NOTES

GRISWOLD REVISITED IN LIGHT OF *UPLINGER*: AN HISTORICAL AND PHILOSOPHICAL EXPOSITION OF IMPLIED AUTONOMY RIGHTS IN THE CONSTITUTION*

INTRODUCTION

> We deal with a right of privacy older than the Bill of Rights — older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.[1]

Few would deny the euphony and eloquence of Justice Douglas's stirring concluding paragraph in *Griswold v. Connecticut*.[2] With appropriate disdain for Connecticut's efforts to justify a law prohibiting married couples from using contraceptives, Douglas led the Supreme Court in striking down this "uncommonly silly law"[3] as a violation of the constitutional right of privacy.[4]

This constitutional right is, however, mentioned nowhere in the United States Constitution. Justice Douglas found it in the "penumbras" of the Bill of Rights.[5] Justice Goldberg looked to the cryptic words of the ninth amendment[6] to find a marital right of privacy.[7] Justice Harlan, invoking the long-

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1. Griswold v. Connecticut, 381 U.S. 479, 486 (1965).
2. Id.
3. Id. at 527 (Stewart, J., dissenting).
4. Id. at 485.
5. Id. at 484-85.
6. The ninth amendment reads in full: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Although the Supreme Court throughout its history has treated this amendment as a virtual nullity, both its enactment and its imperative suggest that it is a guiding light to an adequate understanding of the role of the Bill of Rights in American society. See Redlich, Are There "Certain Rights . . . Retained By the People?" 37 N.Y.U. L. Rev. 787 (1962). See also Justice Goldberg's concurrence in *Griswold*, 381 U.S. at 486-99, and see notes 42, 43, and accompanying text infra.

7. *Griswold*, 381 U.S. at 487 (Goldberg, J., concurring).

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lost doctrine of substantive due process,[8] found the Connecticut statute a violation of fundamental rights implicit in the fourteenth amendment's due process clause.[9] Finally, Justice White determined that the law was not even rational under the due process clause.[10] As a result, the offensive statute fell before a potpourri of rationales that legal realists might suspect were adjudicative prestidigitation rather than cogent legal analyses.

This Note responds to mounting political and judicial criticism of the *Griswold* right of privacy by demonstrating that the Court's seminal decision was consistent with the purpose and development of the Bill of Rights. Moreover, in light of the present Court's failure to recognize a broad right of sexual autonomy, this Note argues that the constitutional right of privacy provides consenting adults with the right to engage in private consensual sexual activity.

Many believe that *Griswold*'s reliance on implied constitutional values was nothing more than unbridled judicial activism, a convenient means for judges and others desiring social change to impose their views on American society while bypassing the more cumbersome—and more democratic—legislative process. This was the criticism of *Griswold*'s first detractor, Justice Black, who described the watershed case as a "claim for this Court and the federal judiciary power to invalidate any legislative act which the judges find irrational, unreasonable or offensive."[11] Other critical commentators have been less concerned with the *Griswold* Court's exercise of judicial authority to protect implied rights than with what they perceive as the conceptually muddled and confusing opinions in *Griswold* and its progeny.[12]

Of course, the plaudits and criticism that followed *Griswold* would have disappeared had the 1965 case served only to dispense with the offensive birth-control law, which was soundly condemned even by those who believed it constitutional.[13] *Griswold*, however, has endured as a fount for an ever growing body of controversial constitutional law (and legislative reform) expanding the right of privacy through the establishment of zones of sexual and repro-

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8. For a brief discussion of the origin and development of substantive due process, see text accompanying notes 73-88 infra.

9. *Griswold*, 381 U.S. at 500 (Harlan, J., concurring). The text of the fourteenth amendment may be found in pertinent part in note 69 infra.

10. *Griswold*, 381 U.S. at 506-07 (White, J., concurring).

11. Id. at 511 (Black, J., dissenting).

12. See, e.g., Hafen, The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests, 81 Mich. L. Rev. 463 (1983); Karst, The Freedom of Intimate Association, 89 Yale L.J. 624 (1980); Henkin, Privacy and Autonomy, 74 Colum. L. Rev. 1410 (1974); Gross, The Concept Of Privacy, 42 N.Y.U. L. Rev. 34 (1967).

13. Each of the *Griswold* dissenters began his opinion with a scathing denunciation of the Connecticut statute. Justice Black felt "constrained to add that the law is every bit as offensive to me as it is my Brethren of the majority." *Griswold*, 381 U.S. at 507 (Black, J., dissenting). Justice Stewart lost no time in berating the "uncommonly silly law" on practical, philosophical, and social-policy grounds, and even suggested that birth control counselling "should be available to all." Id. at 527 (Stewart J., dissenting).

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ductive autonomy.[14] *Griswold*'s favorite child, *Roe v. Wade*,[15] has become the Court's most controversial decision of this century[16] and the focal point of a massive political effort to abolish or eviscerate any right of sexual autonomy not deemed consistent with "pro-family" values.[17] Recently, the Reagan administration has joined in the attacks on *Griswold* and its progeny by deprecating implied constitutional rights and urging the Supreme Court to overrule *Roe*.[18]

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14. For a discussion of the leading Supreme Court cases extending *Griswold*, see text accompanying notes 136-60 infra. For a discussion of New York v. Uplinger, the most significant non-Supreme Court decision in this area, see notes 20-32 and accompanying text infra. For a mention and brief discussion of other leading right of privacy cases recognizing a right of sexual autonomy, see cases cited in note 22 infra. For a somewhat more extensive discussion of important cases refusing to recognize this right, see cases cited in notes 22, 24, and 132 infra.

15. 410 U.S. 113 (1973).

16. One might argue that Brown v. Board of Educ., 347 U.S. 483 (1954), was the most controversial decision of this century, but Congress, after much procrastination, eventually followed *Brown* with the Civil Rights Act of 1964, and today no significant politician, on the Right or Left, is urging that *Brown* be overruled. *Roe* is not nearly so secure: twelve years later, powerful factions in Congress—and on the Supreme Court—seek to abolish the constitutional right to have an abortion. See for example Justice O'Connor's dissent in City of Akron v. Akron Center for Health, Inc., 462 U.S. 416 (1983).

17. Professor Hafen's article, supra note 12, is perhaps the most comprehensive and assertive exegesis of the "pro-family" ideology to be found in contemporary law review publications. In his article, Hafen attacks the constitutional quest for sexual autonomy as "an unwarranted amount of individualistic sentiment," id. at 465, and argues that the recognition of individual rights "can be inappropriate and even harmful in the context of family relationships." Id. at 468. Hafen thus urges the recognition of individual sexual autonomy rights only to the extent that these rights would be beneficial to the social institutions of marriage and family. See generally id. According to Hafen, an individual not wanting to become a parent should "abstain from sexual relations" because the Constitution does not "prize her sexual relations independent of childbearing issues." Id. at 537.

18. Through its two principal attorneys, Attorney General William French Smith and Solicitor General Rex E. Lee, the Reagan Administration has repeatedly advocated that state and local authorities, rather than the individual, determine what forms of sexual and procreative behavior are appropriate and moral. Predictably, the Administration's efforts in this matter have largely consisted of unjustified and demagogic attacks on the federal judiciary. In an address to the Federal Legal Council in Reston, Virginia, Smith outlined the Administration's plan for eviscerating federal-court protection of individual rights, and particularly implied individual rights:

> Simply put, consistent with the Constitution and the laws of the United States, the Department of Justice intends to play an active role in effecting the principles upon which Ronald Reagan campaigned.
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> In recent decades, at the behest of private litigants and even the executive branch itself, Federal courts have engaged in . . . judicial policy-making.
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> In the 1942 case of Skinner v. Oklahoma, the Supreme Court first emphasized the concept of fundamental rights that invites courts to undertake a stricter scrutiny of the inherently legislative task of line-drawing. In the nearly 40 years since then, the number of rights labeled "fundamental" by the courts has multiplied. They now include the First Amendment rights and the right to vote in most elections—rights mentioned in the Constitution.
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> In addition, however, they include rights that, though deemed fundamental, were held to be only implied by the Constitution. The latter group, which has become a real base for expanding Federal court activity, includes the right to marry, the right to

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This untoward political assault threatens to abort implied sexual autonomy rights. Despite the Court's recent reaffirmation of *Roe*,[19] the unusual disposition of *New York v. Uplinger*[20] indicates that a Damoclean sword of intolerance now hovers above the constitutional right of privacy. *Uplinger* stemmed from the 1980 case of *People v. Onofre*,[21] in which the New York Court of Appeals relied on *Griswold* and its progeny to hold unconstitutional a state law criminalizing consensual sodomy between unmarried persons.[22] In

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> procreate, the right of interstate travel, and the right of sexual privacy that, among other things, may have spawned a right, with certain limitations, to have an abortion.
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> We do not disagree with the results in all of these cases. We do, however, believe that the application of these principles has led to some constitutionally dubious and unwise intrusions upon the legislative domain. The very arbitrariness with which some rights have been discerned and preferred, while others have not, reveals a process of subjective judicial policy-making as opposed to reasoned legal interpretation.
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> At the very least, this multiplication of implied constitutional rights, and the unbounded strict scrutiny they produce, has gone far enough. We will resist expansion. And, in some cases, we will seek to modify the use of these categories as a touchstone that almost inevitably results in the invalidation of legislative determination. We will seek to modify especially the application of a strict scrutiny to issues whose very nature requires the resources of a legislature to resolve.

N.Y. Times, Oct. 30, 1981, at A22, col. 1.

Solicitor General Lee, a high priest of the Mormon church, sought and failed to "modify the application of a strict scrutiny" to abortion rights in *Akron Center*, 462 U.S. 416 (1983), which reaffirmed *Roe*. However, his assertions of the primacy of state and local legislative authority during the oral arguments to this case were so vehement that Justice Blackmun asked whether the government was asking the Court to overrule not only *Roe* but *Marbury v. Madison* as well! See Jenkins, The Solicitor General's Winning Ways, 69 A.B.A. J. 734, 734 (1983).

19. *Akron Center*, 462 U.S. 416 (1983).

20. People v. Uplinger, 58 N.Y.2d 936, 447 N.E.2d 62, 460 N.Y.S.2d 514 (1983).

21. 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980), cert. denied, 451 U.S. 987 (1981). *Onofre* was a consolidation of the appeals of *People v. Onofre*, *People v. Peoples*, and *People v. Sweat*. The appeals raised the issue of constitutionality of N.Y. Penal Law § 130.38 (McKinney 1980), which prohibited consensual "deviate sexual intercourse," defined in § 130.00 as "sexual conduct between persons not married to each other consisting of contact between the penis and the anus, and mouth and penis, or the mouth and the vulva."

In *People v. Onofre*, the Appellate Divison of the New York Supreme Court, Fourth Department, found this provision unconstitutional as applied to a man who had engaged in consensual homosexual sodomy in his home. See *Onofre*, 51 N.Y.2d at 483-84, 415 N.E.2d at 937-38, 434 N.Y.S.2d at 948. In *People v. Peoples* and *People v. Sweat*, the Buffalo City Court held § 130.00 constitutional against persons arrested for violating this provision in less private circumstances. In each case, the defendant had been arrested while engaging in oral sodomy in a parked vehicle on a semi-deserted street late at night. See 51 N.Y.2d at 484, 415 N.E.2d at 938, 434 N.Y.S.2d at 948. The New York Court of Appeals upheld *Onofre* and reversed *Peoples* and *Sweat*. 51 N.Y.2d at 494, 415 N.E.2d at 493-94, 434 N.Y.S.2d at 954.

22. The Court of Appeals' decision was consistent with those of other state supreme courts. In State v. Pilcher, 242 N.W.2d 348 (Iowa 1976), the Iowa Supreme Court became the first American court of last resort to hold that consensual adult sodomy is protected by the United States Constitution. A year later, the New Jersey Supreme Court canvassed both *Griswold* and its own landmark decision in In re Quinlan, 70 N.J. 10, 355 A.2d 647 (right of autonomy not to use extraordinary means to prolong life), cert. denied, 429 U.S. 922 (1976), in holding that the state's fornication statute violated a right of personal autonomy inherent in both the United States and New Jersey constitutions. State v. Saunders, 75 N.J. 200, 381 A.2d 333 (1977). In 1980, the Pennsylvania Supreme Court took a similar position in striking down

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1981, the Supreme Court denied certiorari to *Onofre*,[23] thus intimating for the first time that the right of privacy did encompass a right of sexual autonomy.[24]

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that state's prohibition of consensual adult sodomy, also relying on both federal and state grounds. Commonwealth v. Bonadio, 490 Pa. 91, 415 A.2d 47 (1980).

However, some state supreme courts have been unable to discern any constitutional right to sexual autonomy. See, e.g., Commonwealth v. Stowell, 389 Mass. 171, 449 N.E.2d 357 (1983) (state may criminalize adultery); State v. Santos, — R.I. —, 413 A.2d 58 (1980) (state may criminalize consensual sodomy by unmarried adults); State v. Bateman, 113 Ariz. 107, 547 P.2d 6 (en banc) (state may criminalize consensual sodomy by both married and unmarried couples), cert. denied, 429 U.S. 864 (1976).

The lower federal courts have likewise split on these issues, but a growing number recognize the right of sexual autonomy in varying contexts. Some of these courts have held that state employment discrimination is impermissible when engaged in to penalize an individual for her sexual practices. See, e.g., Thorne v. City of El Segundo, 726 F.2d 459 (9th Cir. 1983), cert. denied, 105 S.Ct. 380 (1984); Briggs v. North Muskegon Police Dept., 563 F. Supp. 585 (W.D. Mich. 1983); Smith v. Price, 446 F. Supp. 828 (M.D. Ga. 1977), rev'd on other grounds, 616 F.2d 1371 (5th Cir. 1980). See also Baker v. Wade, 553 F. Supp. 1121 (N.D. Tex. 1982) (striking down Texas sodomy statute).

There are, however, many important federal court decisions that refuse to recognize a right of sexual autonomy, whether in employment contexts, Shawgo v. Spadlin, 701 F.2d 470 (5th Cir.), cert. denied, 104 S.Ct. 404 (1983); Hollenbaugh v. Carnegie Free Library, 436 F. Supp. 1328 (W.D. Pa. 1977), aff'd mem. 578 F.2d 1374 (3d Cir.), cert. denied, 439 U.S. 1052 (1978); Baron v. Meloni, 556 F. Supp. 796 (W.D.N.Y. 1983); Suddarth v. Slane, 539 F. Supp. 612 (W.D. Va. 1982); Johnson v. San Jacinto Junior College, 498 F. Supp. 555 (S.D. Tex. 1980), or as invalidating criminal statutes, Doe v. Commonwealth's Attorney, 403 F. Supp. 1199 (E.D. Va. 1975), aff'd mem., 425 U.S. 901 (1976); see also the unusual case of Lovisi v. Slayton, 539 F.2d 349 (4th Cir.) (en banc), cert. denied, 429 U.S. 977 (1976), analyzed in note 132 infra.

Recently, the Court of Appeals for the District of Columbia dealt the right of sexual autonomy a harsh blow in Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984). The Court, per Judge Bork, upheld the Navy's discharge of a petty officer who had engaged in homosexual conduct, holding that it is "impossible to conclude that a right to homosexual conduct is 'fundamental' or 'implicit' in the concept of ordered liberty" unless any and all private sexual behavior falls within those categories, a conclusion we are unwilling to draw." Id. at 1396.

23. 451 U.S. 987 (1981).

24. Prior to its decision to let stand the *Onofre* holding, the Court had strongly indicated that it would not extend the *Griswold* principles to private adult sexual intercourse by unmarried persons. In 1976, the Court delivered what was then perceived as a mortal blow to the right of sexual autonomy by summarily affirming a three-judge district court opinion upholding a Virginia statute that prohibited consensual sodomy. Doe v. Commonwealth's Attorney, 403 F. Supp. 1199 (E.D. Va. 1975), aff'd mem., 425 U.S. 901 (1976).

For good reason most courts have chosen to dismiss this "precedent." See, e.g., *Onofre*, 51 N.Y.2d at 493, 415 N.E.2d at 943, 434 N.Y.S.2d at 954; Baker v. Wade, 553 F. Supp. 1121, 1136-39 (N.D. Tex. 1982). First, the 2-1 majority opinion in *Commonwealth's Attorney* was the product of extraordinarily shoddy reasoning. Although writing in 1975, the district court wholly ignored such important *Griswold* progeny as Stanley v. Georgia, 394 U.S. 557 (1969); Eisenstadt v. Baird, 405 U.S. 438 (1972) (plurality opinion); and Roe v. Wade, 410 U.S. 113 (1973), (all of which are discussed in text accompanying notes 136-49 infra), in rendering its decision. In essence, the court quickly ushered *Griswold*'s progeny to the courthouse door, lest they compel a decision the majority did not want to reach. The Supreme Court's summary affirmance of *Commonwealth's Attorney*'s "out of sight, out of mind" approach to adjudication indicated the Court's desire to duck the issue of sexual autonomy, as it would again do with the *Onofre* and *Uplinger* cases. See text accompanying notes 20-24 supra, and text accompanying notes 25-32 infra.

Second, the Supreme Court itself implicitly retracted the summary affirmance a year later in Carey v. Population Serv. Int'l, 431 U.S. 678 (1977) (plurality opinion), by stating that "the Court has not definitively answered the difficult question whether and to what extent the Con-

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Then, in 1983, in *People v. Uplinger*,[25] the Court of Appeals employed its important *Onofre* precedent to strike down a law prohibiting the solicitation of sodomy.[26] The Supreme Court ominously granted certiorari to this case,[27] causing speculation that Court conservatives had garnered enough votes to strike a devastating blow against implied sexual autonomy rights by holding that the states could criminalize even purely private sodomy by consenting adults.[28]

The Court, however, brought *Uplinger* to an anticlimactic conclusion in May 1984 by deciding that the case was "an inappropriate vehicle for resolving the important constitutional issues raised by the parties."[29] Not surprisingly, four Justices—the minimum needed to grant certiorari—dissented from this dismissal.[30] These four are likely to vote against implied constitutional rights of sexual autonomy.[31] Moreover, confronted by the political *Sturm und Drang* that "pro-family" advocates have generated in the last few years, one

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stitution prohibits state statutes regulating [sexual] behavior among adults." Id. at 694 n.17. Then, three years later, the Court denied certiorari to *Onofre*, an extremely important pro-sexual autonomy decision by one of the most respected and influential state high courts. It seems likely that the Supreme Court would have acted with great alacrity to reverse *Onofre* had a majority of the Court wanted to make *Commonwealth's Attorney* the law of the land.

25. 58 N.Y.2d 936, 447 N.E.2d 62, 460 N.Y.S.2d 514, cert. granted, 104 S. Ct. 64-65 (1983), cert. dismissed, 104 S. Ct. 2332 (1984) (per curiam).

26. The Court of Appeals could have relied solely on first amendment grounds to strike down (or uphold) the solicitation statute, N.Y. Penal Law § 240.35(3) (McKinney 1983), but instead chose to regard the law as a companion statute to the one invalidated in *Onofre*, thus necessitating reliance on the *Onofre* precedent. See *Uplinger*, 58 N.Y.2d at 937-38, 447 N.E.2d at 62, 460 N.Y.S.2d at 515. In addition, both the petitioner and respondent initially argued in the petition for certiorari to *Uplinger* that the Court would have to resolve the *Onofre* issue to decide *Uplinger* (although the state later retracted this). See New York v. Uplinger, 104 S. Ct. at 2333 n.2, 2334. And indeed the Court, in dismissing certiorari as having been improvidently granted, concluded that "a meaningful evaluation of the decision below would entail consideration of the question decided in [*Onofre*]." *Uplinger*, 104 S. Ct. at 2334.

27. 104 S. Ct. 64-65 (1983).

28. Given that the Court denied certiorari to *Onofre* in 1981, its granting of certiorari to the brief memorandum decision in *Uplinger* was surprising—and inappropriate. Perhaps the most likely explanation for this injudicious action is that Justice O'Connor in 1983 provided the fourth vote needed for certiorari that her predecessor, Justice Stewart, would not grant in 1981. In any event, the invocation of the Rule of Four in this case was not a good omen.

29. New York v. Uplinger, 104 S. Ct. 2332, 2334 (1984).

30. Id. at 2335.

31. Justice White, joined by Chief Justice Burger and Justices Rehnquist and O'Connor, dissented from the dismissal of certiorari in a two-sentence paragraph, arguing simply that the "merits" of the *Uplinger* decision "should be addressed." Id. The judicial philosophies of these Justices in right of privacy cases indicates that they would have assaulted, rather than "addressed," the *Onofre-Uplinger* right of sexual autonomy. Rehnquist, who in Carey v. Population Serv. Int'l., 431 U.S. 678 (1977), stated that "[t]hose who valiantly but vainly defended the heights of Bunker Hill in 1775" did not intend to protect the right of minors to purchase contraceptives, id. at 717 (Rehnquist, J., dissenting), is a certain vote against the expansion—or even maintenance—of *Griswold* and its current progeny. Indeed, Rehnquist has asserted that state statutes criminalizing "certain consensual acts" are facially constitutional. Id. at 718 n.2 (Rehnquist, J., dissenting). He does not explain this position except to cite the dubious "precedent" of *Commonwealth's Attorney* (described and analyzed in note 24 supra). Id. Perhaps, however, the Justice will some day explain why in his view the Battle of Bunker Hill was fought,

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or more of the majority who voted to dismiss *Uplinger* would likely have sided with their conservative brethren had they not been able to avoid the issue. Civil libertarians must therefore accept the *Uplinger* result and hope for a better day, when more *Griswold* progeny may emerge.

Notwithstanding the current realpolitik, the Constitution, forged in principle and shaped by the hopes and aspirations of free people, mandates the Court's recognition of a broad right of sexual autonomy, even as it mandated *Griswold* itself twenty years ago. *Uplinger* exemplifies the Court's repeated failure to recognize this fundamental right inhering in the evolving Bill of Rights.[32]

This Note reexamines and defends the *Griswold* implied right by exploring its antecedents and its development, and argues that it is inclusive of a constitutional right of sexual autonomy. Part I recounts the historical foundation of implied rights in the Constitution and demonstrates that this foundation provides bedrock support for the *Griswold* decision. Throughout the

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if not to protect individuals against excessive governmental interference in their most intimate relationships.

Although Chief Justice Burger's inclusion in the Roe v. Wade majority, 410 U.S. 113 (1973), demonstrates that he is not unalterably opposed to the development of *Griswold*, he has generally joined his conservative brethren in right of privacy cases. See, e.g., Eisenstadt v. Baird, 405 U.S. 438, 465-72 (1972) (plurality opinion) (Burger, C.J., dissenting). More significantly, Burger is the author of the landmark companion cases of Miller v. California, 413 U.S. 15 (1973) and Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973), which allow states to prohibit public obscenity on general and vague assumptions of community mores and aesthetic values. Since the Chief Justice is willing to brush aside explicit first amendment rights to placate local opinion as to what is morally acceptable, it follows that he will not uphold implied sexual autonomy rights against strong community disapproval of certain forms of consensual sexual behavior.

Justice White concurred in *Griswold*, 381 U.S. at 502-07 (White, J., concurring), and in *Baird*, 405 U.S. at 460-65 (White, J., concurring), and *Carey*, 431 U.S. at 702-03 (White, J., concurring), which, respectively, extended *Griswold* to unmarried persons and minors. But in these opinions he concurred only on the grounds that the laws in question were irrational, not because he thought there was a fundamental right protecting contraceptive use. See id. And he joined *Carey* only on the assumption that the opinion did not declare "unconstitutional any state law forbidding extramarital sexual relations." *Carey*, 431 U.S. at 702 (White, J., concurring). Also, White, along with Rehnquist, dissented in Roe v. Wade, 410 U.S. at 221-23 (White, J., dissenting).

Justice O'Connor's views on the constitutional right of privacy are largely unknown since she has been a Justice for only three years. However, her strong dissent in *Akron Center*, 103 S. Ct. 2481, 2504-17 (1983) (O'Connor, J., dissenting), and her general agreement with Justice Rehnquist that states' rights are to be accorded the greatest respect, make her an unlikely candidate to discern a right of sexual autonomy in the Constitution.

32. See also People v. Onofre, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980), cert. denied, 451 U.S. 987 (1981); Hollenbaugh v. Carnegie Free Library, 436 F. Supp. 1328 (W.D. Pa. 1977) (state may terminate employment of adulterous employee), aff'd, 578 F.2d 1374 (3rd Cir.), cert. denied, 439 U.S. 1052 (1978); Lovisi v. Slayton, 539 F.2d 349 (4th Cir.) (en banc), cert. denied, 429 U.S. 977 (1976) (see note 132 infra); Doe v. Commonwealth's Attorney, 403 F. Supp. 1199 (E.D. Va. 1975), aff'd mem., 425 U.S. 901 (1976) (see note 24 supra).

Prior to these determinations, the Court had twice refused to use the "void for vagueness" doctrine to strike down archaic sodomy statutes using common law terms such as "the abominable and detestable crime against nature" to describe certain consensual sex acts. See Rose v. Locke, 423 U.S. 48 (1975) (per curiam); Wainwright v. Stone, 414 U.S. 21 1973) (per curiam).

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history of the United States, the Supreme Court has maintained the vitality of the Constitution by construing it as a living social contract embodying the ideas and principles upon which this republic was founded. The Court has often had to search behind the print for the concepts to correctly articulate and protect the implied liberties that are the birthright of every individual. *Griswold* is quite possibly the best example of the Court's acknowledgment of this "unwritten constitution"[33] because it affirms and guards a civil liberty that free persons necessarily enjoy—the right of privacy, aptly described as "the most comprehensive of rights and the right most valued by civilized men."[34]

Part II analyzes the *Griswold* right of privacy and shows that this right is actually a constitutional right of autonomy far more protective of individual freedom than the common-law right of privacy. The Note then explores some of the compelling reasons why the *Uplinger* Court should have held that the autonomy rights protected by *Griswold* and its progeny are inclusive of the right of sexual autonomy, an implied right as obvious and fundamental as any the Court has ever recognized.

I
IMPLIED RIGHTS AND THE HISTORICAL FOUNDATION OF *GRISWOLD*

The principles incorporated in the United States Constitution can remain vital only so long as the Constitution is recognized for what it is—an eighteenth-century social contract between free people and their chosen government that has flourished in the twentieth century because it has never been uprooted from its Enlightenment soil. The Constitution, and particularly the Bill of Rights, was and is a recognition and guarantee of the inalienable rights of the individual, some explicitly stated in the text and some left implied.[35]

33. See D. Richards, Sex, Drugs, Death, and the Law: An Essay on Human Rights and Overcriminalization, at 31 (1982) [hereinafter Sex, Drugs, Death]. Richards argues that the only "morality" consistent with the Constitution is the recognition of the individual's right of autonomy to determine and define her own nature and destiny without paternalistic state interference. See generally id. Professor Richards's book is a forceful exposition of the Constitution's inherent incorporation of contractarian natural law rights and Millian political theory.

34. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). Justice Brandeis's strong defense of the right to privacy in his dissent from the Court's determination that the fourth amendment placed no restrictions on police wiretapping—a decision later overruled in Katz v. United States, 389 U.S. 347, 353 (1967)—was consistent with his exegesis of privacy rights in The Right to Privacy, 4 Harv. L. Rev. 193 (1890), a classic article he coauthored with Samuel D. Warren almost one hundred years ago. See text accompanying notes 123-25 infra.

35. See, e.g., Kelley v. Johnson, 425 U.S. 238, 251-52 (1976) (Marshall, J., dissenting). In dissent, Justice Marshall noted that it was obvious to the founding fathers that the Constitution did not have to specify in so many words such obvious rights as the right to wear a hat in public. Moreover, as Judge Craven of the Fourth Circuit once noted, if permission for every act had to be specifically given, "a new Library of Congress would be needed to house only one copy of these laws of permission." Craven, Personhood: The Right To Be Let Alone, 1976 Duke L.J. 699, 706.

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The founding fathers believed in implied rights.

In symbolically severing the colonies' political ties to England, Thomas Jefferson looked only to natural law to articulate what he believed to be the fundamental principles of political and social liberty:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it . . . .[36]

For Jefferson and the first citizens of the United States, an individual's fundamental rights were self-evident. More importantly, they were so because they transcended and antedated the establishment of government.[37] A just government did not create fundamental rights; it recognized them.[38]

It was towards this concept that Justice Douglas reached when he found that Connecticut had denied married couples "a right of privacy older than the Bill of Rights."[39] Douglas's penumbras may have been metaphysical as well as conceptual: a free government by definition is without legal authority to infringe any fundamental right. And if Douglas did not seek a metaphysical foundation for the *Griswold* holding, Justice Harlan certainly did in arguing that the law violated "basic values implicit in the concept of ordered liberty."[40]

Alexander Hamilton believed that individual rights were so obvious that any bill of rights would be superfluous. He argued that the individual was free and independent except to the extent that the people explicitly consented otherwise:

> It is evident, therefore, that according to their primitive signification, [bills of rights] have no application to constitutions professedly founded upon the power of the people, and executed by their immediate representatives and servants. Here, in strictness, the people surrender nothing; and as they retain everything, they have no need of particular reservations . . . .[41]

James Madison, the principal author of the Bill of Rights, saw the need

36. The Declaration of Independence, para. 1 (1776).

37. See, e.g., Henkin, supra note 12, at 1412-14.

38. Id. at 1414 n.7. See also the contractarian views of Professor Richards in Unnatural Acts and the Constitutional Right to Privacy: A Moral Theory, 45 Fordham L. Rev. 1281, 1281-85 (1977), and in Sex, Drugs, Death, supra note 33, at 30-33.

39. *Griswold*, 381 U.S. at 486.

40. Id. at 500 (Harlan, J., concurring) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

41. Henkin, supra note 12, at 1413 (quoting from The Federalist No. 84).

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for a bill of enumerated rights and assured Hamilton that the specification of particular rights in the Constitution would not leave implied rights unprotected. Madison then drafted the ninth amendment to insure that the government would not "deny or disparage" implied rights.[42] Madison, like his revolutionary brethren, understood that individual liberty was too precious and delicate to be shackled to the quill. The ninth amendment thus suggests a mode of expansive interpretation in constitutional litigation.[43]

Only a few years after the adoption of the Bill of Rights, the Supreme Court, still in its infancy, added its imprimatur to the constitutional theories of the founding fathers. Justice Chase wrote the majority opinion in *Calder v. Bull*,[44] looking to natural law theory as a source of implied rights:

> I cannot subscribe to the omnipotence of a state legislature, . . . although its authority should not be expressly restrained by the constitution. . . . The people of the United States erected their constitutions . . . to establish justice, to promote the general welfare, to secure the blessings of liberty . . . . The purposes for which men enter into society will determine the nature and terms of the social compact . . . . The nature and ends of legislative power will limit the exercise of it. This fundamental principle flows from the very nature of our free republican governments . . . . There are certain vital principles in our free republican governments, which will determine and overrule an apparent and flagrant abuse of legislative power . . . . An act of the legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority.[45]

The Court held in dicta that, by virtue of "the general principles of law and reason," a legislature could not violate lawful private contracts or property rights.[46] Significantly, the Court found that these "general principles" were a limitation not only on Congress but on state legislatures as well, even though

42. See Redlich, supra note 6, at 805 (citing I Annals of Cong. 456 (1834)).

43. In his *Griswold* concurrence, Justice Goldberg did not suggest that the ninth amendment was a depository of implied rights. Rather, he observed that the ninth amendment was "surely relevant in showing the existence of. . . fundamental personal rights" within the Bill of Rights but not specifically mentioned. Id. at 492-93 (Goldberg, J., concurring). The ninth amendment thus points to the concepts underlying the first eight amendments. And this suggests that the analytic gulch between Douglas and Goldberg in *Griswold* could have been easily bridged.

44. 3 U.S. (3 Dall.) 386 (1798).

45. Id. at 387-88. The Chase Court in *Calder* reserved the question of whether it could exercise the power of judicial nullification, a question the Marshall Court would answer affirmatively five years later in the epic Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). *Calder*, 3 U.S. at 392. For a discussion of the significance of *Marbury*, see note 50 infra.

46. Id. at 388. The plaintiffs in error had contended that a Connecticut law setting aside a probate court decree was an ex post facto law within the meaning of art. I, § 10, cl. 1, of the Constitution. *Calder*, 3 U.S. (3 Dall.) at 387. Since the Court found that this provision applied only to criminal law, id. at 391, and since the plaintiffs had made no natural law claims, the Court had no need to discuss implied natural law rights.

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the Constitution placed few explicit restrictions on state power vis-a-vis individual rights.[47]

Justice Iredell decried the Court's exegesis of natural law rights in a concurring opinion that Justice Black would quote in his *Griswold* dissent.[48] Iredell, like his distant successor, objected that the principles of natural law "are regulated by no fixed standard," and that the Justices could not properly pronounce a law void "merely because it is, in their judgment, contrary to the principles of natural justice."[49]

Justice Iredell's fears would not impel the young Court to sever the spirit of the Constitution from its letter. The dynamic Marshall Court based the most important decisions in the Court's history on implied government powers,[50] and placed vested natural law rights on the same plane as explicit constitutional rights. In *Fletcher v. Peck*,[51] Chief Justice Marshall voided a Georgia law abrogating a property contract and wrote that either "the particular provisions of the constitution" or the "general principles which are common to our free institutions" made the law unconstitutional.[52] Not to be outdone in the expounding of natural law theory, Justice Johnson concurred, stating that he did not rely on any specific provision of the Constitution but "on a general principle, on the reason and nature of things: a principle which will impose laws even on the Deity."[53] Johnson concluded that the founding fathers had

47. Only art. I, § 10, cl. 1 ("No state shall . . . pass any Bill of Attainder, ex post facto law impairing the Obligation of Contracts . . . ."); and art. IV, § 2, cl. 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.") specifically limited state power to infringe individual liberties. The Bill of Rights did not apply to the states at this time. See, e.g., Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833). *Barron*, of course, did not survive the twentieth century. See note 91 and text accompanying notes 89-91 infra.

48. *Griswold*, 381 U.S. 479, 524-25 (1965) (Black, J., dissenting) (quoting Calder v. Bull, 3 U.S. (3 Dall.) 386, 399 (1798) (Iredell, J., concurring)).

49. Id. at 525.

50. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), and McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

Marbury, which established the implied power of the judiciary to review and nullify legislation on constitutional grounds, was an historical milestone that has shaped and defined American democracy, and guided it successfully through the Scylla of majority rule and the Charybdis of individual rights. Founded on Chief Justice Marshall's assertion that "[i]t is emphatically the province and duty of the judical department to say what the law is," id. at 177. *Marbury* has "settled the review power of the Court in a manner that has never since been questioned, so far as American constitutional law has been concerned." 1 N. Redlich & B. Schwartz, Constitutional Law, ch. 1, p. 12 (1983).

McCulloch held that Congress could use all reasonable means to accomplish objectives within its constitutional power. Since Congress may constitutionally legislate in only a few enumerated areas, i.e., to protect interstate commerce and basic civil rights, much of the important federal legislation of the last half century, including the National Labor Relations Act, as amended, 29 U.S.C. §§ 151-69, and the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-1 to 17, would not be constitutional but for the broad "means" power that *McCulloch* grants Congress.

51. 10 U.S. (6 Cranch) 87 (1810).

52. Id. at 139.

53. Id. at 143 (Johnson, J., concurring).

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intended "to afford a general protection to individual rights against the acts of the *state legislatures.*"[54]

In *Terrett v. Taylor,*[55] the Marshall Court, through Justice Story, held that Virginia could not constitutionally appropriate land that it had recognized as belonging to the Episcopal church. The Court eschewed reliance on any specific constitutional right as a basis for its decision, asserting that "we think ourselves standing upon the principles of natural justice, upon the fundamental laws of every free government, upon the spirit and the letter of the constitution" in holding the state's action unconstitutional.[56]

As the nineteenth century progressed, so did legal positivism,[57] and the Court began to rely exclusively on narrow interpretations of explicit provisions of the Constitution.[58] The bold innovation of the Marshall Court gave way to the strict constructionism of the Taney Court, which, for the most part, limited the scope of the Constitution in order to promote states' rights.[59]

The Taney Court's unwillingness to look beyond the surface of the Constitution led the Court to its most infamous decision. In *Dred Scott v. Sandford,*[60] Chief Justice Taney, writing for the majority, held that slaves were legally nothing but the property of their masters. Taney relied on a myopic historical analysis of the Constitution to justify his conclusions:

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54. Id. at 144 (Johnson, J., concurring) (emphasis added).

55. 13 U.S. (9 Cranch) 43 (1815).

56. Id. at 52.

57. The second half of the nineteenth century witnessed the rejection of natural law theory in favor of legal positivism in most of the Western world. See, e.g., E. Bodenheimer, Jurisprudence: The Philosophy and Method of the Law 91-109 (rev. ed. 1979). Influenced primarily by John Austin's view that the law was essentially whatever the state commanded, the legal positivists considered nonsensical any theory of law reliant on metaphysical, ethical, or natural law concepts. Professor Bodenheimer explains more fully:

> Legal positivism shared with positivistic theory in general the aversion to metaphysical speculation and to the search for ultimate principles. It rejected any attempt by jurisprudential scholars to discern and articulate an idea of law transcending the empirical realities of existing legal systems. It sought to exclude value considerations from the science of jurisprudence and to confine the task of this science to an analysis and dissection of positive legal orders. The legal positivist holds that only positive law is law; and by positive law he means those juridical norms which have been established by the authority of the state.

Id. at 94.

Natural law theory returned in the twentieth century and has been dominant since the end of the Second World War. Id. at 135-42. Legal positivism was not a viable theory of jurisprudence after the Holocaust; indeed, the sentences of death handed down at Nuremburg in 1946 were perhaps directed not so much at Nazi war criminals as at a theory of law that enabled them to argue that they had acted "lawfully."

There can be no doubt that legal positivism is antithetical to the United States Constitution. The founders wrote the Constitution with the firm belief that the commands of the state must be just to be law. Otherwise, the people are not bound to these commands and have the right to alter or abolish the command-giving body. See text accompanying notes 36-43 supra.

58. See P. Brest, Processes of Constitutional Decisionmaking 712 (1975).

59. See, e.g., The License Cases, 46 U.S. (5 How.) 504 (1847) (expanding the power of the states to regulate commerce in the absence of congressional regulation under the commerce clause).

60. 60 U.S. (19 How.) 393 (1857).

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> No one, we presume, supposes that any change in public opinion or feeling, in relation to this unfortunate race . . . should induce the court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted. . . . [I]t must be construed now as it was understood at the time of its adoption . . . . Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day.[61]

Chief Justice Taney confused "popular opinion" with the knowledge and wisdom gained through social and political evolution. Still, Taney's opinion was undoubtedly correct if one accepts his theory of constitutional construction. The text of the Constitution did acknowledge and tacitly permit slavery.[62] Nonetheless, a different Court might have articulated the concepts of individual dignity and freedom inherent in the Constitution instead of giving undue weight to textual provisions whose existence was due to an unholy political compromise needed for the ratification of the Constitution.[63] The

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61. Id. at 426.

62. See U.S. Const. art. I, § 2, cl. 1; art. I, § 9, cl. 1.

63. Professor Dworkin's theory of constitutional interpretation demonstrates why the Court must look to the underlying values of the Constitution to interpret it correctly. Dworkin distinguishes general "concepts" from particular "conceptions" of the "concepts" and explains that the Court cannot limit its responsibility to an historical inquiry into the "conceptions" of political equality and justice that the authors of the Constitution had in mind because the Constitution, by its very nature, embodies "concepts" that the founders themselves may have misinterpreted on occasion—or may have ignored for political reasons—in writing the text. Thus, a fertile "concept" may be corrupted by a wrongful or deceptive application. R. Dworkin, Taking Rights Seriously 131-49 (1978). Dworkin uses a simple hypothetical to illustrate this theory:

> Suppose I tell my children simply that I expect them not to treat others unfairly. I no doubt have in mind examples of the conduct I mean to discourage, but I would not accept that my "meaning" was limited to these examples, for two reasons. First I would expect my children to apply my instructions to situations I had not and could not have thought about. Second, I stand ready to admit that some particular act I had thought was fair when I spoke was in fact unfair, or vice versa, if one of my children is able to convince me of that later; in that case I should want to say that my instructions covered the case he cited, not that I had changed my instructions. I might say that I meant the family to be guided by the *concept* of fairness, not by any specific *conception* of fairness I might have had in mind.

Id. at 134 (emphasis in original).

Dworkin's views should be compared with those of Chief Justice Marshall:

> A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language. . . . *[W]e must never forget that it is a constitution we are expounding.*

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Taney Court, in deciding *Dred Scott*, managed to build upon the Constitution an ignoble edifice that would make the impending civil war a necessity rather than a likelihood.

The post-Civil War Court was more willing to uphold implied rights. In *Crandall v. Nevada*,[64] the Chase Court relied not on natural law theory but on the federalist structure of the United States to hold unconstitutional a Nevada law levying a one-dollar tax on persons entering or exiting the state. The Court found this impermissible because it obstructed personal interstate travel and therefore impeded business travel as well as obstructing the federal movement of citizens.[65] The Court reasoned that each citizen had a right to interstate mobility; otherwise, "upon the pleasure of a state, the government itself may be overthrown by an obstruction to its exercise."[66] The Court might have relied on the commerce clause to resolve this case, as it had in the similar *Passenger Cases*,[67] but the Justices based their determination solely on "the inferences which we have already drawn from the Constitution itself."[68]

The enactment of the post-Civil War amendments[69] drastically altered American federalism, explicitly giving the federal government the power to protect fundamental civil liberties against state encroachment. Specifically, the fourteenth amendment forbade the states from depriving anyone "of life, liberty, or property, without due process of law," and from denying anyone "the equal protection of the laws." However, as is true of most of the text of the Bill of Rights, the meaning and scope of these provisions were not readily apparent. Phrases like "due process" and "equal protection" could be interpreted narrowly or expansively. Moreover, Congress, in drafting the new amendments, had been divided and to a great extent impelled by the Machia-

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819) (emphasis added).

64. 73 U.S. (6 Wall.) 35 (1868).

65. Id. at 43-45.

66. Id. at 44.

67. 48 U.S. (7 How.) 283 (1849).

68. *Crandall*, 73 U.S. at 49. Although the Court has since held that an airport may impose a one-dollar tax on incoming passengers, Evansville-Vanderburgh Airport Auth. v. Delta Airlines, 405 U.S. 707 (1972), the Court has consistently reaffirmed the right to interstate travel as "fundamental to the concept of our Federal Union." United States v. Guest, 383 U.S. 745, 757-58 (1966). The Court gave a broad scope to this right in Shapiro v. Thompson, 394 U.S. 618 (1969), holding that a state could not inhibit migration to it by denying welfare benefits to new residents.

69. U.S. Const. amends. XIII (1865), XIV (1868) and IV (1870).

The thirteenth amendment reads in pertinent part: "Neither slavery nor involuntary servitude, except as a punishment for crime . . . shall exist within the United States, or any place subject to their jurisdiction."

The fourteenth amendment reads in pertinent 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 fifteenth amendment reads in pertinent part: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

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vellian political ambitions of the Radical Republicans.[70] In interpreting the amended Bill of Rights, the Court would have to choose between giving full play to the lofty principles of the new amendments and merely implementing the designs of the Radical Republican Congress.

The Court chose the latter course in the *Slaughter-House Cases*,[71] the Court's first review of the fourteenth amendment. The majority asserted that "any fair and just construction of any section or phrase of these amendments" would be based on the intentions of Congress to remedy the specific evil of slavery.[72] The Court ruled out an expansive interpretation of the general language of the fourteenth amendment, refusing to impart any implied or natural law meaning to it. However, in a dissenting opinion, Justice Bradley rebuked the majority with words that have earned him recognition as "the father of substantive due process":[73]

> The people of this country brought with them to its shores the rights of Englishmen; the rights which had been wrested from English sovereigns. . . . Blackstone classifies these fundamental rights under three heads, as the absolute rights of individuals, to wit: the right of personal security, the right of personal liberty, and the right of private property. . . . These are the fundamental rights which can only be taken away by due process of law, and which can only be interfered with . . . by lawful regulations necessary or proper for the mutual good of all; and these rights, I contend, belong to the citizens of every free government.
>
> . . . .
>
> Admitting . . . [that prior to the adoption of the post-Civil War amendments] the States were not prohibited from infringing any of the fundamental [rights] of citizens of the United States, except in a few specified cases, that cannot be said now . . . . In my judgment, it was the intention of the people of this country in adopting [the fourteenth amendment] to provide National security against violation by the States of the fundamental rights of the citizen.[74]

Although the *Slaughter-House Cases* would stand as a barrier to equality and justice for minority citizens until the middle of the twentieth century,[75] Justice Bradley's dissent —and substantive due process—would soon prevail

70. For a good account of the political machinations that accompanied the enactment of the post-Civil War amendments, see generally R. Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment (1977).

71. 83 U.S. (16 Wall.) 36 (1873).

72. Id. at 72.

73. See Henkin, supra note 12, at 1414 n.10.

74. *Slaughter-House Cases*, 83 U.S. at 114-16, 121-22 (Bradley, J., dissenting).

75. The Court found its way through this barrier a few times in the nineteenth century: see, e.g., Strauder v. West Virginia, 100 U.S. 303 (1879) (exclusion of black citizens from juries unconstitutional); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (arbitrary discrimination against legally admitted Chinese aliens unconstitutional).

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when implied property rights were at issue. The doctrine of substantive due process was essentially a reformulation of natural law theory; some laws, even if cloaked with plenary procedural "due process," were simply too antithetical to a free people to be considered law, and any abrogation of ownership rights was antithetical to nineteenth-century America.

Only a year after the *Slaughter-House Cases*, the Supreme Court embraced much of the substance of Justice Bradley's landmark dissent. In *Loan Association v. Topeka*,[76] the Court offered a few observations on the nature of individual rights and democratic government:

> It must be conceded that there are such rights in every free government beyond the control of the State. A government which recognized no such rights, which held the lives, the liberty and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism . . . of the majority . . . but it is none the less a despotism. . . .
>
> . . . .
>
> There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact would not exist [are respected by all legitimate governments].[77]

By the end of the nineteenth century, substantive due process existed as a potent implied-rights doctrine to protect property interests against economic regulation, although the Court indicated little willingness to use this doctrine or equal protection to protect other personal interests.[78] *Lochner v. New York*,[79] handed down in 1905, represents the zenith of economic due process. The *Lochner* Court struck down legislation limiting the employment of bakers to ten hours a day and sixty hours a week as violative of due process. The statute, held the Court, unreasonably impaired the right of a baker and his employer to contract for such working conditions.[80]

Lochner symbolizes what many consider to have been an era of judicial obstructionism during which the Court protected only the interests of the affluent by imposing laissez-faire on the marketplace, contrary to the needs and wishes of the public.[81] It was therefore not surprising that Justice Douglas, who was appointed to the Supreme Court at a time when it was hastily repudi-

76. 87 U.S. (20 Wall.) 655 (1874).

77. Id. at 662-63.

78. See, e.g., Plessy v. Ferguson, 163 U.S. 537 (1896), the infamous "separate but equal" interpretation of the fourteenth amendment, overruled in Brown v. Board of Educ., 347 U.S. 483 (1954).

79. 198 U.S. 45 (1905).

80. Id. at 59.

81. Professor Brest observes that prior to the emergence of laissez-faire dogmatism in the *Lochner* era, the people had relied on "a tradition of government regulation going back to the colonies and England." Brest, supra note 58, at 721.

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ating economic due process, insisted in *Griswold* that the constitutional right of privacy was not substantive due process by any other name.[82] If the *Lochner* Court had no business reading Herbert Spencer's *Social Statics* into the fourteenth amendment,[83] it followed that the *Griswold* Court had no business reading John Stuart Mill's *On Liberty* into due process.[84]

Lochner, however, was not as wrong as its critics believe it was. The principles that the Court articulated in the opinion were not incorrect; the Court left no doubt that "[b]oth property and liberty are held on such reasonable conditions as may be imposed by the governing power of the State . . . , and with such conditions the Fourteenth Amendment was not designed to interfere."[85] The Court expressly recognized that state police power could be legitimately used to protect the "safety, health, morals and general welfare of the public."[86] It was in the application of these principles to the facts that the *Lochner* Court abandoned logic and embraced Spencer's pernicious philosophy.[87] The Court's holding might have been sound had the facts been different. For example, it would be an impermissible assault on liberty for a state legislature to determine that no one in any employment under any circumstances had the right to work more than sixty hours a week. Surely, professional baseball players, federal judges, actors, and law students, among others, may work as many hours per week as they find necessary to meet their contractual and moral responsibilities without paternalistic state interference. The refusal of the Court after the New Deal to limit government regulation of business may have been as unwise as the *Lochner* Court's misguided activism.[88]

The *Lochner* era did produce a theory of implied fourteenth amendment rights that survived and grew even as economic due process was relegated to

82. *Griswold*, 381 U.S. at 481-82.

83. See *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting). Spencer transposed Darwin's theory of natural selection to the economic and political milieu and concluded that society would evolve properly only if there were no public health institutions, public education, public communications, or any other form of national welfare. See Bodenheimer, supra note 57, at 77-78. *Lochner* demonstrates that Spencer's views were in vogue for a while; however, both the *Lochner* result and Spencer's philosophy proved too unfit to survive.

84. In *On Liberty*, the classic exposition of libertarian thought, Mill argued that "the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection . . . . Over himself, over his own body and mind, the individual is sovereign." Commonwealth v. Bonadio, 490 Pa. 91, 96, 415 A.2d 47, 50 (1980) (quoting *On Liberty*).

85. *Lochner*, 198 U.S. at 53.

86. Id.

87. Professor Henkin argues that "all of our recent constitutional history would have been more coherent, and more satisfying to the Justices and to the various consumers of their constitutional product, had the Supreme Court never abandoned substantive due process but had merely excised its *laissez-faire* excrescence." Henkin, supra note 12, at 1427.

88. See, e.g., Williamson v. Lee Optical Co., 348 U.S. 483 (1955) (holding that a statute forbidding an optician from fitting lenses without an ophthalmologist's prescription was constitutional, though the law was perhaps "needless" and "wasteful"). For an argument that the philosophical underpinnings of substantive due process, as opposed to laissez-faire, were sound, see Henkin, supra note 12, at 1416-19, 1427.

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the yellowing pages of history. The doctrine of selective incorporation established that some of the protections of the first eight amendments of the Bill of Rights were so fundamental that they were binding on the states through the very concept of due process. In *Chicago, B.&.Q.R.R. v. Chicago*,[89] the Court, holding that the eminent domain provision of the fifth amendment[90] was applicable to the states, began a process that would eventually overcome *Barron v. Baltimore*[91] in favor of a federalism permitting the Bill of Rights to protect individuals travelling within the sometimes precarious confines of state jurisdiction.

The *Lochner* era also produced two significant cases that seemingly employed substantive due process to protect personal autonomy rights. *Meyer v. Nebraska*[92] dealt with a state law prohibiting the teaching of a foreign language to any child who had not completed the eighth grade. In a terse opinion, the Court struck down the xenophobic law, asserting that no legislature "could impose such restrictions upon the people of a state without doing violence to both letter and spirit of the Constitution."[93] Two years later, in *Pierce v. Society of Sisters*,[94] the Court relied on *Meyer* to hold unconstitutional a state law denying parents the right to send their children to parochial or private schools.

It is unclear whether these opinions were substantive due process or merely first amendment[95] cases in disguise. Both were decided shortly before the Court held the first amendment applicable to the states,[96] and the Court may have applied the free exercise clauses, respectively, to *Meyer* and *Pierce* *sub silentio*. Certainly, if these cases were decided today, the Court would look no further than the first amendment.[97] However, *Meyer* and *Pierce* demonstrated the Court's willingness to uphold fundamental rights without citing express wording in the Constitution.

Similarly, it is unclear whether substantive due process or the eighth amendment[98] controlled the disposition of *Skinner v. Oklahoma*.[99] *Skinner*

89. 166 U.S. 226 (1897).

90. ". . . nor shall private property be taken for public use, without just compensation."

91. Although the Supreme Court has never specifically overruled *Barron*, 32 U.S. (7 Pet.) 243 (1833), which held that the Bill of Rights was not binding on the states, the incorporation doctrine has applied to the states all of the first eight amendments except the grand jury provision of the fifth amendment, and the second, third, and seventh amendments.

92. 262 U.S. 390 (1923).

93. Id. at 402.

94. 268 U.S. 510 (1925).

95. The first amendment reads in full: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

96. Gitlow v. New York, 268 U.S. 652 (1925). The Court decided *Pierce* only one week before deciding *Gitlow*.

97. The *Griswold* Court in fact cited *Meyer* and *Pierce* as first amendment cases and reaffirmed them on this basis. *Griswold*, 381 U.S. at 482-83.

98. The eighth amendment reads in full: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

99. 316 U.S. 535 (1942).

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struck down a statute mandating the sterilization of some recidivist felons. The Court justified its decision in terms that make *Skinner* a precursor of *Griswold*: "We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race."[100] Surprisingly, Justice Douglas, who authored this opinion, mentioned it only in passing in *Griswold*.[101] Perhaps Douglas believed that *Skinner*'s emphasis on the utilitarian values of procreation was inconsistent with a right enabling married couples to protect themselves against reproduction.[102]

Between *Skinner* and *Griswold*, the Court eschewed reliance on substantive due process and any other variation of natural law theory. However, a new activism was beginning during this period, with the Court giving more reach to the explicit provisions of the Bill of Rights. In 1938, Justice Stone predicted the new era in a footnote to *United States v. Carolene Products Co.*:[103] "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments . . . ."[104] Even before the apppointment of Earl Warren as Chief Justice, the Supreme Court had increasingly begun to intervene in state affairs with a broader view of the Bill of Rights in order to protect personal rights.[105]

The arrival of Chief Justice Warren began an era of controversy and deep division in American society, as the Court broadened the scope of the Bill of Rights to sweep away decades of political and social ignorance, hypocrisy, and injustice. The inexorable result of the Warren Court's epic decision in *Brown v. Board of Education*[106] was a political counter-assault that the Justices weathered by constantly affirming constitutional principles[107] with a firm sense of direction, looking to the spirit of the Constitution, and not just its commas and semicolons.[108]

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100. Id. at 541.

101. See *Griswold*, 381 U.S. at 485.

102. Because *Griswold* allows the separation of sexual pleasure from procreation, it is fundamentally different from *Skinner*, although both are perhaps the offspring of substantive due process. The importance of this distinction cannot be overemphasized for reasons delineated in text between notes 160-62 infra.

103. 304 U.S. 144 (1938).

104. Id. at 152 n.4.

105. See, e.g., West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (free speech right of Jehovah's Witnesses not to salute flag in public schools); Sweatt v. Painter, 339 U.S. 629 (1950) (hastily established law school for black students inadequate under the equal protection clause); McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950) (unconstitutional for state to require black students in state university to sit in separate sections of the classroom, library, and cafeteria).

106. 347 U.S. 483 (1954).

107. See, e.g., Cooper v. Aaron, 358 U.S. 1 (1958) (the Court's strongly reasserts its authority to nullify unconstitutional state laws).

108. The Warren Court's refusal to retreat from its responsibility in the face of extreme

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In *NAACP v. Alabama ex rel. Patterson*,[109] the Court applied the first amendment to sustain the associational privacy rights of the NAACP's Alabama members against a state effort to compel the disclosure of their names and addresses. The opinion held that "[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs."[110] Similarly, in *NAACP v. Button*,[111] the Court protected the associational rights of the NAACP from a Virginia law prohibiting the civil rights organization from urging persons to seek its legal help. The Court explained that the first amendment needed "breathing space to survive."[112]

In *New York Times v. Sullivan*,[113] the Court relied on the same concept of "breathing space" to protect the first amendment rights of the press against harassing libel suits. In *New York Times*, as in *Patterson* and *Button*, the Court protected rights at the very core of the first amendment by affording protection to peripheral rights, which emanated from the conceptual core to form buffer zones designed to ward off various forms of oppressive state interference with constitutional rights. The constitutional right of privacy thus began with a utilitarian foundation, and in *Griswold* the Court took the further step of protecting the right of marital privacy and association for its own sake.[114]

Griswold was a logical next step in the Court's efforts to protect the concepts of individual dignity and autonomy that underlie the American social contract. The Court's firm historical recognition of implied rights, embodying the constitutional vision of the Framers, pointed to a constitutional right of privacy. To protect this right, the Court reached deep into the well of constitutional principle, consistently with the historical mandate that the Justices "must never forget that it is a constitution we are expounding."[115] Twenty years after *Griswold* the nature and scope of the right of privacy are still undetermined, but the right of sexual autonomy now emanates from the *Griswold* principle.

II
THE CONSTITUTION, PRIVACY AND AUTONOMY

Individuals have needed privacy at least since Adam and Eve decided to

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political pressure may be contrasted with the Burger Court's inability to stand fast in the protection of constitutional rights, as manifested in *Uplinger*.

109. 357 U.S. 449 (1958).

110. Id. at 462.

111. 371 U.S. 415 (1963).

112. Id. at 433.

113. 376 U.S. 254 (1964).

114. The first amendment right of association was for Douglas, if not the Court, the primary source of the *Griswold* right of privacy. See, for example, Douglas's concluding paragraph in *Griswold*, 381 U.S. at 486.

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

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put fig leaves to good use.[116] In ensuing years, rights of privacy were recognized in Western society. As early as the thirteenth century, the English writ of trespass *vi et armis* provided individuals with a common law right of personal privacy.[117] The Magna Charta acknowledged a right of privacy against the state.[118] Blackstone classified "the right of personal security" as one of three fundamental rights possessed by all Englishmen.[119]

Since privacy is essential to individuality, an American value of the highest order, it is not unusual that American law has also historically recognized privacy rights. The fourth amendment, for instance, protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[120] A century ago, the Supreme Court interpreted this amendment as a protection against invasion "of the sanctity of a man's home and the privacies of life."[121] More recently, the Court has affirmed that the fourth amendment is a positive right of privacy and not merely a negative injunction limiting the power of the police to search and seize physical objects.[122]

In their famous 1890 article, *The Right to Privacy*,[123] Warren and Brandeis demonstrated that a broad right of privacy existed in American common law. The article analyzed the principle "[t]hat the individual shall have full protection in person and in property" in light of changing living conditions and in "[r]ecognition of man's spiritual nature, of his feelings and his intellect."[124] Warren and Brandeis offered an understanding of the true value of the right to privacy—it protected nothing less than "the right to one's personality."[125]

In *Union Pacific Railway v. Botsford*,[126] the Supreme Court also acknowledged a right of common law privacy, holding that it did not have the authority to compel a plaintiff to submit to a medical examination. The common

116. Genesis 3:7.

117. See, e.g., Woodbine, The Origins of the Action of Trespass, 33 Yale L.J. 799, 814-16 (1924).

118. See Shattuck, The True Meaning of the Term "Liberty" in Those Clauses in the Federal and State Constitutions Which Protect "Life, Liberty and Property," 4 Harv. L. Rev. 365, 373 (1890).

119. This was noted by Justice Bradley in his famous dissent in *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 114-17 (1873) (quoted in pertinent part in text accompanying note 74 supra).

120. The fourth amendment reads in full: "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."

121. Boyd v. United States, 116 U.S. 616, 630 (1886).

122. Katz v. United States, 389 U.S. 347 (1967) (fourth amendment protection not limited to physical incursions, but includes some electronic surveillance as well).

123. Warren & Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890).

124. Id. at 193.

125. Id. at 207.

126. 141 U.S. 250 (1891).

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law, said the Court, would not allow such an intrusion upon an individual's privacy:

> No right is held more sacred, or is more carefully 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, unless by clear and unquestionable authority of law. . . . "The right to one's person may be said to be a right of complete immunity: to be left alone."[127]

By the time *Griswold* was decided, there was an enormous body of tort law protecting "the right to be left alone."[128] This, coupled with the fourth amendment and the recently recognized first amendment right of association,[129] undoubtedly made the *Griswold* Court aware that the Constitution was not without substantial protection for such an important and omnipresent value.[130]

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127. Id. at 251 (quoting Cooley, Torts 29). Federal Rule of Civil Procedure 35(a) now authorizes physical and mental examinations for civil parties, and the Court has held this Rule constitutional. Schlagenhauf v. Holder, 379 U.S. 104 (1964).

128. See generally Prosser, Privacy, 48 Calif. L. Rev. 383 (1960).

129. See text accompanying notes 109-12 supra.

130. The Supreme Court has recognized and given substantial deference to the right of privacy in cases in which constitutional or common law privacy interests have clashed with other rights, most notably the first amendment.

For example, privacy interests have precluded the extension of New York Times v. Sullivan, 376 U.S. 254 (1964), to all persons involved in newsworthy events, limiting *New York Times* protection against most libel suits to public officials and public figures. See Gertz v. Welch, Inc., 418 U.S. 323 (1974). Moreover, in recent years the Court has narrowed the category of persons who can be described as "public officials" or "public figures" under *New York Times* in order to protect the privacy interests recognized by state law. See, e.g., Hutchison v. Proxmire 443 U.S. 111 (1979); Time, Inc. v. Firestone, 424 U.S. 448 (1976). However, the Court has indicated that privacy interests never overcome the right of the press to report truthfully matters of public concern. See, e.g., Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) (holding unconstitutional a state law excluding the press and public from any rape trial involving a child victim); Cox Communications Corp. v. Cohn, 420 U.S. 469 (1975) (state may not permit tort recovery against a TV station for broadcasting the name of a rape victim).

Privacy rights in the home overcame the first amendment in FCC v. Pacifica Found., 438 U.S. 726 (1978), which held that the FCC had power to regulate non-obscene but "patently offensive" speech on the radio. The Court reasoned that although a listener could always turn off the radio, he might not be able to do so before the verbal "assault" occurred. Id. at 748-49. The first amendment may permit such an assault in public, see, e.g., Cohen v. Californa, 403 U.S. 15 (1971) (an individual has the right to wear a jacket inscribed "Fuck the Draft" in public), but "in the privacy of the home, . . . the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." *Pacifica*, 438 U.S. at 748. But see Bolger v. Youngs Drug Prods. Corp., 103 S. Ct. 2875 (1983) (home privacy interests do not justify a federal law prohibiting the unsolicited mailing of birth-control information).

Even Justice Douglas, the greatest defender of first amendment rights in the Court's history, believed that privacy rights could overcome free speech rights. Douglas wrote a concurring—and deciding—opinion in Lehman v. City of Shaker Heights, 418 U.S. 298 (1974), in which the Court held that a city did not have to permit political advertising on mass-transit vehicles. "In my view the right of commuters to be free from forced intrusions on their privacy precludes the city from transforming its vehicles of public transportation into forums for the dissemination of ideas upon this captive audience." Id. at 307 (Douglas, J., concurring).

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However, the facts of *Griswold* reveal a glaring difference between the right of privacy as it existed in the common law and fourth amendment, and the implied right the Court began to recognize. The *Griswold* appellants were not a married couple but directors of Planned Parenthood who had given birth-control information and a prescription for contraceptives to a married couple.[131] By arresting the directors, Connecticut had, at worst, peripherally intruded upon the privacy of the couple. Moreover, nothing in the opinion indicates that there was a violation of the fourth amendment or of any common law right of privacy. Certainly a state may intrude upon an individual's personal privacy in appropriate circumstances when the intrusion is necessary to the enforcement of a valid state interest. For example, the right of privacy in this narrow sense would not stand as a barrier to reasonable police efforts to obtain evidence of homicide, theft, etc. Yet in *Griswold* the state could not enforce the law because the law itself was constitutionally invalid. For this reason, some commentators have noted that *Griswold* and its progeny go beyond privacy by protecting fundamental rights of autonomy and establishing zones of protected activity into which the state may not enter.[132]

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131. *Griswold*, 381 U.S. at 480. By virtue of federal-court standing rules, the *Griswold* appellants were in fact asserting the right of the married couple to privacy and autonomy, from which a right to sell contraceptives was derived. Id. at 481. Nonetheless, it is important to note that the events of this case did not transpire in a place where a married couple might seek "privacy" to use contraceptives.

132. See Karst, supra note 12, at 664; Richards, supra note 38, at 1304; Henkin, supra note 12, at 1410-11; see generally Gross, supra note 12. Consider also the New York Court of Appeals' distinction between "privacy" and "autonomy":

> [I]t should be noted that the right addressed in the present context is not, as a literal reading of the phrase might suggest, the right to maintain secrecy with respect to one's affairs or personal behavior; rather, it is a right of independence in making certain kinds of important decisions, with a concomitant right to conduct oneself in accordance with those decisions, undeterred by governmental restraint.

People v. Onofre, 51 N.Y.2d 476, 485, 415 N.E.2d 936, 939, 434 N.Y.S.2d 947, 949 (1980), cert. denied, 451 U.S. 987 (1981).

The important decision in Lovisi v. Slayton, 539 F.2d 349 (4th Cir.) (en banc), cert. denied, 429 U.S. 977 (1976), is ample evidence of the danger of failing to recognize that *Griswold* confers autonomy rather than privacy in the narrow sense. In *Lovisi*, the Fourth Circuit upheld the conviction of a married couple who had been prosecuted under the Virginia sodomy statute, which prohibited consensual sodomy even between married persons. The court acknowledged that generally what married couples "do in the privacy of the marital boudoir is beyond the power of the state to scrutinize." Id. at 351. The Lovisis, however, were "swingers" whose acts of consensual sodomy were photographed by a third party and witnessed by the Lovisis' eleven- and thirteen-year-old daughters, who also brought at least one of the steamy photographs to school. Id at 350-51. The court thus concluded that the couple's behavior was a waiver of the constitutional right of privacy/autonomy. Id at 351-52.

The court would not have reached this unsound conclusion if it had recognized that the Lovisis acted within a zone of autonomy, not of privacy. Even if the admission of the third party and the children to the marital bedroom was a waiver of "privacy," the consensual sexual activity remained protected from prosecution under any law criminalizing the sex itself without regard to the circumstances. Within the zone of sexual autonomy, the variety of sex between a consenting married couple cannot be the basis of state sanctions.

Of course, this is not to say that the Lovisis' indiscretion should have gone unpunished. State laws prohibiting child abuse would have been appropriate in this case, and in fact the state initially procured a conviction against Mr. Lovisi on such charges, but the Virginia Supreme

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Of course, there is a strong fourth amendment value implicit in *Griswold.* Justice Douglas found "repulsive to the notions of privacy surrounding the marriage relationship" the idea of allowing "the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives."[133] But, as noted, there are circumstances in which the police may search these "sacred precincts," even for evidence of marital sexual activity.[134] Moreover, if *Griswold* were only a fourth amendment privacy case, a legislature wanting to ban birth-control use could avoid running afoul of the fourth amendment simply by making the sale or distribution of contraceptives a serious crime while legislating no penalty for personal use. Yet *Griswold* and its birth-control progeny[135] have firmly established that no such law could withstand scrutiny under the *Griswold* right of privacy/autonomy. The government has no business in the zone of sexual autonomy.

Griswold's progeny have established with certainty that the zone of autonomy is more protective than privacy rights alone. The Court could have decided *Stanley v. Georgia*[136] on elementary fourth amendment grounds. Not only was Stanley the victim of an illegal search, but the facts of his case were almost identical to those of the landmark case of *Mapp v. Ohio*,[137] which applied the exclusionary rule to the states. The *Stanley* majority chose instead to protect Stanley's absolute right to possess and view obscenity in the privacy of

Court reversed this conviction because of an improper jury instruction. Lovisi v. Commonwealth, 212 Va. 848, 188 S.E.2d 206, cert. denied, 407 U.S. 922 (1972). However, the court held that Lovisi could be tried again on the same charges, 212 Va. at 851, 188 S.E.2d at 209, so there was no need for the state to invoke the sodomy statute. Moreover, the state never even attempted to convict Mrs. Lovisi on child-abuse charges. Certainly these and related charges were apposite to the circumstances of this case and would have served society's interest in protecting the welfare of the Lovisi children. *Lovisi* is especially troublesome because the state did not need to use unconstitutional means to get to a desirable end.

Similar considerations apply to the recent decision in United States v. Lemons, 697 F.2d 832 (8th Cir. 1983). Here the appellant had been convicted of sodomy charges under Arkansas law for engaging in consensual homosexual sodomy in a public restroom. Id. at 833-34. The court upheld the conviction because of the public nature of the sexual activity in question, although it indicated that a constitutional challenge to the Arkansas law "by persons fearing prosecution for private acts under the sodomy statute" would be feasible. Id. at 835. But the court should have recognized that even public sex acts fall within the zone of sexual autonomy when the state seeks to make the sex itself, rather than the public manifestation of it, illegal. The appellant should have been prosecuted for indecent exposure. This would have properly struck the balance between individual rights and state police power to protect public morals.

133. *Griswold,* 381 U.S. at 485-86.

134. For example, in Lovisi v. Slayton, 539 F.2d 349 (4th Cir.), cert. denied, 429 U.S. 977 (1976), see note 132 supra, the police, pursuant to a search warrant, searched the Lovisis' bedroom for evidence of the sexual shenanigans to which the Lovisi children had been exposed, and found incriminating photographs. Id. at 531. This was not an improper police procedure since the Lovisis' sexual behavior was the basis of a constitutionally legitimate prosecution for child abuse. See Lovisi v. Commonwealth, 212 Va. 848, 188 S.E.2d 206, cert. denied, 407 U.S. 922 (1972).

135. See text accompanying notes 142-49 and 157-60 infra.

136. 394 U.S. 557 (1969).

137. 367 U.S. 643 (1961). The *Stanley* Court acknowledged the similarity between the two cases. *Stanley,* 394 U.S. at 560 n.3.

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his home, although the state could suppress all public obscenity.[138] *Stanley* was based in great part on the first amendment,[139] but the Court's refusal since *Stanley* to give obscenity any protection outside the home[140] indicates that the importance of *Stanley* lies in its assertion of an individual's right to satisfy his personal and emotional needs in the privacy of his home, free from moralistic state intervention.[141] The *Stanley* doctrine thus confers a right of autonomy in the home.

Autonomy rather than privacy was also the issue in *Eisenstadt v. Baird*,[142] in which the Court extended *Griswold* to unmarried persons. The facts here disclose not a couple seeking privacy but a "pro-choice" activist, William Baird, seeking publicity for his defiance of a Massachusetts statute prohibiting the distribution of contraceptives to unmarried persons.[143] Baird's distribution of contraceptive foam to a female student and his subsequent arrest occurred not in a "sacred precinct" but before a student audience at Boston University.[144] Justice Brennan, writing for a plurality, relied only on the "rationally related" test to find the law unconstitutional,[145] but his penultimate paragraph strongly suggested a right of autonomy: "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."[146]

Finally, *Roe v. Wade*[147] has everything to do with autonomy and little to do with privacy, a point Justice Rehnquist seized upon in his *Roe* dissent.[148] The act of abortion necessarily entails the loss of privacy. An abortion is performed by a third party in surroundings not at all conducive to a sense of personal security. Moreover, personal information must be released and medical records collected,[149] contributing to a loss of privacy in the narrow, common law sense.

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138. Under Roth v. United States, 354 U.S. 476 (1957), obscenity is not protected by the first amendment. The Court has since reaffirmed *Roth*. See, e.g., Miller v. California, 413 U.S. 15 (1973).

139. *Stanley*, 394 U.S. at 564.

140. See, e.g., Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973) (no first amendment right to show obscene movies to consenting adults in movie theatres); United States v. Orito, 413 U.S. 139 (1973) (no right to transport personal obscenity on common carriers).

141. See *Stanley*, 394 U.S. at 565.

142. 405 U.S. 438 (1972) (plurality opinion).

143. Id. at 440.

144. Id.

145. Id. at 447-53.

146. Id. at 453 (emphasis in original).

147. 410 U.S. 113 (1973).

148. Id. at 172 (Rehnquist, J., dissenting).

149. Although the state may not prohibit or deter the right to have an abortion, it may enact laws mandating medical competence in the performance of abortion procedures. See, e.g., City of Akron v. Akron Center for Reproductive Health, 103 S. Ct. 2481, 2492 (1983). The state may require, as part of these procedures, that a woman give her written consent to the abortion and that her physician keep records of the abortion. Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52, 65-67 (1976).

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In the late 1970's, the Court further extended *Griswold* by recognizing certain basic "family" rights. In *Moore v. City of East Cleveland*,[150] the Court held unconstitutional a zoning ordinance that had the effect of prohibiting extended families from living under the same roof. In overturning the criminal conviction of a sixty-three-year-old grandmother who insisted that her grandchildren, who were cousins rather than brothers, be permitted to live with her, a plurality of the Court, through Justice Powell, observed that "the Constitution protects the sanctity of the family *precisely because the institution of the family is deeply rooted in this Nation's history and tradition*."[151] This theme was apposite a year later in *Zablocki v. Redhail*,[152] in which the Court held unconstitutional a Wisconsin law requiring an individual to obtain court approval to marry if he had a legal obligation to support his minor children not in his custody. The Court, noting that it had long recognized the right to marry as fundamental,[153] stated that "it would make little sense to recognize a right of privacy with respect to other matters of *family life* and not with respect to the decision to enter *the relationship that is the foundation of the family in our society*."[154]

The strong emphasis in these opinions on the historical and cultural primacy of family relationships and institutions has led some constitutional law mavens, particularly Professor Bruce Hafen, to speculate that *Griswold* and its progeny do not protect a right of sexual autonomy or personal privacy, but rather affirm the traditional family as the foundation of the American way of life.[155] The inevitable conclusion of this revisionist interpretation of the constitutional right of privacy is that the Court will not recognize a right of sexual autonomy since such a right would protect many forms of sexual activity not in harmony with traditional family norms.[156]

Although this critique of the *Griswold* right is not absurd—and after *Uplinger* may become the analysis of a majority of the Court—a close examination of the constitutional right of privacy as it has been explicated over the past twenty years provides weighty evidence that *Griswold* and its progeny protect individual autonomy and not only American family mores. Even the decisions in *Moore* and *Zablocki* do not lend strong support to the Hafen analysis. Only nine days after the Court decided *Moore*, it handed down *Carey v.*

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150. 431 U.S. 494 (1977) (plurality opinion).

151. Id. at 503 (emphasis added).

152. 434 U.S. 374 (1978).

153. Id. at 383-84.

154. Id. at 386 (emphasis added).

155. See generally Hafen, supra note 12; Grey, Eros, Civilization and the Burger Court, 43 Law & Contemp. Probs. 83 (1980).

156. See generally Hafen, supra note 12. Professor Grey, while generally agreeing with Hafen's reading of *Griswold* and its progeny as "pro-family" cases, believes that most laws prohibiting consensual sexual behavior will be struck down by the Supreme Court in the near future, not because of "any notion in the justices' minds that sexual freedom is essential to the pursuit of happiness," but because of "the same demands of order and social stability that have produced the contraception and abortion decisions." Grey, supra note 155, at 97.

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Population Services International,[157] which extended to unmarried minors the *Griswold-Baird* right to purchase and use birth control devices. Moreover, the Court stated that "the outer limits of [the constitutional right of privacy] have not been marked,"[158] a pregnant assertion[159] reiterated in *Zablocki.*[160]

Although scrutiny of the Court's phraseology in these "family" cases is inconclusive at best, a close philosophical exposition of *Griswold* and its progeny demonstrates that the Court has recognized and protected the basic components of a broad right of sexual autonomy. In both symbolic and practical terms, the Court has laid most of the groundwork for the right of sexual autonomy. Indeed, much of *Griswold* and its progeny makes sense only if complemented by the recognition of constitutionally protected zones of sexual freedom.

The symbolic import of the *Griswold* right of privacy is the most compelling refutation of the "pro-family" revision. By recognizing that every woman has the absolute right to prevent or terminate her pregnancy, the Court has created an inviolate zone of autonomy that protects the most essential component of non-traditional, "anti-family" sexual activity—the separation of sexual pleasure from procreation. Although societal mores prescribe the institution of marriage in order to perpetuate American society, every individual has both a fundamental right to marry and to refrain from procreation; thus, every individual also has the right to enjoy sex without regard to its utility or to the "pro-family" command of the Judeo-Christian ethic to "be fruitful and multiply."[161] Under the Bill of Rights, sex is for the enjoyment and growth of *individuals,* not for the perpetuation of the species. In essence, the Court has already recognized some sexual autonomy rights, but refuses to announce this explicitly.

Unfortunately, the *Uplinger* Court declined the opportunity to characterize the constitutional right of privacy/autonomy in terms that would encompass a general right to realize one's sexual identity to the fullest. The specific holdings of *Griswold* and its progeny still protect only manifestations of sexual activity rather than the activity itself. Birth-control use and abortion are protected, even for minors, but the activity that generates the demand for these prophylactics is not. This is an anomaly that has not gone unnoticed[162]—and one that the *Uplinger* Court should have corrected. This incongruity is not a product of the Justices' varying pragmatic concerns about the political and judicial consequences of their recognition of an expansive right of sexual au-

157. 431 U.S. 678 (1977) (plurality opinion).

158. Id. at 684.

159. See note 24 supra.

160. 434 U.S. at 385.

161. Genesis 9:1.

162. Pointing out this anomaly, the New Jersey Supreme Court has noted that the decision "to engage in the conduct which is a necessary prerequisite to child-bearing" is "at least as intimate and personal [a decision] as those which are involved in choosing whether to use contraceptives." State v. Saunders, 75 N.J. 200, 214, 381 A.2d 333, 340 (1977) (see note 22 supra).

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tonomy. Rather, these concerns undoubtedly contain the fear that such a right would open the flood gates of Millian philosophy in the courts, igniting a new era of substantive due process that would make the *Lochner* era appear to have been the epitome of judicial restraint.[163] Of course, the fact that some state supreme courts have relied heavily on Mill's philosophy to articulate the right of sexual autonomy[164] undoubtedly has not assuaged the Court's trepidation.

However, the practical effects of *Griswold* and its progeny, no less than their symbolic import, demonstrate the irrationality of the Court's unwillingness to move forward on this issue. If the state intends to forbid most forms of consensual adult sexual activity, it must have the means to do so. Yet laws prohibiting fornication, sodomy, and adultery are likely to ensnare only the most indiscreet lovers. Otherwise, they are invariably unenforced and unenforcible.[165] On the other hand, restrictive abortion and contraception laws could be enforced with some regularity and serve as a minimally effective deterrent to—and perhaps a very effective punishment for—"anti-family" sexual transgressions. But the Supreme Court has provided most transgressors with protection just where it is needed. For all its reluctance to recognize the right of sexual autonomy, the Court surely must be aware that if there is a Pandora's Box of hedonism threatening to devour conventional morality in American society, the Box has long been open and will never again be closed.

Griswold, then, is the foundation of a right of sexual autonomy. But it remains to be seen why this right is truly implicit in the Bill of Rights and what its contours are. In upholding autonomy rights in *Griswold* and its progeny, the Court has neglected to explain fully the essence of these rights. This is partly because of political and social considerations,[166] but also because the issue can be fully explored only in exhaustive analyses that would entail much philosophical, psychological, and sociological evaluation of the purposes of law in a free society, a project the Court does not have the time or resources to

163. The Court's trepidation of the ghost of John Stuart Mill was evidenced by the rise and fall of Stanley v. Georgia, 394 U.S. 557 (1969), which recognized a broad right of home privacy to possess and enjoy legally obscene materials. See text accompanying notes 136-41 supra. Read broadly but plausibly, *Stanley* indicated that the state could not regulate sexual morality in the home. See id. at 564-65. *Stanley* also seemed to endorse the Millian principle that the state had no business attempting to regulate individual moral behavior that did not directly affect others, at least in the context of pornographic literature. See id. However, within a few years the Court had retreated so far from *Stanley*'s implications that the case was limited to its facts even in first amendment contexts, see cases cited note 140 supra, and the states were deemed to have broad police power to promote community mores. See Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973).

164. For example, in articulating the right of sexual autonomy in Commonwealth v. Bonadio, 490 Pa. 91, 415 A.2d 47 (1980) (cited note 22 supra), the Pennsylvania Supreme Court based its decision as much on Millian concepts as on the federal and state constitutions. 490 Pa. at 96-97, 415 A.2d at 50-51.

165. The basic right of privacy in the fourth amendment would in itself almost always be enough to thwart any serious attempt by law-enforcement authorities to curtail sex among unmarried—and reasonably discreet—persons.

166. See text accompanying notes 14-32 supra.

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undertake. However, freedom has always been a paramount value in American law to the extent that liberty is conducive to individual growth and identity. Accordingly, the reason that forms of sexual behavior are constitutionally protected may be fairly obvious—perhaps as obvious as the right of a person to wear a hat in public.[167]

In a thesis on the natural morality underlying the Constitution, Professor David Richards has shown that the right of sexual autonomy inheres in the Bill of Rights.[168] Elaborating on the Constitution's protection of "natural moral rights,"[169] Richards explains that the right to make personal decisions concerning sexual behavior is "of fundamental importance among the strategic decisions in one's life,"[170] and therefore "any coercive prohibition of certain forms of sexual love would be a deprivation of a uniquely significant experience."[171] Richards postulates that sexual love may come in a variety of meaningful, albeit unpopular, forms, and the Constitution protects these as surely as it protects marital intimacy.[172] Sexual enjoyment is a positive good that must be regarded as an inalienable right in the "unwritten constitution."[173]

Support for Richards's thesis may be found in the concepts underlying two provisions of the Bill of Rights that Justice Douglas neglected to mention in his *Griswold* penumbral theory: the free exercise and establishment clauses of the first amendment. These clauses incorporate principles of human freedom and dignity that establish an inviolable zone of autonomy analogous to sexual autonomy. Against an historical backdrop of religious tyranny and cruel persecution, the founding fathers wrote the religion clauses to guarantee the individual that she would be free to enter what Martin Buber aptly termed the "I-Thou" relationship[174] in the manner best suited to her conscience and personality. The I-Thou communion is "too personal, too sacred, too holy to permit its unhallowed perversion by the state.[175] The founding fathers well understood that to compel an individual to worship God in a manner not of

167. See note 35 supra.

168. See generally Richards, supra note 38.

169. Id. at 1313.

170. Id. at 1308.

171. Id. at 1307.

172. See generally id.

173. See note 33 supra.

174. M. Buber, I And Thou (W. Kaufmann trans. 1970). For Buber, the I-Thou (or I-You) is a relationship which may exist between God and man, between persons, and between man and nature. See generally id. The relationship between God and each person is always I-Thou, and therefore primary, because "the lines of relationships intersect in the eternal You." Id. at 123. Human relationships, however, revert back to the "I-It" since there are circumstances in which an individual must treat another as an object rather than relate to her as a spiritual being. "And in all the seriousness of truth, listen: without It a human being cannot live. But whoever lives only with that is not human." Id. at 85.

175. Engel v. Vitale, 370 U.S. 421, 432 (1962) (state may not authorize prayer for public-school children).

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her choosing is to force her to estrange God, deny her spiritual and cultural identity, and renounce an essential part of her being.

This is also true of the sexual I-Thou relationship, which, like the primary I-Thou, is at the heart of personality and identity.[176] It is no more legitimate for the state to confine sexual love within artificial walls of bigotry and ignorance than to control the mode of religious expression. As Richards notes, cruel deprivation results from state attempts to straightjacket the sexual expression of consenting adults.[177] These attempts are also absurd because the variety of sexual expression that nurtures and enriches human life is as infinite as the stars. Viewed in conjunction with *Griswold*'s conceptual penumbras, the religion clauses suggest a philosophy of political and social freedom within which there is a broad right of sexual privacy/autonomy.

Some commentators have focused on the value of autonomy itself rather than on the positive goods within its zone. They argue that it is the ability to choose that is of the greatest importance to personal development. Professor Karst, echoing Warren and Brandeis, asserts that the right of sexual privacy/autonomy is essential to the development of the individual's sense of identity.[178] A person's ability to determine "Who am I?" depends on her ability to choose relationships, and intimacy provides her with the values she most needs.[179] Only within this zone of protected sexual autonomy can a person be herself.[180]

Another way of approaching the right of sexual privacy/autonomy is to analogize to property rights. The Supreme Court's long history of protecting implied constitutional rights leaves no doubt that property rights were at center stage until a half century ago.[181] The values in owning property are to some extent the same values that inhere in any zone of autonomy. The Court's eager defense of property rights in the early days of this nation was based on a determination to protect not just the value of actually possessing property in the crude sense of having something that is "mine, all mine!" but more importantly the value property has in conferring autonomy rights upon its possessors, thereby enabling them to define themselves as individuals. For example, a person can say something important about herself by the color she paints her house, or the type of car she drives, or how she earns and spends money. However mundane and commonplace these activities may seem, they are principal ways of defining oneself in American society.

176. That sexual expression is upon the same spiritual and emotive plane as religious expression is profoundly conveyed by *The Song of Songs*, which uses the symbolism of joyous and uninhibited sex to express the relationship between God and his Chosen People: See *Song of Songs*: 7:2-8:3.

177. Richards, supra note 38, at 1307.

178. Karst, supra note 12, at 635.

179. Id. at 636-37.

180. See, for example, the Pennsylvania Supreme Court's exposition of Millian individualism in Commonwealth v. Bonadio, 490 Pa. 91, 96-97, 415 A.2d 47, 50 (1980).

181. Note that the overwhelming number of implied-rights cases examined in Part I of this Note defended property rights.

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John Locke's view of property rights as an essential liberty significantly influenced the founding fathers.[182] Locke saw property as an extension of self, and thus as a manifestation of autonomy. A person became herself through her use of property.[183] It has been said that Locke's theory of property was so influential on the Supreme Court that, until the New Deal, the Court looked upon property as a "sub-person."[184]

Warren and Brandeis also took note of the close relationship between the rights of property and privacy as they had developed in the common law. Property rights had grown to comprise intangible, as well as physical, possession.[185] An individual had the right to possess herself, and this "property" right was the most fundamental.[186] A contemporary philosopher elaborates:

> The right to privacy is the right to the existence of a social practice which makes it possible for me to think of this existence as *mine.* This means that it is the right to conditions necessary for me to think of myself as the kind of entity for whom it would be meaningful and important to claim personal and property rights. It should also be clear that the ownership of which I am speaking is surely more fundamental than property rights. Indeed, it is only when I can call this physical existence mine that I can call objects somehow connected to this physical existence mine. That is, the transformation of physical possession into ownership presupposes ownership of the physical being I am. Thus the right of privacy protects something that is presupposed by both personal and property rights.[187]

It follows that an individual enjoys the right to define herself by assuming the sexual identity and mannerisms most conducive to the enrichment of her personality, of which she is the sole possessor. It was obvious to the founding fathers that a free government could not arbitrarily seize one's fungible goods; today it should be no less obvious that a free government cannot rely on bigotry and fear to deny an individual ownership of any part of her identity, the possession most important to the individual.

Under any analysis, the right of privacy/autonomy is the fundamental right that underlies all political rights, express or implied. It is difficult to conceive of the Constitution not embodying this right since it is a right superior to, and necessary for, many of the rights that the Constitution expressly protects. Accordingly, the right of privacy/autonomy to which *Griswold* and

182. The spirit of John Locke was unquestionably imbued in the Bill of Rights. See, e.g., Bodenheimer, supra note 57, at 49-50.

183. See Konvitz, Privacy and the Law: A Philosophical Prelude, 31 Law & Contemp. Probs. 272, 275 (1966) (quoting John Locke, The Second Treatise of Civil Government 129 (Everyman's Library, 1924)).

184. Id. at 276.

185. Warren & Brandeis, supra note 123, at 193.

186. See id. at 205-07.

187. Reiman, Privacy, Intimacy and Personhood, 6 Phil. & Pub. Aff. 26, 43 (1976) (emphasis in original).

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its progeny have given some recognition and protection may be more obvious in the American social contract than in the text of the Bill of Rights itself. The Constitution's protection of individuality and its establishment of free institutions render unconstitutional government prohibition of consensual private sexual expression among consenting adults.

CONCLUSION

In *Griswold v. Connecticut*, the Supreme Court, in accordance with its history and purpose, relied on penumbral values inherent in the Bill of Rights to assert and protect a right of personal autonomy not explicitly guaranteed by the Constitution. In subsequent cases, the Court has reaffirmed and expanded this right. However, in recent years the Court has refused to allow the *Griswold* right to maturate fully and thus encompass a right of sexual autonomy. After *New York v. Uplinger*, it is evident that the Court has been drawn closer to the center of a political maelstrom that threatens to devour the living Constitution and reduce it to the status of a collection of written rules and regulations fading rapidly into crumbling parchment. Yet this maelstrom is not an irresistible force, and when next confronted by the right of sexual autonomy, the Court may have the fortitude to look beyond the text to interpret the real Constitution, the embodiment of a still radical political philosophy that remains the best hope for a harmonious society in which every person is free to be all she can be.

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