PERSONAL LIBERTY

by Dennis Goldford, Ph.D.

In American constitutional law the phrase “right to privacy” refers not to questions of information and secrecy, but rather to the idea that government has no authority to interfere with the right of individuals to make their own decisions about intimately personal, fundamental matters like marriage, sexual activity, and child rearing. Though controversial, the right to privacy developed because of, and must be understood in terms of, two important questions in our constitutional system: first, how are individual rights protected against government, and, second, what individual rights are protected against government?

Prior to the adoption of the Fourteenth Amendment in 1868, the rights of Americans were protected (beyond a few provisions of Article I, Section 10, of the Constitution and the mechanisms of separation of powers and federalism) in three principal ways. First, individuals were protected against certain actions of the federal government by the Bill of Rights. Second, individuals were protected against certain actions of their own state governments by a bill of rights or other such provisions in the constitution of their state. Third, individuals traveling to a state other than their own were protected against certain actions of that state government by certain provisions of Article IV of the Constitution. The key point is that, at that time, individuals had no federal protection against actions of their own state governments, because the Supreme Court held in *Barron v. City of Baltimore* (1833) that the Bill of Rights applied to federal actions only—not to state actions. As the Court stated in *Twining v. New Jersey* (1908), “the first ten Amendments of the Federal Constitution are restrictive only of national action.”

Due to doubts about the constitutionality of the Civil Rights Act of 1866, which provided for federal protection for the newly freed slaves against the southern state governments, the Fourteenth Amendment was ratified in 1868 and stated, in part: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” The Supreme Court held in the *Slaughter-House Cases* that the Privileges or Immunities Clause of the Fourteenth Amendment did not now make the protections of the Bill of Rights applicable against state governments in defense of fundamental individual rights. Nevertheless, many justices believed that the Fourteenth Amendment does in fact establish a basket of fundamental rights grounded in the U.S. Constitution to be protected against state infringement. Increasingly, the Supreme Court came to argue that the idea of liberty

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mentioned in the Due Process Clause of the Fourteenth Amendment provides the textual basis for this basket of protected fundamental rights.

If the Due Process Clause answers the question of how fundamental individual rights are protected by the Constitution against state governments, the other question became more problematic: what fundamental individual rights are protected by the Constitution against state governments? In other words, how do we know what rights are contained in that federally guaranteed basket? One answer, suggested in the late nineteenth century and supported most prominently by Justice Hugo Black in the twentieth, is that any and all rights protected against federal infringement by the Bill of Rights are protected against state infringement by the Due Process Clause of the Fourteenth Amendment. However, the Supreme Court as a whole has never accepted this argument. Rejecting it for the Court in *Palko v. Connecticut* (1937), Justice Benjamin Cardozo wrote: “Whatever would be a violation of the original bill of rights (Amendments one to eight) if done by the federal government is now equally unlawful by force of the Fourteenth Amendment if done by a state. There is no such general rule.” The question remains, therefore: how do we determine what fundamental individual rights are protected by the Constitution against state governments?

Justice Cardozo went on to suggest two criteria for making that determination: a right is contained in that federally guaranteed basket of rights protected against state infringement if it is “implicit in the concept of ordered liberty” or is, citing another case, a “principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental” (*Palko*). This allowed for substantial overlap between the Bill of Rights and the Due Process Clause, for the Court came to see many of the rights protected against federal infringement by the Bill of Rights as protected against state infringement by the Due Process Clause because they satisfied either or both of these two criteria. Still, the Court’s acceptance of these two criteria in many ways simply shifted rather than solved the initial problem. How do we know if a right is one protected by the Due Process Clause? How do we then know when a right is “implicit in the concept of ordered liberty” or is a “principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental”?

The problem here is that, in the absence of specific words in a written text, it appears quite difficult to get people to agree on what rights are part of ordered liberty or even on what rights are fundamental in our political and legal traditions. On the one hand, we do not want to claim more rights than are permissible, because asserting a right means limiting majority rule. On the other hand, if we want to defer to the preferences of a popular
majority we run the risk of allowing that majority to infringe on individual rights that it really should not endanger. This is why the right to privacy is so controversial, for people disagree about whether it exists and, if it does, about what it protects. Thus, in *Griswold v. Connecticut* (1965), Justice William Douglas wrote with regard to marriage: “We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system,” whereas Justice Black wrote: “I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision.”

To be sure, also writing in *Griswold*, Justice Arthur Goldberg argued, “The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments” (488). Nevertheless, almost no one either before or after *Griswold* appealed to the Ninth Amendment to justify the protection of an unenumerated—unmentioned—right. Thus, in *Roe v. Wade*, Justice Harry Blackmun stated: “This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment’s reservation of rights to the people, is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.” Whether one favors or opposed a right to abortion, it is clear that Justice Blackmun neglected to do the hard work here of dealing with the difficult interpretive questions we have raised. Specifically, why does abortion fall within the right to privacy? (Indeed, appealing to the other criterion, the dissenters in *Roe* argued that a right to abortion is not a principle of justice grounded in American traditions.) Why, as in the case of *Lawrence v. Texas*, do homosexual relations fall within the right to privacy?

We could say, of course, that there is no such thing as a right to privacy in the Constitution, because there is no black-letter textual provision containing those words. If we were to say this, however, we would have to remember that there is no black-letter text that provides for either the presumption of innocence or the power of judicial review, both of which are conventionally considered to be in the Constitution. Additionally, we would have to address what is perhaps the central question about the protection of individual rights in our constitutional system: do we have a right to make our own decisions about certain personal and even intimate matters that we consider absolutely fundamental to our identity and sense of self in the absence of an explicit, black-letter text in the Constitution that protects any such right?
Long ago, in the case of *Calder v. Bull*, Justice Samuel Chase wrote: “I cannot subscribe to the omnipotence of a State Legislature, or that it is absolute and without controul; although its authority should not be expressly restrained by the Constitution, or fundamental law, of the State.” As you read and think about the following materials on the right to privacy, ask yourself whether you agree or disagree with Justice Chase.

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According to common law tradition carried over in the United States from England, abortion before “quickening” (or when the fetus’s movements could be felt) was not a crime. In 1821, Connecticut adopted a portion of Lord Ellenborough’s Act (1803) and passed the first law banning abortion after quickening. Twenty years later, eight states had such laws. At the time of the adoption of the Fourteenth Amendment in 1868, 20 states (out of 37) restricted abortion. Generally, abortions after quickening were felonies while those procedures performed before quickening were treated as misdemeanors. Gradually, the legal distinction between pre- and post-quickening abortions began to disappear. By the 1950s, almost every state banned all abortions except when necessary to save the woman’s life.

In the late 1960s, however, some states began to relax their laws restricting abortion. This trend coincided with the feminist movement, and the liberalization of laws governing sexuality and privacy. The trend was also mirrored in legal challenges to laws regulating intimate relations. The Supreme Court struck down laws banning the use of birth control by married couples (Griswold v. Connecticut, 1965), and single people (Eisenstadt v. Baird, 1972).

Beginning with Colorado in 1967, thirteen states opened access to abortion. Several states restricted the procedure somewhat, while 31 states allowed abortion only to save the life of the mother. Texas was one of those states. A Texas woman, using the pseudonym Jane Roe, challenged the Texas law and her case eventually went to the Supreme Court. Roe claimed that the law robbed her of her right to privacy and her liberty as protected by the Due Process Clause of the Fourteenth Amendment.
DOCUMENT A

Lord Ellenborough’s Act, 1803

*Note: Connecticut adopted this British Law in 1821.*

That if any Person or Persons...shall wilfully, maliciously, and unlawfully administer to, or cause to be administered to or taken by any of his Majesty’s Subjects, any deadly Poison, or other noxious and destructive Substance or Thing, with Intent such his Majesty’s Subject or Subjects thereby to murder, or thereby to cause and procure the Miscarriage of any Woman then being quick with Child... shall be and are hereby declared to be Felons, and shall suffer Death as in Cases of Felony without Benefit of Clergy.

› What stage of abortions did Lord Ellenborough’s Act criminalize?

DOCUMENT B

Article 1191 of the Texas Penal Code, first adopted in 1857

If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use towards her any violence or means whatever externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary not less than two nor more than five years; if it be done without her consent, the punishment shall be doubled. By “abortion” is meant that the life of the fetus or embryo shall be destroyed in the woman’s womb or that a premature birth thereof be caused.

› Compare and contrast this law’s definition of and penalty for abortion with the law in Document A.

DOCUMENT C

Section of The Fourteenth Amendment, 1868

[No state shall ... deprive any person of life, liberty, or property, without due process of law.

› What is required in order for states to deprive people of liberty?

Various guarantees create zones of privacy. The right of association contained in the penumbra [arc] of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers “in any house” in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”

The Fourth and Fifth Amendments were described ... as protection against all governmental invasions “of the sanctity of a man’s home and the privacies of life.”

- On which Bill of Rights amendments does the Court base the right to privacy?
“Large Abortion Billboard Alongside Road,” 1971

- If abortions were legal in some states, how could they be illegal in others?
Pro-Life Demonstrators, 1971

- What is the message of these demonstrators?
"We have had abortions"

These 53 American women invite you to join them in a campaign for honesty and freedom

Last year, 343 prominent and respected Frenchwomen were willing to sign a public manifesto declaring that they had undergone abortions. This acte de révolte dramatized their individual determination to take their lives and liberation into their own hands. It also showed their willingness to stand with and to speak for their less well-known sisters, who were forced to suffer unwanted pregnancies or illegal abortions in silence.

To many American women and men it seems absurd, in this allegedly enlightened age, that we should still be arguing for a simple principle: that a woman has the right to sovereignity over her own body. Still, there are tragically few places in the country where a woman can obtain an abortion without the expense and deception of conforming to inhuman laws, or the expense and physical danger of going outside the law. (Organizations offering information on the laws and on abortion availability are listed on page 126 of this issue.) The vast majority of abortion laws in this country are remnants of obscenarian attitudes and medieval prejudices.

In fact, at least one of every four women in the United States has had an abortion. Until the recent legal reform in two states, all of those had to be either therapeutic or illegal. Given the difficulty of securing a therapeutic abortion, the great majority of abortions endured by American women have been illegal—and therefore dangerous. This has caused untold suffering, especially on the part of poor women who must resort to self-induced or botched abortions. Some idea of the lives to be saved by repealing abortion laws is suggested by the recent drastic reduction in deaths from childbirth, a statistic that includes deaths from bungled abortions, in New York City alone. During the first nine months of the new legal abortion program, "deaths from childbirth" dropped by at least 60 per cent.

To save lives and to spare other women the pain of socially-imposed guilt, 53 respected women residents in the United States have volunteered to begin the American Women's Petition by signing the statement below. Our purpose is not to alliterate or to ask for sympathy, but to repeal archaic and inhuman laws. Because of the social stigma still wrongly attached to abortion, many women in public life, or with husbands in public life, have felt unable to join us. We are mostly women active in community work, or in the arts. But we invite all women, from every walk of life, to help eliminate this stigma by joining us in this petition, and signing the statement below. The complete list will be sent to the White House, to every State Legislature, and to our sisters in other countries who are signing similar petitions for their lawmakers.

Barbara Lee D. Diamondstein, Susan Edmiston, Nora Ephron, Lee Grant, Grace Paley
Sanny Aurelio, Gail Greene, Beverly Pepper
Lorraine Beebe, Nancy Grossman, Eleanor Perry
Joan Bingham, Barbara Barrie Harnick, Frances Fox Piven
Patricia Bosworth, Lillian Hellman, Letty Cottin Pogrebin
Kay Boyle, Dorothy Pitman Hughes, Mary Rodgers
Addy D. Brekin, Elizabeth Janeway, Naomi Ellen Rubin
Susan Brownmiller, Jill Johnston, Nora Sayre
Hortense Calisher, Billie Jean King, Anita Segel
Jacqueline Michot Cebulski, Shirley Clarke, Maria B. Siegel
Lucinda Cisler, Bill Johnston, Anne Sexton
Shirley Clarke, Billie Jean King, Ruth P. Smith
Judy Collins, Maxine Kumin, Susan Swenson
Mary Cunningham, Jill Johnston, Gloria Steinem
Alessandra Dell 'Olio, Billie Jean King, Lena Tabori
Karen DeCross, Vivica Lindfors, Barbara W. Tuchman
Barbara Lee D. Diamondstein, Marcia Colman Morton, Shirley Ann Wheeler
Susan Edmiston, Anaïs Nin
**DOCUMENT H**

_Eisenstadt v. Baird, 1972_

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 to whether to bear or beget a child.

- What is the difference between this decision and the one in _Griswold v. Connecticut_ (Document D)?

**DOCUMENT I**

**MAJORITY OPINION**

Majority Opinion (7-2), _Roe v. Wade, 1973_

It is ... apparent that at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century ... a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today. At least with respect to the early stage of pregnancy, and very possibly without such a limitation, the opportunity to make this choice was present in this country well into the 19th century. Even later, the law continued for some time to treat less punitively an abortion procured in early pregnancy....

The Constitution does not explicitly mention any right of privacy. In a line of decisions, however ... the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution....

This right of privacy, whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment’s reservation of rights to the people, is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy....

[T]he right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation.

The pregnant woman cannot be isolated in her privacy. ...[I]t is reasonable and appropriate for a State to decide that at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved....

(continued on next page)
With respect to the State’s important and legitimate interest in the health of the mother, the “compelling” point, in the light of present medical knowledge, is at approximately the end of the first trimester.

With respect to the State’s important and legitimate interest in potential life, the “compelling” point is at viability. ...If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother....

The [Texas] statute, that excepts from criminality only a lifesaving procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment....

- How did this decision build upon the rulings in Griswold and Eisenstadt (Documents D and H)?

- Compare the Court’s use of the term “viability” to the phrase “quick with child” in Document A.

- Why do you think the decision in Roe remains controversial, while the rulings in Griswold and Eisenstadt do not?

- Should the Court have devised the trimester framework?

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**DOCUMENT J**

Dissenting Opinion (William Rehnquist), Roe v. Wade, 1972

I have difficulty in concluding, as the Court does, that the right of “privacy” is involved in this case....

The fact that a majority of the States reflecting, after all, the majority sentiment in those States, have had restrictions on abortions for at least a century is a strong indication, it seems to me, that the asserted right to an abortion is not “so rooted in the traditions and conscience of our people as to be ranked as fundamental.” Even today, when society’s views on abortion are changing, the very existence of the debate is evidence that the “right” to an abortion is not so universally accepted as the appellant would have us believe.

- On what bases does Rehnquist disagree with the majority opinion?
Dissenting Opinion (Byron White), Roe v. Wade, 1973

The Court, for the most part, sustains this position: during the period prior to the time the fetus becomes viable, the Constitution of the United States values the convenience, whim, or caprice of the putative mother more than the life or potential life of the fetus; the Constitution, therefore, guarantees the right to an abortion as against any state law or policy seeking to protect the fetus from an abortion not prompted by more compelling reasons of the mother.... With all due respect, I dissent. I find nothing in the language or history of the Constitution to support the Court’s judgment....

The Court apparently values the convenience of the pregnant mother more than the continued existence and development of the life or potential life that she carries. Whether or not I might agree with that marshaling of values, I can in no event join the Court’s judgment because I find no constitutional warrant for imposing such an order of priorities on the people and legislatures of the States...

This issue, for the most part, should be left with the people and to the political processes the people have devised to govern their affairs.

Why does White object to the majority ruling?
Identify the symbolic significance of the tree, the axe, and the term “swing vote.”