

> The Court was not, after all, choosing simply between the alternatives of abortion and continued pregnancy. *It was instead choosing among alternative allocations of decisionmaking authority*, for the issue it faced was whether the woman and her doctor, rather than an agency of government, should have the authority to make the abortion decision at various stages of pregnancy. . . . Despite what the Court's opinion seemed to say, the result it reached was not the simple "substitution of one non-rational judgment for another concerning the relative importance of a mother's opportunity to live the life she has planned and a fetus's opportunity to live at all," but was instead a decision about *who should make judgments of that sort*.[122]

The necessity for strict seclusion implied in *Griswold*, if not fading, at least now varies with the circumstances.[123] In *Roe* numerous persons were encompassed by the woman's right of privacy. The right was exercised in a hospital, which is a relatively public place in comparison with the home.[124] A requirement of strict seclusion would preclude recognition of the right, yet the Court in *Roe* upheld the woman's right to decisional privacy because the activity, while not isolated, remained secluded as against the public. Her actions were only public among those with whom she shared her privacy.[125] To all others, these actions remained private.[126]

Although both *Eisenstadt* and *Roe* involved unmarried women, the Court did not consider whether the state could validly punish the underlying illicit sexual relationship.[127] Yet these cases allowed the individuals involved in nonmarital heterosexual relationships to take contraceptive precautions and obtain abortions.[128] While perhaps not indicating approval of the under-

121. 410 U.S. at 117-18 n.1, 165-66.

122. Tribe, *Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 11 (1973) (emphasis in original) (footnotes omitted).

123. See text accompanying note 111 *supra*.

124. See note 134 *infra*.

125. "Nor is an abortion a 'public matter': only the participants in the operation are present." Wheeler & Kovar, *supra* note 11, at 547.

126. "The desire for privacy is nearly always partial. There is a desire to be simultaneously in private and in 'public' in relations with particular other persons." Shils, *Privacy: Its Constitution and Vicissitudes*, 31 LAW & CONTEMP. PROB. 281, 304-05 (1966) [hereinafter cited as Shils]; *see Katz, A Postscriptum, supra* note 30.

127. In *Roe* the Court dismissed almost out of hand such an indirect motive: "It has been argued occasionally that these laws were the product of a Victorian social concern to discourage illicit sexual conduct . . . . [I]t appears that no court or commentator has taken the argument seriously." 410 U.S. at 148. In *Eisenstadt* the Court was less blunt, but the effect was the same: "[D]eterring fornication . . . cannot reasonably be taken as the purpose of the ban on distribution of contraceptives to unmarried persons." 405 U.S. at 450.

128. See note 134 *infra*. "The Court did not speak in terms of relationships, but its language indicates that, if a relationship is a prerequisite, the relationship of marriage is not. It would seem that any heterosexual relationship would suffice to rationalize *Eisenstadt* in terms of a relationship analysis, because the Court had no information concerning the permanence of the

lying illicit activity, these cases clearly establish that the state's interest in indirectly regulating such sexual activity is subordinate to the individual right of decisional privacy.[129]

D. *Paris Adult Theatre I v. Slaton*

Further refinement of this quasi-public distinction came in *Paris Adult Theatre I v. Slaton*,[130] in which respondents sought to enjoin two Atlanta movie theaters from showing allegedly obscene films. The Supreme Court found no fundamental personal liberty implicated in viewing such movies in a place of public accommodation; while reaffirming the protection of the home articulated in *Stanley v. Georgia*,[131] the Court refused to extend it. "[I]t is unavailing to compare a theater open to the public for a fee with the private home of *Stanley*."[132] The quasi-public surroundings of the theater, coupled with a profit motive, negated any privacy interest that might otherwise attach.[133]

Initially, *Paris* seems to imply that in order to be protected, activities must still be in the privacy of the home. This inference is dispelled by the Court's distinction between the broad protection given decisional privacy and the limited protection given obscenity:

> The protection afforded [obscenity] by *Stanley v. Georgia* is restricted to a place, the home. In contrast, the constitutionally protected [decisional] privacy of family, marriage, motherhood, procreation, and child rearing is not just concerned with a particular place, but with a protected intimate relationship. *Such protected privacy extends to the doctor's office, the hospital, the hotel room, or as otherwise required to safeguard the right to intimacy involved.* Obviously, there is no necessary or legitimate expectation of privacy which would extend to marital intercourse on a street corner or a theater stage.[134]

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sexual relationships of the women who were given the contraceptives. . . . Any continuing relationship between them . . . was not only lacking the supportive legal framework of marriage, but also in some states would itself involve the crime of fornication." *Roe and Paris, supra* note 36, at 1177.

129. "The lack of discussion in *Roe* of morality and offensiveness may signal the Court's implicit assumption that the enforcement of morality cannot justify the infringement of a fundamental right such as privacy." *Roe and Paris, supra* note 36, at 1172.

"The growing protection of non-procreational activity between consenting adults reflects the changing sexual mores of society. The early basis of the right in the ancient institution of marriage soon lost its relevance and applicability in the late 1960's and early 1970's. *Eisenstadt* represented not so much a shocking expansion of the ill-defined right of privacy as a recognition by the Court, in the guise of equal protection language, that it could no longer enforce an outdated morality." Note, *The Constitutional Right of Privacy: An Examination*, 69 Nw. U.L. REV. 263, 268 (1974).

130. 413 U.S. 49 (1973).

131. 394 U.S. 557 (1969).

132. 413 U.S. at 65-66.

133. *Id.* at 68. See note 137 *infra*.

134. *Id.* at 66 n.13 (emphasis added). This passage, in reinterpreting *Roe*, makes clear that the right of privacy is decisional in character and capable of extension to others. See text accompanying notes 113-29 *supra*.

The Court thus recognized the necessity for decisional privacy to be variable, and reaffirmed its application, depending on the circumstances, even in quasi-public places.[135] The Court added a caveat, however, that if there were commercial exploitation of the intimate activity, no protection would attach.[136] This is consistent with the right of decisional privacy, for in such circumstances the intent of the parties is public dissemination.[137] Conversely, when the person's expectation is seclusion from the public, the activity is protected.[138]

E. Summary

The concept of decisional privacy has been evolving slowly to meet the needs of society to protect the individual from governmental intrusion into areas of intimate concern.[139] This right of decisional privacy can be seen as the right to control the extent of dissemination of otherwise secret information about oneself.[140] When such information is shared, although no longer technically secret, there is no intention to share the knowledge on a wider scale.[141] The information is still private as against the rest of the world. So, too, may acts be shared. It is this control over the consensual act of sharing that is at the root of decisional privacy. Without such control, it would not be possible to maintain the integrity of one's character.[142] To preserve this

135. This also undercuts the necessity for strict seclusion that the court of appeals felt was decisive in Lovisi v. Slayton, 549 F.2d 349 (4th Cir.), *cert. denied*, 97 S. Ct. 485 (1976). See notes 194-209 and accompanying text *infra*.

136. 413 U.S. at 65.

137. See text accompanying notes 29-32 *supra*. *See, e.g.*, Raphael v. Hogan, 305 F. Supp. 749 (S.D.N.Y. 1969) (sodomy in theatrical play not protected); People v. Parker, 33 Cal. App. 3d 842, 109 Cal. Rptr. 354 (1973) (filming oral copulation with intent commercially to market film negates privacy expectation); People v. Drolet, 30 Cal. App. 3d 207, 105 Cal. Rptr. 824 (1973) (performing oral copulation for paying public negates expectation of privacy).

138. See text accompanying notes 124-26 *supra*.

139. One commentator has suggested that this right may also be called "personhood." "The theme of personhood is . . . emerging. It has been groping . . . for a rubric. Sometimes it is called privacy, inaptly it would seem . . . ; autonomy perhaps, though that seems too dangerously broad. But the idea is that of personhood in the sense of those attributes of an individual which are irreducible in his selfhood. We all know the agonizing judgments that have had to be made and that will have to be made in such diverse areas as abortion and the death penalty, which it seems to me are aspects of this issue of personhood." Freund, *Remarks at the Annual Dinner of the American Law Institute*, 52 ALI PROCEEDINGS 574-75 (1975-76); *see* Marshall, *The Right to Privacy: A Skeptical View*, 21 MCGILL L.J. 242 (1975).

140. *See generally* Wheeler & Kovar, *supra* note 11, at 539-40.

141. *See* Shils, *supra* note 126. "That which is solitarily private is often impelled outward into a community of two persons; that which is personally private between two persons is often impelled outward into a sharing between one of the two and a third person, and so it goes—but nearly always with the intention that it should not pass beyond that third or *n*th sharer. Voluntary self-disclosure is not usually intended to be boundless. The disclosure does not entirely annihilate the boundedness characteristic of privacy." *Id.* at 304-05.

142. *See* Fried, *Privacy*, 77 YALE L.J. 475, 477-78 (1968): "It is my thesis that privacy is not just one possible means among others to insure some other value, but that it is necessarily related to ends and relations of the most fundamental sort: respect, love, friendship and trust.

vital fundamental interest, case law has generated a zone of presumptive immunity from governmental regulation for non-public conduct:[143] "outside areas of plainly harmful conduct, every American is left to shape his own life as he thinks best . . . ."[144]

Decisional privacy with respect to the private sexual activity of consenting adults should be within this protection. The state's asserted right to regulate sexual behavior derives from its general police power in regard to morality.[145] In the past, mere recitation of this incantation has been enough to foreclose further judicial examination of the matter. The privacy cases,[146] however, in protecting access to contraceptives and abortion as a fundamental right, imply protection of the underlying decision regarding sexual behavior as well. Thus, when state regulation impinges on an individual's choice of sexual activity, a deeper inquiry must be undertaken. *Eisenstadt* and *Roe* intimated that the state's generalized interest in morality is insufficient to be considered compelling.[147] The state's interest, then, must be

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Privacy is not merely a good technique for furthering these fundamental relations; rather without privacy they are simply inconceivable. They require a context of privacy or the possibility of privacy for their existence. To make clear the necessity of privacy as a context for respect, love, friendship and trust is to bring out also why a threat to privacy seems to threaten our very integrity as persons. To respect, love, trust, feel affection for others and to regard ourselves as the objects of love, trust and affection is at the heart of our notion of ourselves as persons among persons, and privacy is the necessary atmosphere for these attitudes and action, as oxygen is for combustion." *See also* Note, *From Private Places to Personal Privacy: A Post-Katz Study of Fourth Amendment Protection*, 43 N.Y.U.L. REV. 968, 978 (1968).

143. *See* Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1425-26 (1974). "Hence, the real significance of the composite approach of *Griswold* and the recent abortion decisions is their establishment of the presumption that individual privacy is so vital and fundamental a right that government must be amply prepared to justify any intrusions upon it." Clark, *Constitutional Sources of the Penumbral Right to Privacy*, 19 VILL. L. REV. 833, 883-84 (1974).

144. Doe v. Bolton, 410 U.S. 179, 213 (1973) (Douglas, J., concurring in both *Doe* and Roe v. Wade, 410 U.S. 113 (1973)) (challenging Georgia's abortion laws) (quoting Kent v. Dulles, 357 U.S. 116, 126 (1958)). Justice Douglas saw this right as protecting "freedom of choice in basic decisions of one's life . . . ." 410 U.S. at 211.

145. *See, e.g.*, Note, *The Right to Decide—Individual Liberty Versus State Police Powers*, 18 ARIZ. L. REV. 207, 208-20 (1976); Note, *The Constitutionality of Sodomy Statutes*, 45 FORDHAM L. REV. 553, 579-85 (1976); *Roe and Paris, supra* note 36, at 1166-73.

146. Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965).

147. *See* Roe v. Wade, 410 U.S. 113, 152-54 (1973); Eisenstadt v. Baird, 405 U.S. 438, 447-54 (1972); *cf.* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 57-69 (1973) (exhibition of obscene movies regulatable); Stanley v. Georgia, 394 U.S. 557, 565 n.8, 566-68 (1968) (private possession of obscenity permissible); Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684, 688-90 (1959) (denial of license to exhibit "immoral" movie); Roth v. United States, 354 U.S. 476, 485 (1957) (mailing of obscene pictures not protected); *id.* at 501-02 (Harlan, J., concurring in part, dissenting in part); Moreno v. United States, 345 F. Supp. 310, 314 (D.D.C. 1972), *aff'd*, 413 U.S. 528 (1973) (arbitrary classification of household regarding eligibility for foodstamps); *In re* Labady, 326 F. Supp. 924, 926-28 (S.D.N.Y. 1971) (private homosexual conduct no bar to naturalization); Mindel v. United States Civil Serv. Comm'n, 312 F. Supp. 485, 487 (N.D. Cal. 1970) (private sexual conduct unrelated to job performance not grounds for dismissal). See notes 129 & 145 *supra*.

more than merely the police power to govern morality if it is to rise to the level of a compelling interest necessary to overcome this right of decisional privacy.[148]

That the same right of decisional privacy exists when one or both of the original participants includes a third party was demonstrated in *Griswold, Eisenstadt*, and *Roe*. The factual situation in each of these cases indicated that protection was given to individuals involved in intimate associations who chose to include two, or even more, persons in order to effectuate their intimate decisions. In all these cases, the additional parties were brought within the derivative privacy of the original decisionmaker. *Griswold* presented the marital association of two individuals who shared their private contraceptive decision with their doctor; the initial decision to seek contraceptive information protected the doctor as well.[149] In *Eisenstadt* the right of an unmarried individual to obtain contraceptives was asserted. The person who helped realize her decision in this instance was not a doctor.[150] *Roe* further extended protection under this right to as many persons as were necessary to effectuate a woman's decision to terminate her pregnancy.[151] The realm of privacy thus enlarged by these cases was valid as against those to whom the privacy had not been extended, including the state.[152]

It is apparent that under this theory of decisional privacy whether an intimate decision and its effectuation will be protected cannot depend on the number of persons involved.[153] Since under *Griswold, Eisenstadt*, and *Roe* the state cannot exclude a third person from protection, neither can it logically exclude a fourth person[154] nor, absent a compelling state interest, can any numerical line be drawn. Of course, numbers must make a difference at some point because there will be too many persons involved to avoid

148. "*Roe* and *Paris* suggest that in the absence of a fundamental privacy right or another fundamental constitutional guarantee, the Court will give the states very broad and virtually unreviewed discretion to legislate on the basis of rather nebulous and nonempirical interests such as the regulation of morality. However, when a fundamental right to privacy exists, there is reason to believe that its infringement cannot be justified by those same interests." *Roe and Paris, supra* note 36, at 1167. See notes 129 & 145 and accompanying text *supra*. *Paris* does not lessen the state's burden under this analysis because unlike decisional privacy, which draws its protection from a variety of sources, the only protection obscenity can claim from that case derives solely from the sanctity of the home.

149. See notes 54-58 and accompanying text *supra*.

150. Implicitly involved in her decision was a third person, her present or potential lover. See notes 128-29 *supra*.

151. See text accompanying notes 123-29 *supra*.

152. "Privacy may be the privacy of a single individual, it may be the privacy of two individuals, or it may be the privacy of three or numerous individuals. But it is always the privacy of these persons, single or plural, vis-à-vis other persons." Shils, *supra* note 126, at 281.

153. See note 134 and accompanying text *supra*; see note 156 *infra*.

154. See text accompanying note 134 *supra*.

rendering the act public, but the boundaries short of excessive numbers must be formed by the individual's choice.[155]

The evolution of the case law to date thus indicates that as long as the acts are secluded from the public, are consensual, and are not for profit, the concept of decisional privacy should prevail. Absent a compelling state interest, this would leave to the individual, rather than the government, the right to fix the limits of his privacy.[156] Specifically, individual decisions regarding unusual sexual preferences such as sodomy should be beyond state regulation as a matter of decisional privacy.[157] Several states are in apparent agreement, having legislatively revised their sodomy statutes to place the private consensual sexual activities of adults beyond state regulation.[158] Virginia's sodomy statute has not been so revised, and it was upheld

155. "This approach does not unqualifiedly sanction personal whim. If the activity in question involves more than one participant, as in the instant case, each must be capable of consenting, and each must in fact consent to the conduct for the right of privacy to attach." Doe v. Commonwealth's Attorney, 403 F. Supp. 1199, 1204 (E.D. Va. 1975) (Mehrige, J., dissenting), *aff'd mem.*, 425 U.S. 901 (1976). Moreover, *Eisenstadt* and *Roe* suggest this number may be quite large. See text accompanying notes 112 & 134 *supra*.

156. "We believe that the most important factor to be considered is whether the challenged conduct is public or private in nature. If it is public or if it involves a large number of other persons, it may pose a threat to the community. If, on the other hand, it is entirely private, the likelihood of harm to others is minimal and any effort to regulate or penalize the conduct may lead to an unjustified invasion of the individual's constitutional rights. For instance, it is now established that official inquiry into a person's private sexual habits does violence to his constitutionally protected zone of privacy." *In re* Labady, 326 F. Supp. 924, 927 (S.D.N.Y. 1971).

157. Some state courts that recently reviewed their sodomy statutes have indicated at least by way of dictum that this theory of decisional privacy is correct as a matter of constitutional law. *See, e.g.*, State v. Callaway, 25 Ariz. App. 267, 542 P.2d 1147 (1975), *rev'd sub nom.* State v. Bateman, 113 Ariz. 107, 547 P.2d 6 (1976); State v. Pilcher, 242 N.W.2d 348 (Iowa 1976) (only as to heterosexual conduct); State v. Elliot, 88 N.M. 187, 539 P.2d 207 (Ct. App. 1975), *rev'd*, 89 N.M. 305, 551 P.2d 1352 (1976); People v. Rice, 80 Misc. 2d 511, 363 N.Y.S.2d 484 (Suffolk County Dist. Ct. 1975), *rev'd per curiam*, 87 Misc. 2d 257, 383 N.Y.S.2d 799 (App. Term 1976).

Curiously, when the examination of sodomy statutes is indirect, as when the state is seeking civil sanctions relating to employment, some courts appear to be more receptive to privacy arguments asserted by individuals. Unless there is a demonstrable effect on job performance, the state is precluded from indirectly regulating the private sexual conduct of its employees. *See, e.g.*, Norton v. Macy, 417 F.2d 1161 (D.C. Cir. 1969); Acanfora v. Board of Educ., 359 F. Supp. 843 (D. Md. 1973), *aff'd on other grounds*, 491 F.2d 498 (4th Cir.), *cert. denied*, 419 U.S. 836 (1974); Morrison v. State Bd. of Educ., 1 Cal. 3d 214, 416 P.2d 375, 82 Cal. Rptr. 175 (1969); *On Privacy, supra* note 75, at 726-32; 69 NW. U.L. REV. 263, 268-72 (1974).

158. *See* CAL. PENAL CODE §§ 286, 288a (West Supp. 1977); COLO. REV. STAT. ANN. §§ 18-3-401, -404, -409 (Supp. 1975); CONN. GEN. STAT. ANN. §§ 53a-65, -70, -71, -72a, -72b, -73a (West Supp. 1976); DEL. CODE tit. 11, §§ 765, 766, 772, 773 (Supp. 1976); HAW. REV. STAT. § 768-71 (1968), *repealed by* 1972 Haw. Sess. Laws, act 9; ILL. ANN. STAT. ch. 38, § 11-2 (1972) (1961 Laws, p. 1983 §§ 11-2, -3, -4, -5, -9 (Smith-Hurd Supp. 1977) (P.A. 77-2638 § 1 (1973)); IND. CODE §§ 35-41-1-2, -42-4-2 (Supp. 1976); ME. REV. STAT. tit. 17-A, §§ 251-55 (1976 Pamph.); MINN. STAT. § 617.14 (1964), *repealed by* 1967 Minn. Laws, ch. 507, § 12; N.M. STAT. ANN. §§ 40-A-9-20 to -23 (Supp. 1975); N.D. CENT. CODE §§ 12.1-20-01 to -07 (Special Supp. 1975); OHIO REV. CODE ANN. §§ 2907.03, .04, .06, .07, .09 (Page 1975), §§ 2907.01, .05 (Page Supp. 1977); OR. REV. STAT. §§ 163.305, .325, .335, .385, .395, .405, .415, .425, .435, .445, .455,

in *Lovisi v. Slayton*,[159] a case in which the concept of decisional privacy was recognized but not applied.

III. *Lovisi v. Slayton*

A. A Factual Summary

Although married, the petitioners in *Lovisi* did not confine their sexual activities to each other; they indulged in "swinging"—the consensual welcoming of additional adult partners to a marital sexual relationship. The Lovisis placed an advertisement in a magazine catering to "swingers."[160] Through this medium they made contact with a man of similar sexual preferences. They engaged in tripartite sexual activities in the privacy of the Lovisis' bedroom.[161] These activities were commemorated with the aid of a Polaroid camera.[162] The trial was precipitated when the wife's daughters were caught with an allegedly obscene photograph they had taken to school.[163] The photograph allegedly depicted one of the girls seated on a sofa next to an adult male; both were nude.[164] The teacher who confiscated the picture tore it up and flushed it down a toilet, so its contents were never proved in court.[165] Two days later, the mother was called to a hearing at school with the principal, a welfare department representative, the police, and her daughters.[166] One of the girls told the police there were similar photographs at home.[167] The mother then left the meeting and the police secured a search warrant.[168] Although the Lovisis later claimed without

.465 (1975); S.D. COMPILED LAWS ANN. §§ 22-22-21, *repealed by* 1976 S.D. Sess. Laws, ch. 158, § 22-8; WASH. REV CODE §§ 9.79.140, .170, .180, .190, .200, .210, .220 (Supp. 1975); W. VA. CODE §§ 61-8B-1 to -13 (1977); *cf.* ALA. CONST. art. I, § 22 (right of privacy); CAL. CONST. art. I, § 1 (privacy affirmatively protected as a matter of state constitutional law); HAWAII CONST. art. I, § 5 (protection similar to that provided by Fourth Amendment from invasions of privacy).

159. 363 F. Supp. 620 (E.D. Va. 1973), *aff'd*, 539 F.2d 349 (4th Cir.), *cert. denied*, 97 S. Ct. 485 (1976).

160. 363 F. Supp. at 622.

161. *Id.*

162. *Id.* A question arose at trial and on appeal about who operated the camera. The prosecution contended that the wife's daughters had been present in the room and had taken the pictures. The defense strongly urged that the daughters were not present and that the pictures were taken by means of an automatic timing device on the camera. The question was never resolved at trial. *Id.*

163. Carolyn Acree, aged 11 at the time in question, and Eugenia Acree, aged 13 at that time, were Margaret Lovisi's children by a former marriage. *Id.*

164. *Id.* at 623.

165. Brief for Appellants at 4, Lovisi v. Slayton, 539 F.2d 349 (4th Cir.), *cert. denied*, 97 S. Ct. 485 (1976).

166. 363 F. Supp. at 623.

167. *Id.*

168. Brief for Appellants at 5, Lovisi v. Slayton, 539 F.2d 349 (4th Cir.), *cert. denied*, 97 S. Ct. 485 (1976).

contradiction that the pictures of their sexual activities were kept in a box in a locked gun cabinet,[169] one of the arresting officers testified that there were other unrelated pictures of an obscene nature throughout the house.[170]

At trial, the third party participant, a native of the West Indies, testified for the prosecution.[171] As a result of his allegedly criminal involvement he was deported.[172] His testimony indicated that the fellatio had taken place but that the pictures had been taken by means of the automatic-timing feature on the camera.[173]

B. The Federal District Court

The district court reviewed the Lovisis' habeas corpus petition for their convictions of sodomy with each other in the presence of a third person[174] and found that the right of privacy protected the sexual intimacies of husband and wife.[175] The court observed that the Virginia statute, which purported to reach all sodomistic conduct regardless of where and with whom it takes place, regulated "no less than the actual form of sexual expression between husband and wife."[176] The statute allowed "approved" conduct while making criminal whatever conduct the state considered "unacceptable." The court found such a distinction to be an unbridled attempt to interfere with the intimate details of the marriage. Under the constitutional principles enunciated in the earlier privacy cases, the court held that the statute could not be applied to the private consensual sexual activities of husband and wife.[177] Yet the court perceived that something more than mere marriage vows made the activity worthy of protection. Rather, it is "the nature of sexuality itself or something intensely private to the individual which calls forth constitutional protection."[178] In light of *Eisenstadt* the court doubted whether there was any basis whatsoever for applying the statute to the private sodomous activities of consenting unmarried heterosexual adults.

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169. 363 F. Supp. at 627 n.4.

170. *Id.* at 623. Regardless of the nature of the pictures found within the house, their possession was not charged. In any event, they should come within the protection afforded the home by Stanley v. Georgia, 394 U.S. 557 (1969). See notes 33-41 and accompanying text *supra*. The only pictures of the Lovisis' sexual activities came from the locked gun cabinet. 363 F. Supp. at 623. See text accompanying note 169 *supra*.

171. Brief for Appellants at 30, Lovisi v. Slayton, 539 F.2d 349 (4th Cir.), *cert. denied*, 97 S. Ct. 485 (1976).

172. 539 F.2d at 350 n.2.

173. 363 F. Supp. at 622.

174. *Id.* at 621.

175. *Id.* at 624.

176. 363 F. Supp. at 625. See note 3 *supra*. It may be that the dictum in the court of appeals opinion in *Lovisi* has already limited application of the Virginia statute to other than married couples. See text accompanying note 194 *infra*.

177. *Id.*

178. *Id.*

Seeing beyond the factual diversion of the third person's presence, the court determined that the right of privacy was individual, not relational in nature, and that it could perhaps encompass all three persons' actions.[179] Prerequisite to such protection, however, was the physical seclusion of the activity.[180] In addition, because the acts were photographed the court required, as a necessary element of this protection, the permanent and absolute seclusion of these photographs.[181] Because the Lovisis failed to provide complete protection of the photographs subsequent to the activities depicted therein, the court held that they had retroactively waived their right to privacy regarding the acts.[182]

The court's reliance on a theory of waiver seems misplaced because it amounts to the application of a standard of strict liability. In the criminal context, waiver is treated as a variable concept, differing in its requirements depending upon the values at stake. Under the Fourth Amendment guarantee against unreasonable search and seizure, consent to a search is regarded as acceptance of any constitutional infirmities in the search.[183] Voluntariness of the consent is, therefore, quite important. The district court in *Lovisi* relied on *Schneckloth v. Bustamonte*,[184] which held that the voluntariness of consent by one not in custody was to be determined by all of the circumstances.[185] The person's knowledge of a right to refuse consent was relevant but not conclusive on the question of the validity of the consent.[186] When the constitutional guarantees of a fair criminal trial are at issue, there is a stricter definition of waiver.[187] The state must show that there was "an intentional relinquishment or abandonment of a known right or privilege."[188]

Neither sense of waiver was truly applicable to the facts of *Lovisi*. The fundamental nature of the right of privacy inherent in the person and the home indicates that it is entitled to substantial protection. " '[C]ourts indulge every reasonable presumption against waiver' . . . and . . . do not presume acquiescence in the loss of fundamental rights."[189] The right of privacy therefore seems more closely aligned to the criminal procedural

179. *Id.* at 624-25.

180. *Id.* at 626.

181. *Id.* at 626-27. "By electing to photograph their sexual relations, thus creating the possibility that the intimacy of their acts would be destroyed by future viewing by others, the Lovisis took upon themselves an especially heavy burden to protect their privacy. They did not meet that burden, the Court concludes, because of their failure to deny other persons access to the photographs." *Id.* at 627.

182. *Id.*

183. Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973).

184. 412 U.S. 218 (1973).

185. *Id.* at 248-49.

186. *Id.*

187. *See, e.g.*, Argersinger v. Hamlin, 407 U.S. 25 (1972); Douglas v. California, 372 U.S. 353 (1963); Gideon v. Wainwright, 372 U.S. 335 (1963); Griffin v. Illinois, 351 U.S. 12 (1956); Powell v. Alabama, 287 U.S. 45 (1932).

188. Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

189. *Id.*

guarantees than to the guarantee against unreasonable search and seizure, assuming it could be classed with either. Even if waiver by consent were a properly applicable concept, the Lovisis' conduct should have had to amount to a knowing, intelligent waiver of their fundamental right of decisional privacy for the court's rationale to apply. At most, their conduct amounts to negligence; this should be insufficient to trigger the court's theory of waiver.

Waiver, however, is not a proper concept to use when the right of privacy is involved. Privacy cannot by its nature be relinquished retroactively. The right is either applicable or inapposite. If the facts of a particular situation show that the actions were "public," the claim to a right of privacy does not arise. Conversely, if the facts show the right does exist, its presumptive immunity from regulation attaches and is not waived by subsequent conduct. The right of privacy is then overcome only by a compelling state interest. There is no middle ground onto which the waiver concept can be imposed.

Even assuming that the concept of waiver is appropriate, the facts in *Lovisi* do not support such a finding. The evidence did not show that the "girls were actually in possession of the photographs depicting the acts here prosecuted."[190] Yet because the girls somehow acquired an unrelated "sexually oriented photograph,"[191] later confiscated at school, the court concluded that the parents had abandoned the privacy surrounding their consensual sexual activities.[192] Finally, the court stated that the girls were aware of the activities at issue,[193] but left unanswered the question of whether the girls acquired that knowledge by accident or by design. The flaw in the court's logic is that its allegations of negligence on the Lovisis' part were not tied to their conduct. The most the state could show was that the Lovisis consensually shared their privacy with a third person, who was necessary to the satisfaction of their sexual preferences. There was no intention to share that privacy with others, especially not with the state. Thus, vis-à-vis the state, the activity remained private.

Although the district court correctly assessed the requirements of the right of decisional privacy in the abstract, it went astray in applying the

190. 363 F. Supp. at 627.

191. *Id.*

192. *Id.* "While the evidence does not reveal that the Acree girls were actually in possession of the photographs depicting the acts here prosecuted, it is clear that they had possession of another sexually oriented photograph. This suggests that snapshots taken by the Lovisis were not kept at home in such a way that the children would be denied access to them." *Id.* The court indicated that it was equally plausible that the girls acquired the pictures through no fault of the Lovisis: "The girls' testimony was further impeached by the admission of Carolyn Acree that she would like to see the relationship of her mother and her stepfather broken apart and that she would like for her mother and stepfather to go to prison so that she, Carolyn, and her sister might be returned to their natural father." *Id.* at 626 n.3 (citation omitted).

193. *Id.* at 627 n.4. *See generally* Supplemental Appendix for Appellants, Lovisi v. Slayton, 539 F.2d 349 (4th Cir.), *cert. denied*, 97 S. Ct. 485 (1976).

theory to the facts of the case. This resulted in an improper holding based on alleged but unproven subsequent negligence. Under the facts as proven, there was a good-faith attempt to restrict access to any pictures of the Lovisis' activities. Because this negated an intent to share their privacy with their daughters, the Lovisis' privacy was preserved.

C. The Court of Appeals

The court of appeals acknowledged that the right of privacy applied to the private consensual sexual activities of husband and wife: "What they do in the privacy of the marital boudoir is beyond the power of the state to scrutinize."[194] The court held, however, that the presence of a third person in their bedroom dissolved this protection of privacy by making their actions completely "in public" and consequently subject to regulation by the state.[195]

In contrast to the district court's reasoning, the court of appeals indicated that the expectation of marital privacy would not be negated by the later "recounting in explicit detail [of] their own intimacies and techniques."[196] While the court did not expressly extend this protection to explicit, but not obscene, photographs of sexual activity, the logic of the court's rationale indicates that such protection should be extended. The taking of such pictures can be seen as one of the details of marriage insulated from state regulation by *Griswold*;[197] thus the privacy of the activity is not destroyed by the fact that pictures are taken. Subsequent regulation of the private sexual activity on the basis of who might or did see these photographs is untenable because the First Amendment protects oral and written non-obscene descriptions of such activity;[198] protection probably would have been available even had the pictures been obscene.[199] The locational protection afforded by *Stanley v. Georgia*[200] to mere private possession of obscenity in the home seems to apply squarely.[201] There may well be a corollary protection available under the rationale of *Stanley* that would protect the production of obscenity in the home for private viewing.[202] The

194. 539 F.2d at 351; *see* BARNETT, *supra* note 41, at 29.

195. *Id.* See text accompanying note 134 *supra*; see note 156 *supra*.

196. 539 F.2d at 351.

197. See text accompanying note 73 *supra*.

198. *See* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501-03 (1952) (motion pictures protected by First Amendment).

199. Neither court made an express determination that the pictures were obscene. The district court indicated that some pictures found in the house were "of an obscene nature," 363 F. Supp. at 623, but did not include in that characterization the pictures of the Lovisis' conduct. *Id.* The court of appeals merely termed the pictures "erotic." 539 F.2d at 350.

200. 394 U.S. 557 (1969).

201. See notes 33-41 and accompanying text *supra*.

202. "[P]erhaps in the future [*Stanley*] will be recognized as good law only when a man writes salacious books in his attic, prints them in his basement, and reads them in his living room." United States v. Thirty-Seven Photographs, 402 U.S. 363, 382 (1961) (Harlan, J., dissenting). See notes 33-41 and accompanying text *supra*.

most likely argument that the state might offer in rebuttal is that it has a compelling interest in protecting children from exposure to such materials.[203] Had such exposure been shown and obscenity proven, the Lovisis might have been charged with crimes relating to the corruption of minors, or possibly producing obscenity, but even this would not permit prosecution of the underlying conduct because the Lovisis had maintained their expectation of privacy.

The difference in the approach of the two courts is partially explained by the court of appeals' over-reliance on the *Griswold* inference of a marriage relation as a prerequisite to protection under the right of decisional privacy.[204] Since *Griswold* the Court has greatly extended protection of privacy beyond the marital relation. *Eisenstadt v. Baird*[205] stated that the right of privacy was individual in nature and that marriage was but "an association of two individuals."[206] *Roe v. Wade*[207] also protected the privacy of an individual. Even the wording of the Fourteenth Amendment, the source of protection for privacy against state interference, focuses on the person, not on a relationship.[208] Finally, one of the cases relied on in *Griswold* indicates that even the right to marry is an individual right.[209] Yet

203. Ginsberg v. New York, 390 U.S. 629, 634-43 (1968) (different standard of obscenity for children).

204. This over-reliance on the marriage relationship also seems to have been present in Doe v. Commonwealth's Attorney, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976). Two homosexuals brought a declaratory judgment action challenging the constitutionality of Virginia's sodomy statute as violative of their right to sexual privacy. The three judge court found that the right of privacy derived solely from *Griswold's* protection of family life, the sanctity of the home, and the incidents of marriage. *Id.* at 1200-01. Relying strongly on Justice Harlan's dissent in Poe v. Ullman, 367 U.S. 497, 522 (1961), a precursor to *Griswold*, the court concluded that homosexual conduct met none of the *Griswold* criteria it found requisite to protection under the right of privacy. *Id.* at 1201-02. Consequently, the state's rational basis in regulating morality was sufficient to sustain the statue's criminalization of private consensual homosexual conduct against this privacy challenge. *Id.* The dissent, by tracing the constitutional evolution of the right to privacy since *Griswold*, noted that the right is now individual in nature rather than dependent on marriage for its existence. *Id.* at 1204. The dissent concluded: "A mature individual's choice of an adult sexual partner, in the privacy of his or her own home, would appear to me to be a decision of the utmost private and intimate concern." *Id.* at 1203.

The Supreme Court's summary affirmance indicates that it is not yet willing to find homosexual activity entitled to protection as part of the fundamental right of privacy. The Court's caution in this regard is not surprising, inasmuch as it has yet to delineate affirmatively the protected boundaries of intimate heterosexual conduct. Whether there is some constitutional distinction between heterosexual and homosexual sodomy will remain uncertain until the Court speaks further. *See generally* Comment, *Doe v. Commonwealth's Attorney: Closing the Door to a Fundamental Right of Sexual Privacy*, 53 DEN. L.J. 553 (1976); Note, *The Constitutionality of Sodomy Statutes*, 45 FORDHAM L. REV. 553 (1976).

205. 405 U.S. 438 (1972).

206. *Id.* at 453. See note 107 and accompanying text *supra*.

207. 410 U.S. 113 (1973). See text accompanying note 118 *supra*.

208. See note 42 *supra*.

209. Meyer v. Nebraska, 262 U.S. 390, 399 (1923). Even earlier the Court had reaffirmed the general common law's right of privacy: "No right is held more sacred, or is more carefully

the court of appeals apparently overlooked these factors in its narrow characterization of privacy as relational rather than individual in nature. If the court had properly applied the developments in the law since *Griswold*, it would not have found decisive the mechanical distinction that two persons are "in private" while three are not.[210]

In *Griswold*, Justice Douglas noted that the marriage relation was a bilateral loyalty.[211] No violence is done to that loyalty when additional persons are welcomed into the activities of the marital relationship. The couple's expectation of privacy remains, and their conduct evinces an intent to extend their privacy only to a private person—not to the state. While perhaps no longer technically bilateral, the loyalty is maintained; the consensual activities are still "sacred" as against state intrusion.

The dissent in the *Lovisi* appellate decision, starting with the majority's premise that married couples were protected from criminal inquiry into their private consensual activities, reasoned that "secrecy is not a necessary element of the right and that therefore the right exists, whether or not exercised in secret. . . . What would not be punishable sodomy in [a third person's] absence is not rendered punishable sodomy by his presence . . . ."[212] Moreover, the dissent argued, under the test articulated by the majority, while a married couple who subsequently talked or wrote of their marital sexual activities was protected from prosecution, a couple forced by economic conditions to share housing, and to that extent losing the superficial privacy required by the majority, would be subject to prosecution even though there was no subsequent dissemination.[213] The dissent also felt that a married couple's use of sexual surrogates as part of an attempt to salvage a sexually maladjusted marriage would violate the majority's test for protection of privacy.[214] "Surely these absurd results suggest that the presence of [a third person] is irrelevant."[215] The dissent concluded that "certainly within the marital relation, and perhaps in some instances even without, the nature and kind of consensual sexual intimacy is beyond the power of the state to regulate or even to inquire."[216] Thus, although the dissent did not have occasion on these facts to extend expressly to a third person the right of privacy as an individual right, the dissenters indicated that at a minimum protection was available as a function of the married couple's privacy.

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guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others." Union Pacific Ry. v. Botsford, 141 U.S. 250, 251 (1891) (dictum).

210. "The presence of the onlooker . . . in [their] bedroom dissolved the reasonable expectation of privacy . . . ." 539 F.2d at 351.

211. 381 U.S. at 486.

212. 539 F.2d at 354-55 (Winter, J., dissenting).

213. *Id.*

214. *Id.*

215. *Id.* at 355.

216. *Id.* at 354.

The Supreme Court's denial of certiorari[217] in this case left unanswered the question of whether the right of decisional privacy is individual or remains relational. The logical progression of the cases indicates that the right should be treated as individual in character. All that remains is for the Court to affirm this evolution of the right as a matter of positive law.

Conclusion

Whatever the source of the right to decisional privacy, the Supreme Court has recognized its existence. Yet the Court has not delineated the boundaries of that right. Explicit protection has been given to effectuating decisions regarding sexual activities; sexual privacy, at least within marriage, has been viewed as fundamental. The Court has also given some protection to the sexually-related decisions of unmarried heterosexual adults. The Court has yet, however, to pass squarely on whether the right of privacy in sexual decisions protects marital sodomy.

The cases reviewed in this note indicate that highly structured distinctions between protected and unprotected activity should give way to a more flexible orientation on the part of the courts. Judges should deal more forthrightly with the question of whether there is a reasonable expectation of privacy. The answer in each case will depend partially on the nature and location of the consensual activity, on the numbers of individuals involved, and on whether there is a commercial intent. By adopting a standard of seclusion as against the public, the courts could allow the state to regulate its proper concern, the public manifestations of sexual conduct, while protecting those who prefer unconventional methods of private sexual fulfillment.

The right of decisional privacy regarding sexual activity then devolves to the right of an individual to make and to effectuate decisions regarding intimate areas of one's life. If there is actual consent and the activities are secluded vis-à-vis the public, a presumptive immunity from governmental regulation attaches. This immunity can be overcome only by a compelling state interest. The police power interest in morality is not compelling, and thus is insufficient to overcome this presumption. Therefore, despite state sodomy statutes, the right of sexual decisional privacy, as a matter of constitutional law, should protect the participants' preferences as long as force is not employed nor minors involved. Simply put, "[p]rivate consensual sex acts between adults are matters, absent evidence that they are harmful, in which the state has no legitimate interest."[218]

217. 97 S. Ct. 485 (1976).

218. Doe v. Commonwealth's Attorney, 403 F. Supp. 1199, 1203 (E.D. Va. 1975) (Mehrige, J., dissenting) (citations omitted), *aff'd mem.*, 425 U.S. 901 (1976).

DEDICATION

This issue of the *Quarterly* is dedicated to Donald R. Wright in commemoration and recognition of his most distinguished tenure as Chief Justice of the California Supreme Court.

Chief Justice Wright came to the California Supreme Court with a plethora of legal and judicial experience. He sat on municipal and superior court benches as well as the court of appeal. In each of these positions, he distinguished himself as a dedicated and thoroughly knowledgeable judge, conscious of both the ideals and the realities of justice.

As the commentaries that survey some of his most significant opinions attest, Chief Justice Wright was a preeminent legal scholar and a perceptive administrator. As a result, he was more than an able leader of California's judicial system; he was also an exemplar of individual courage and conviction who was capable of leading the legal community as a whole, while inspiring loyalty and respect. The numerous tributes to Chief Justice Wright by his personal friends and colleagues further demonstrate that Donald Wright was a man of exceptional integrity and compassion, a delightful companion, and a warm friend.

It is to both the humane individual and the eminent jurist that we devote this issue in the hope that these efforts will express our deep admiration and respect for this exceptional man, Donald R. Wright.

Board of Editors

CHIEF JUSTICE DONALD R. WRIGHT