

Summer 1986

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### Recommended Citation

Gerald G. Watson, The Ninth Amendment: Source of a Substantive Right to Privacy, 19 J. Marshall L. Rev. 959 (1986)

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# THE NINTH AMENDMENT: SOURCE OF A SUBSTANTIVE RIGHT TO PRIVACY

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## INTRODUCTION

The "right of privacy" is an eloquent phrase that seems to capture so much of what Americans regard as the essence of our democratic political system. But, does such a right exist in fact, or is the assertion a futile attempt to thwart the invasive efforts of an increasingly sophisticated technocracy? The Constitution does not specifically mention a right of privacy. If such a right is to exist as a curb to state action, it must be created out of the fabric of the Constitution itself. The ninth amendment is part of that constitutional fabric. It succinctly states that "the enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people."

The purpose of this paper is to demonstrate that the ninth amendment was originally intended to serve as an independent constitutional "source" of substantive rights and that it can usefully fulfill that function today for historically identifiable rights, such as privacy. Drawing upon legal, philosophical, historical, anthropological and sociological evidence, I will further attempt to establish that a right to privacy existed before the ninth amendment was adopted in 1791. Such evidence will support the oft-repeated but seldom substantiated view that privacy is a fundamental right "retained by the people."<sup>1</sup> By relying upon historical scholarship, it is possible to provide meaningful content to the retained but unenumerated rights in the ninth amendment, while dealing with the justifiable concerns of Justice Black<sup>2</sup> and others<sup>3</sup> that unenumerated rights are a ready vehicle for subjective constitutional interpretation.

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1. See, e.g., Kent, *Under the Ninth Amendment What Rights are the 'Others Retained by the People?'*, 29 FED. B.J. 219, 228-229 (1970); Bertelsman, *Ninth Amendment and Due Process of Law — Toward a Viable Theory of Unenumerated Rights*, 37 U. CIN. L. REV. 777 (1968).

2. *Griswold v. Connecticut*, 381 U.S. 479, 507-527 (1965) (Black, J., dissenting).

3. See, e.g., L. WARD, *THE BILL OF RIGHTS* 70 (1958); *Right of Privacy: A Black View of Griswold v. Connecticut*, 7 HASTINGS CONST. L.Q. 777 (1980); Franklin, *The Ninth Amendment as Civil Law Method and its Implications for Republican Form of Government*, 40 TUL. L. REV. 487 (1966).

The body of the paper is divided into four major sections, each dealing with an important aspect of the interpretation of the ninth amendment or the right of privacy. In the first section, an examination of the majority, concurring and dissenting opinions in *Griswold v. Connecticut*, is undertaken. In the second section of the paper, the ninth amendment is examined as a rule of construction or independent source of substantive rights through a review of the adoption of the amendment and its pre-*Griswold* interpretation. The third section of the paper examines the general question "What rights are 'retained by the people' under the Ninth Amendment?" The fourth section of the paper considers the historical evidence for a pre-existing general right of privacy utilizing anthropological, philosophical, sociological, cultural and legal evidence drawn from the Western tradition, with an emphasis upon England and America before 1791. Some attention is also given to the historical evidence for a particular right of privacy in sexual matters.

Before turning to the major substantive portions of this paper it is worthwhile to briefly consider the meaning of privacy. There have been numerous attempts at definition, ranging from a right "to be let alone," to "control over knowledge about oneself."<sup>4</sup> Alan Westin has provided a thoughtful definition of privacy as "the claim of individuals, groups, or institutions to determine for themselves when, how and what extent information about them is communicated to others."<sup>5</sup> But even this definition, while useful, conceals much of importance.

First, privacy is not and cannot be an absolute right. Second, privacy is not an isolated right or freedom, it is intimately connected with other cherished human values. As Charles Fried has argued, love, friendship and trust are impossible without it.<sup>6</sup> Moreover, it is important to recognize that privacy is not a single abstract principle. According to Dionisopoulos and Ducat, for example, privacy can be place-oriented, person-oriented, or relational, such as privacy in marriage, or between doctor and patient.<sup>7</sup>

An examination of case law and current literature reveals three distinct issues that dominate the modern discussion of privacy. First, there is the perennial tort concern for invasion of privacy, particularly as it relates to the intrusiveness of the mass media.<sup>8</sup> Sec-

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4. An excellent survey of definitions can be found in D. O'BRIEN, *PRIVACY, LAW AND PUBLIC POLICY* 3-29 (1979).

5. A. WESTIN, *PRIVACY AND FREEDOM* 7 (1967).

6. According to Fried, "privacy creates the moral capital which we spend in friendship and love. . . . Privacy grants the control over information which enables us to maintain degrees of intimacy." C. FRIED, *PRIVACY IN LAW, REASON AND JUSTICE* 56 (Hughes ed. 1969).

7. P. Dionisopoulos & C. Ducat, *The Right to Privacy* 30 (1976).

8. See, e.g., Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960).

ond, the question of privacy is raised in matters involving sexual conduct.<sup>9</sup> Finally, there has been increasing discussion and concern about the privacy implications posed by sophisticated electronic surveillance and the development of computerized data banks on the part of government.<sup>10</sup> These areas of concern suggest that privacy has at least two major implicit dimensions: secrecy and autonomy.

One should not seek greater conceptual clarity than the subject permits. Therefore, in this paper privacy will be explored in all of its multi-faceted richness without further attempts at definition. The reader should, however, keep in mind the various senses in which that term may be utilized.

#### PRIVACY FROM 1890 TO THE GRISWOLD DECISION

The origin of the principle of privacy is lost in the mists of history. At least one author has traced its origins to primitive man,<sup>11</sup> another sought its historical development in Biblical and ancient Greek concepts,<sup>12</sup> while elsewhere it has been identified as implicitly applied in early English property or breach of trust cases at common law.<sup>13</sup> As an explicit legal concept, it is sometimes argued that the right or privacy is a recent invention, dating back to an influential law review article published in 1890 by Samuel Warren and Louis D. Brandeis, two young Boston lawyers.<sup>14</sup> In that article they were primarily concerned with proposing a remedy for invasions of personal privacy by the press.<sup>15</sup> By 1960 Professor Prosser was able to state that "the right of privacy, in one form or another, is declared to exist by the overwhelming majority of the American Courts."<sup>16</sup>

But the right of privacy recognized by Warren and Brandeis, as well as by subsequent statutory or case law, was a tort right, not a constitutional principle. It remained for the Warren Court in the celebrated 1965 case of *Griswold v. Connecticut*<sup>17</sup> to discover a constitutional right to privacy in the emanations and penumbras of spe-

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9. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965).

10. See, e.g., WESTIN, *supra* note 5.

11. WESTIN, *supra* note 5, at 8.

12. Konvitz, *Privacy and the Law: A Philosophical Prelude*, 31 LAW & CONTEMP. PROBS. 272 (1966).

13. Note, *Toward a Constitutional Theory of Individuality: The Privacy Opinions of Justice Douglas*, 87 YALE L.J. 1579 (1978), citing to, among others, *Pope v. Curl*, 26 Eng. Rep. 608 (Ch. 1741) (upholding injunction to prevent publication of letters written by Alexander Pope based upon property rights in the words composed) and *Yovatt v. Winyard*, 37 Eng. Rep. 425 (Ch. 1820) (appropriation of veterinarian's secret recipes by former employee a breach of trust and confidence). *Id.* at 1579 n.1.

14. Glancy, *The Invention of the Right to Privacy*, 21 ARIZ. L. REV. 1 (1979) referring to Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

15. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 219 (1890).

16. Prosser, *supra* note 8 at 386.

17. 381 U.S. 479 (1965).

cific provisions of the Bill of Rights.

Although there are a number of specific constitutional provisions, including the first, third, fourth and fifth amendments, that protect aspects of privacy, there is no specific provision which guarantees a general right of privacy. Traditionally, the Supreme Court has dealt with privacy interests not directly protected by an enumerated constitutional right in two ways. First, the Court has sometimes been willing construe a particular enumerated right, such as the first amendment right of assembly, into a more comprehensive right.<sup>18</sup>

The second approach taken by the Court has been to utilize the fifth and fourteenth amendments to protect unenumerated rights. As Bertelsman points out, unenumerated rights were occasionally mentioned in 19th century judicial opinions, but had little impact until the rise of the substantive due process doctrine in the 1890's.<sup>19</sup> The economic decisions of this era, best exemplified by the famous case of *Lochner v. New York*,<sup>20</sup> were substantially discredited after 1937. Substantive due process, however, was also applied to non-economic "personal" liberties during this era, with the result of sustaining the privacy interests of individuals in several key cases.<sup>21</sup> The reluctance of the Court after 1937 to utilize the due process clause to protect fundamental, but unenumerated rights, however, meant that this approach was generally unavailable to protect privacy interests.<sup>22</sup>

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18. 357 U.S. 449 (1958). Thus, in *NCAA v. Alabama*, the court held Alabama's demand for the membership list of the NAACP unconstitutional as an infringement upon the freedom of association because disclosure would discourage group affiliation. The obvious privacy interest protected here was the concern of NAACP members to keep their affiliation hidden from the probing eyes of an allegedly hostile, segregationist state government. This approach, however, is relatively circumscribed. It may not adequately address many issues of privacy which arguably do not bear the same close relationship to specific enumerated rights.

19. Bertelsman, *supra* note 1, at 782.

20. 198 U.S. 45 (1905).

21. In *Meyer v. Nebraska*, 260 U.S. 390 (1923), for example, the Court invalidated a state law prohibiting the teaching of foreign languages (in this case German) to young children. And several years later the Court sustained a challenge to an Oregon statute that required children to attend public, rather than private or parochial schools. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). While not specifically discussing privacy, these fourteenth amendment cases nonetheless resulted in protecting important privacy interests in the form of autonomous choice within the familial context.

22. It should be noted that the Equal Protection clause of the fourteenth amendment has also been used upon occasion to protect fundamental, but unenumerated rights. One pre-*Griswold* equal protection case, *Skinner v. Oklahoma*, 316 U.S. 535 (1942) is of particular interest because it foreshadowed the broad sweep of *Griswold*. Writing for the Court in 1942, Justice Douglas invalidated an Oklahoma statute providing for compulsory sterilization after a third felony conviction (with exceptions) on the basis that "we are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very and

The dilemma for the *Griswold* Court, then, was to protect individual privacy where the facts of the case could not be readily subsumed under a specific enumerated right, without falling into the swamp of subjective interpretation implicit in substantive due process. The multiple opinions published in *Griswold* are indicative of the difficulty the Court had grappling with this problem. According to one analyst, "*Griswold* marks the first occasion upon which the Supreme Court discussed a composite right to privacy, drawing its substance from a number of the Bill of Rights' guarantees in language which appeared to indicate a strong constitutional presumption against any manner of governmental infringement."<sup>23</sup> Among those provisions of the Bill of Rights cited in this important privacy case was the Ninth Amendment. This amendment to the Constitution had only been cited on eight previous occasions by the Supreme Court.<sup>24</sup> *Griswold* thus became the first opinion in which the Supreme Court actually utilized the Ninth Amendment to protect an unenumerated right.

The facts in *Griswold* are simple and compelling. Griswold, Executive Director of the Planned Parenthood League of Connecticut, and co-defendant Buxton, a physician and Professor at Yale Medical School who served as Medical Director for the League's New Haven Center, were arrested and convicted of violating state statutes which made it an offense to use "any drug, medicinal article or instrument" to prevent conception, or to assist, abet or counsel another to do so. Such statutes, if enforceable, would clearly put the Planned Parenthood League out of business. The defendants had given information and medical advice about contraception to married persons. The defendant/appellants were found guilty as accessories and fined \$100 a piece.<sup>25</sup> They appealed on fourteenth amendment grounds, but were rebuffed by the state appellate courts, at which point the United States Supreme Court granted review.

The *Griswold* case resulted in six published opinions. The final result was a seven-to-two decision on the outcome, with the legal reasoning in some disarray.<sup>26</sup>

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survival of the race." *Id.* at 535. These references to "basic" and "fundamental" rights are apparently an isolated incident between the demise of substantive due process and the *Griswold* decision.

23. Clark, *Constitutional Sources of the Penumbra Right to Privacy*, 19 VILL. L. REV. 828, 833-834 (1974).

24. Ringold, *The History of the Enactment of the Ninth Amendment and its Recent Development*, 8 TULSA L.J. 1, 12 (1972). This article contains a complete list of all state and federal reported decisions citing the Ninth Amendment up to 1972.

25. *Griswold v. Connecticut*, 381 U.S. 479, 480 (1965).

26. Justice Douglas expressed the view of a five member majority. Justice Goldberg, with whom Chief Justice Warren and Justice Brennan concurred, joined the opinion of the Court, but wrote separately stressing the role of the ninth amendment. Justices Harlan and White wrote separate concurring opinions, while Justices

Justice Douglas, writing for the majority, argued that the Connecticut statute invaded a constitutionally protected "zone of privacy" created by the "penumbras" that emanated from explicit guarantees in the Bill of Rights.<sup>27</sup> The explicit guarantees were to be found in the "penumbras" of the first, third, fourth and fifth amendment. Although Justice Douglass briefly noted the ninth amendment to support his position, he appears to have regarded it as "a rule of construction and not a source of fundamental rights."<sup>28</sup>

More explicit emphasis was placed upon the ninth amendment by Justice Goldberg in his concurring opinion. According to Ringold, "the dramatic rebirth of the Ninth Amendment in 1965 was due solely to the concurring opinion of Justice Goldberg."<sup>29</sup> Although he joined the majority, in his separate concurring opinion Justice Goldberg relied almost entirely upon the ninth amendment.

According to Goldberg, the "language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there was additional fundamental rights, protected from governmental infringement, which exists alongside those fundamental rights specifically mentioned in the first eight constitutional amendments."<sup>30</sup> Acknowledging that the ninth amendment had been seldom used, Justice Goldberg argued that "to hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the ninth amendment and to give it no effect whatsoever."<sup>31</sup> Thus, Justice Goldberg concluded that "the right of privacy in the marital relation is fundamental and basic—a personal right 'retained by the people' within the meaning of the Ninth Amendment . . . protected by the Fourteenth Amendment from infringement by the States."<sup>32</sup>

Justice Goldberg's legal analysis in *Griswold* is not entirely clear or satisfactory. While disclaiming that the ninth amendment is an independent source of rights,<sup>33</sup> thus ostensibly agreeing with Justice Douglas that it is a mere rule of construction, Goldberg views the amendment as a powerful tool to protect "fundamental" personal rights.<sup>34</sup> In effect, Goldberg uses the ninth amendment as an independent constitutional source of substantive rights which meet the

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Black and Stewart dissented in two separate opinions in which each joined the other.

27. *Id.* at 484-485.

28. Note, 46 WASH. L. REV. 565, 567 (1971).

29. Ringold, *supra* note 24, at 2.

30. *Griswold v. Connecticut*, 381 U.S. 479, 488 (1965).

31. *Id.* at 491.

32. *Id.* at 499.

33. *Id.* at 492.

34. *Id.* at 492-493.

test of being "fundamental."<sup>35</sup>

In dissent, Justice Black, a strict constructionist, criticized the majority opinion, but reserved his sharpest remarks for the arguments advanced by Harlan and Goldberg. He indicated that these opinions mark a return to the philosophy of the *Lochner* era which utilized "natural law due process philosophy."<sup>36</sup> Clearly Justice Black views the Goldberg position on the ninth amendment as more than a mere rule of construction. He saw this stance as an illegitimate and potentially limitless source of additional federal power under the guise of retained rights. This argument, however, ignores the fact that the ninth amendment makes history potentially available as an instrument to help identify and refine unenumerated rights.<sup>37</sup>

The influence of *Griswold* upon subsequent developments has been substantial and well-documented.<sup>38</sup> It remains unclear, however, just what role, if any, should be played by the ninth amendment in the development of American constitutional law generally, and in the further definition of the right to privacy.<sup>39</sup> The opinions

35. *Id.* at 493-496. See Ringold, *supra* note 24, for another account that accepts the view that Goldberg's opinion means that the ninth amendment is a source of substantive rights. Ringold has sought to reconcile the practical effect of the Goldberg opinion, with Goldberg's stated position (that the ninth amendment is not an independent source of rights) by arguing that "historically none of the amendments, not the Constitution itself, is the source of the natural rights of man. . . ." Thus one may accept Goldberg's statement (that the ninth amendment does not constitute an independent source of rights), yet consistently maintain that the ninth amendment is a repository and descriptive of man's fundamental liberties to the same degree as the first eight amendments." *Id.* at 19.

36. *Griswold v. Connecticut*, 381 U.S. 479, 516 (1965). The concurring opinions of Justices Harlan and White were based upon the view that the Connecticut statute deprived persons of "liberty" as used in the fourteenth amendment without due process of law. Justice Harlan in particular relied heavily upon the due process clause to protect values "implicit in the concept of ordered liberty." *Id.* at 500. If the net result of the Goldberg approach is indistinguishable from Justice Harlan's "ordered liberty," why use the ninth amendment? Bertelsman argued that "it is the ghost of *Lochner* which inspires the reluctance to recognize unenumerated rights." Bertelsman, *supra* note 1, at 784. Another commentator observed that "apparently Goldberg felt he could not rely solely upon the fourteenth amendment, because the Court had denuded its substantive content. . . . By coupling the ninth amendment to the fourteenth, Goldberg apparently attempted to revive some of the latter's substantive content and invoke the precedents upholding the right of family privacy." Katin, *Griswold v. Connecticut: The Justices and Connecticut's "Uncommonly Silly Law,"* 42 NOTRE DAME LAW, 680, 696 (1967).

37. This is one potentially significant difference between the approaches used by Goldberg and Harlan. The Goldberg approach makes history available as an instrument to help identify and refine unenumerated rights. Unfortunately, Justice Goldberg merely asserts the existence of an historical right to privacy and does not actually utilize historical research to substantiate his position on this issue. The lack of an historical basis for the right of privacy asserted under the Ninth Amendment may help to explain the dissenting viewpoint of Justice Black.

38. See, e.g., Clark, *supra* note 23.

39. For an interesting review of ninth amendment applications since *Griswold*,



in this case, however, have put the question in sharp relief: Is the ninth amendment a rule of construction without substantive content, as Justice Douglas suggests, or is it, in effect, an independent source of substantive rights? If it is a source of substantive rights, how can those rights be identified so as to handle the legitimate concerns expressed by Justice Black about subjective judicial interpretation? Is it apparent that, in part, one must look for the answer in the history of the enactment and interpretation of the ninth amendment itself.

#### THE ADOPTION AND INTERPRETATION OF THE NINTH AMENDMENT

The Constitutional Convention, called to deal with the perceived weaknesses of the Articles of Confederation, deliberated in Philadelphia from May 28, 1787, until the completed document was ready for signature on September 17 of that year.<sup>40</sup> The Constitution emerged from the Convention without a Bill of Rights, igniting an issue which would rage throughout the ratification process.<sup>41</sup>

The Constitution itself called for ratification by special popularly elected conventions in each state and was to take effect upon the favorable vote of nine states. Although delegates to the Constitutional Convention apparently felt that a Bill of Rights was unnecessary, absence of such a statement provoked widespread criticism in state ratifying conventions.<sup>42</sup> Numerous amendments to the Constitution were proposed by the state ratifying conventions.<sup>43</sup> The

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see Gaugush, *The Ninth Amendment in the Federal Courts, 1965-1980: From Desuetude to Fundamentalism?*, 61 DENVER LAW J. (1983-84). Gaugush points out that in the fifteen years immediately after *Griswold* there were more than 400 citations to the ninth amendment in federal decision. For the Supreme Court, however, "after *Griswold*, only seven majority opinions in the cases decided referred to the ninth amendment." Not one of those uses the ninth amendment as a constitutional source for protecting unenumerated rights. A review of subsequent cases indicates that there has been no change, at least at the level of supreme court interpretations. There have been nine additional supreme court cases discussing the ninth amendment in some fashion since the Gaugush article, none of which relied principally upon the ninth amendment.

40. There are numerous historical treatments of the constitutional period. I have relied upon PRITCHETT, *THE AMERICAN CONSTITUTION* (1968) for general background. Where the information is readily available elsewhere and is not controversial, I have avoided footnote citations. In general see, *id.*, at 16-43. On the Bill of Rights see *id.*, at 396-398.

41. On September 12, 1787, toward the end of the Convention's deliberations, George Mason, one of the most influential members, expressed disappointment at the failure of the mostly-completed Constitution to contain a Bill of Rights. His efforts to gain approval for a committee to create such a Bill of Rights was defeated ten to zero, given the limited character of the national government and the existence of such statements in the constitutions of many of the separate states. PRITCHETT, *supra* note 40, at 28.

42. Ringold, *supra* note 24, at 3.

43. E. DUMBALD, *THE BILL OF RIGHTS* (1957) conveniently reprints all state proposals for amendments. See *id.*, Appendix 4 at 173-205. See also Ringold, *supra* note

clamour for a Bill of Rights, to some degree an effort by opponents to defeat or impede ratifications,<sup>44</sup> was irresistible.

In Massachusetts, New York and Virginia, "the promise that a Bill of Rights would be added was instrumental in securing the votes needed for ratification."<sup>45</sup> The new government of the United States went into effect in the Spring of 1789. After ratification, James Madison, elected to the House of Representatives from Virginia, became the moving force behind the Bill of Rights.<sup>46</sup>

Madison took the lead in drafting the Bill of Rights. He sifted through the many state proposals, eliminating duplicates and those that he opposed.<sup>47</sup> He seems to have relied heavily upon Virginia's proposals, which seems natural under the circumstances.<sup>48</sup> On July 8, 1789, Madison presented his proposals to the House of Representatives. The *Annals of Congress* indicate a vigorous debate, along the lines previously drawn about the propriety of amending the Constitution with a Bill of Rights.<sup>49</sup> Madison responded to the argument that unenumerated rights would be endangered by acknowledging that it was a plausible concern but stating that: "I conceive, that it may be guarded against. *I have attempted it, so gentlemen may see by turning to the last clause of the fourth resolution.*"<sup>50</sup>

The final section of Madison's fourth resolution contained the language which, in modified form, was to become the Ninth Amendment.<sup>51</sup>

The exceptions here or elsewhere in the Constitution made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the

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24, at 5.

44. Ringold, *supra* note 24, at 4.

45. For example, James Madison, originally an opponent of a bill of rights, changed his view when he saw the widespread support of anti-federalists, including Jefferson, for such a bill. "In order not to jeopardize ratification in Virginia, Madison promised the (stated) convention that Congress would give first priority to amendments embodying a bill of rights and that he would personally use his influence and efforts to that end." Ringold, *supra* note 24, at 6. The subsequent history of the Bill of Rights, including the ninth amendment, clearly indicates that Madison lived up to this commitment.

46. For an interesting, but brief account of this period see "Biographical note" 43 GREAT BOOKS OF THE WESTERN WORLD 23-26 (1952).

47. Ringold, *supra* note 50, at 6. See also B. PATTERSON, THE FORGOTTEN NINTH AMENDMENT (1955). Patterson's book is the most complete historical account of the legislative history of the ninth amendment. In addition, the book contains a reprint of major portion of the *Annals of Congress*, the most useful source of the meetings of the House of Representatives and the Senate during the first few decades (1789-1824). *Id.* at 93-217.

48. The Virginia proposals are reprinted in their entirety in Dumbald, *supra* note 43, at 182-189.

49. PATTERSON, *supra* note 47, at 100-127.

50. *Id.* as quoted at 115-116 (emphasis added).

51. *Id.* at 111.

powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.

After consideration by the House and Senate, Madison's proposal, somewhat amended, emerged as the eleventh of 12 proposed amendments to be submitted to the states.<sup>52</sup>

Two of the 12 amendments proposed by congress failed to be ratified by the states. The remaining ten, which we know today as the Bill of Rights, were ratified by the necessary eleven states (union now containing 14 states) by December 15, 1791, when they took effect.<sup>53</sup> The defeat of two proposals by the states meant that the eleventh proposed amendment became the ninth amendment of the Constitution, a change which was to figure in later confusion about its interpretation.<sup>54</sup> It is to the use and interpretation of this brief, but potentially important amendment that we now turn.

There would appear to be at least three reasons why the ninth amendment was seldom applied by the courts prior to *Griswold*. One reason for the limited use of the ninth amendment, at least until the *Griswold* decision, is to be found in Justice Story's interpretation of the provision as a mere rule of construction.<sup>55</sup> Second, mistaken identification in an early Supreme Court case may have misled other courts on subsequent occasions into an arguably unnecessary refusal to apply the ninth amendment to state action, thereby cutting off the most likely source of litigation.<sup>56</sup> Finally, after the Civil War, the fifth and fourteenth amendments were available, par-

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52. On the treatment of Madison's proposals within the House and Senate see generally, PATTERSON, *supra* note 47; Ringold, *supra* note 24; and DUMBALD, *supra* note 43.

53. The two defeated amendments dealt with population rations in the House of Representatives, and postponement of congressional salary changes until an intervention election occurred. See PRITCHETT, *supra* note 40, at 24.

54. PATTERSON, *supra* note 47, at 24.

55. Joseph Story, U.S. Supreme Court Justice and author of an influential early treatise on the Constitution only briefly mentions the ninth amendment and indicates that it "was manifestly introduced to prevent any perverse or ingenious misapplication of the well-known maxim, that an affirmation in particular cases implied a negation in all others; and conversely that a negation in particular cases implies an affirmation in all others." J. Story, *2 Commentaries on the Constitution of the United States* 651 (5th ed. 1905). According to one modern scholar, "Story's explanation established the ninth amendment as a rule of construction to aid in the interpretation of other parts of the Constitution, primarily the first eight amendments. The clear implication is that the amendment has no substantive import and cannot, by itself, recognize any individual right." Ringold, *supra* note 24, at 10.

56. The most thorough historical study of the ninth amendment points to the importance of an ambiguity in an early case, *Lessee of Livingston v. Moore, et al*, 32 U.S. (7 Pet.) 469 (1833), which held that the ninth amendment did not extend to the states. The author points out that the *Livingston* case was really discussing the seventh amendment on jury trial. Written in an early period before the amendments were well known by number, the Court was referring to the location of the seventh amendment in the original list of twelve sent to the states for ratification. PATTERSON, *supra* note 47, at 24-25.

ticularly during the era of substantive due process, to protect unenumerated rights. According to Ringold, "[t]he Ninth Amendment seemingly became obsolete before its development began."<sup>57</sup>

In the Twentieth Century, however, a number of factors already discussed in this paper, including the increasing intrusiveness of government into the daily lives of people, have led to reevaluation of this provision. One of the earliest efforts in that direction was an article written in 1936 by a practicing attorney, Knowlton Kelsey, who argued that the Amendment must have meant more than Justice Story had concluded.<sup>58</sup> A more scholarly effort was undertaken by another attorney, Bennett Patterson, in his mid-1950's book on the subject, *The Forgotten Ninth Amendment*.<sup>59</sup> Like Kelsey, Patterson believed that the ninth amendment was a declaration of natural rights, but he supported his interpretation of the provision by a detailed legislative history and review of its judicial construction.<sup>60</sup> After reviewing the history of the adoption, Patterson concluded:<sup>61</sup>

The Ninth Amendment to the Constitution is a basic statement of the inherent natural rights of the individual. Nothing could be clearer than this statement. It is a declaration and recognition of individualism and inherent right, and such a declaration is nowhere else to be found in the Constitution. Its absence elsewhere in the Constitution accounts for its very presence in this Amendment.

It is clear that the views of Kelsey, Patterson, and later commentators such as Redlich<sup>62</sup> had a major influence upon Justice Goldberg's opinion in *Griswold*.<sup>63</sup>

A much more limited construction of the amendment, however, has obviously prevailed in the courts. In its most recent pronouncements on the subject, the Court has continued to view the ninth amendment primarily as a rule of construction.<sup>64</sup>

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57. Ringold, *supra* note 24, at 16.

58. Kelsey, *The Ninth Amendment of the Federal Constitution*, 11 IND. L.J. 309 (1936). According to Kelsey, the ninth amendment was meant to protect other existing rights, particularly natural rights such as the pursuit of happiness, self-preservation and privacy. While provocative, Kelsey's work was flawed by an absence of any serious historical scholarship on the substance of those rights.

59. PATTERSON, *supra* note 47.

60. *Id.* at 6-35.

61. *Id.* at 19.

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

63. *Griswold v. Connecticut*, 381 U.S. 479, 486-499 (1965) (concurring).

64. See *Richmond Newspapers, Inc. v. Commonwealth of Virginia*, 448 U.S. 555 (1980). The Court, in an opinion by the Chief Justice, held that a Virginia statute which authorized exclusion of the press from criminal trials at the discretion of the trial judge, was an unconstitutional violation of the first and fourteenth amendments. In a brief discussion of the ninth amendment, the Chief Justice pointed out that the "Court has acknowledged that certain unarticulated rights are implicit in enumerated guarantees." 448 U.S. at 579 (emphasis added). Specifically mentioned by the Chief Justice was the right to privacy, with a citation to *Griswold*. 448 U.S. at 580

Which interpretation of the ninth amendment is correct? Is it merely a rule of construction, or is it an independent source of substantive rights? Although the dominant interpretation is that it is a rule of construction to be applied to the enumerated rights in the Constitution, the better historical argument supports the view that the ninth amendment is, in effect, an independent source of substantive rights.

Clearly the amendment is at least a rule of construction. But, it was meant to be more than simply a rule of construction; it was also to be a source of substantive rights. This conclusion is based upon three factors. First, Madison was clearly concerned about the inability to adequately express certain rights, and apparently chose the phraseology of the ninth amendment with this problem in mind.<sup>65</sup> Second, a natural rights philosophy was pervasive in that era, as indicated by the "inalienable rights" of the Declaration of Independence, the Virginia Bill of Rights,<sup>66</sup> the numerous proposals for amending the constitution arising out of the state ratification conventions,<sup>67</sup> and other sources.<sup>68</sup> Third, there is the plain meaning of the amendment: it explicitly refers to "other" rights "retained by the people."<sup>69</sup> There is no indication from the historical record that these "other" rights were to be mere extensions of enumerated rights. If the provision had been intended merely to permit a liberal construction of other enumerated rights, it could have, should have, and almost certainly would have been expressed differently. For these reasons, I conclude that the ninth amendment was intended by the Founding Fathers both as a rule of construction to be applied to other enumerated rights, and as an independent source of sub-

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n.16. Note, however, that this use of the amendment as a rule of construction relates only to the interpretation of the *enumerated* rights in the Constitution. Clearly, then, as used by Chief Justice Burger the Ninth Amendment is not an independent source of rights. The following additional cases have briefly discussed the ninth amendment since 1978: *Zablocki v. Redhail*, 434 U.S. 374, 379 (1978); *U.S. v. Helstoski*, 442 U.S. 477, 482 (1979); *City of Rome v. U.S.*, 446 U.S. 156, 182 (1980); *Harris v. McRae*, 448 U.S. 1022, 1024 (Order, J., Brennan in dissent); *Davis v. Scherer*, 52 U.S.L.W. 4956, 4957 (1984); *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1, 5 (1980); *Dun & Bradstreet, Inc. v. Greenmoss Buildings, Inc.*, 105 S. Ct. 2939 (1985).

65. See Ringold, *supra* note 24, at 5, where a letter by Madison is reprinted. See also Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 Sup. Ct. Rev. 119. Kelly points out that Madison was concerned about the inability to adequately express in writing a broadly defined right of conscience which he strongly supported.

66. Reprinted in Dumbald, *supra* note 47, at 170-172.

67. *Id.* at 173-205.

68. PATTERSON, *supra* note 47, at 20, cites without additional reference the following statement attributed to John Adams, one of the leading political figures of the Constitutional period, and the second President of the United States: "You have rights antecedent to all earthly governments; rights that cannot be repealed or restrained by human laws; rights derived from the Great Legislator of the Universe."

69. U.S. CONST. art. VII. See also PATTERSON, *supra* note 47, at 19.

stantive rights "retained by the people" that could be protected by the courts from governmental invasion.<sup>70</sup>

#### IDENTIFYING RIGHTS RETAINED UNDER THE NINTH AMENDMENT

If the ninth amendment is a source of substantive rights, as argued in the preceding section, it is critical to identify those rights. Even more important, however, is to do so in a manner that deals with the threat of unbridled judicial subjectivity — *Lochner* in modern garb protecting personal liberties, rather than economic rights — so aptly pointed out by Justice Black in *Griswold*.

The reality of judicial subjectivity is illustrated by *State v. Abellano*,<sup>71</sup> a post-*Griswold* decision in which the Supreme Court of Hawaii struck down a local ordinance that prohibited participating in or attending a cockfight. The defendant, without a more substantial constitutional leg upon which to stand, claimed that the ordinance violated freedom of movement, which was allegedly part of the right of privacy. The state court relied upon the ninth amendment as a source of substantive rights in order to protect cockfighting by asserting that "[t]he ninth amendment is a reservoir of personal rights necessary to preserve the dignity and existence of men in a free society."<sup>72</sup>

Elsewhere, drawing upon the Universal Declaration of Human Rights, it has been argued that the ninth amendment could protect such varied and ill-defined "rights" as personal dignity, the development of personality, and political asylum.<sup>73</sup> Additionally, it has been suggested that the amendment could protect the right of political participation, access to information, social and economic well-being, and a right to treatment for mental illness.<sup>74</sup> Such use of the ninth amendment seems, at least in some cases, to be excessive and unwarranted, fulfilling the worst fears of Justice Black.

A variety of proposals have been advanced to deal with the potential abuse of the ninth amendment. Justice Goldberg, for example, argued that the amendment should extend to the protection of

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70. As long as the ninth amendment is not limited as a rule of construction for enumerated rights, perhaps it matters little whether it is called a rule of construction for the entire constitutional scheme (the use made of it by Justice Goldberg), or whether, as is done here, it is conceptualized as an independent source of substantive rights. In either case, the result should be the same. I simply conclude that the ninth amendment has meaning beyond that often recognized by courts or commentators, that it could serve to protect unenumerated rights of the people, and that such unenumerated rights need not be within the penumbra of existing enumerated rights.

71. 441 P.2d 333 (Ha. 1968).

72. *Id.* at 337, 339.

73. See Ringold, *supra* note 24, at 48; Bertelsman, *supra* note 1, at 790-792.

74. Kutner, *The Ninth Amendment: The 'Other Rights' Retained by the People*, 51 MARQ. L. REV. 121, 138-139 (1967).

"fundamental" rights, and that judges "must look to the 'traditions and (collective) conscience of our people' to determine whether a principle is (fundamental)."<sup>75</sup> Unfortunately, Goldberg examined the history of the ninth amendment, but only asserted a "tradition" of privacy in his concurrence, a point which did not escape Justice Black. It would appear that the Goldberg formula is largely unapplied, and probably unworkable. What is needed is "an objective authority against which judges can measure 'their personal and private notion' of what these fundamental rights ought to be."<sup>76</sup>

I suggest that the following standards could usefully guide the development and application of the ninth amendment:

1. The right should be comparable to existing enumerated rights in importance and character.<sup>77</sup>
2. The right should have historic justification in the sense that there is evidence that the right was enjoyed by people prior to the adoption of the Bill of Rights.<sup>78</sup>
3. The right should be pervasive, in the sense that it is capable of being exercised by most citizens on a frequent basis.

For present purposes, the standard of principal interest is that of historical justification. "In seeking protection for unenumerated personal freedoms . . . the basic liberties which are supported by substantial historical antecedents are mostly likely to be accorded protection."<sup>79</sup> The remainder of this paper is devoted to a consideration of the historical evidence, defined in the broadest sense of that term, that would support the existence of a right to privacy.

### HISTORICAL PERSPECTIVES ON PRIVACY

The most obvious source of historical evidence for the existence of a right of privacy is to be found in relevant case law, commenta-

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75. *Griswold v. Connecticut*, 381 U.S. 479, 492-493 (1965).

76. Bertelsman, *supra* note 1, at 788-789.

77. This idea is developed by Redlich, who argued that "The language and history of the . . . (ninth) indicate that the rights reserved were to be of a nature comparable to the rights enumerated. They were 'retained . . . by the people' not because they were different . . . but because words were considered inadequate to define all of the rights which man should possess in a free society." Redlich *supra* note 62, at 810-811.

78. This and the following "standard" are adapted from criteria suggested in a law review note. Note, *Constitutional Law — Abortions: Abortions as a Ninth Amendment Right — Babbitt v. McCann*, 46 WASH. L. REV. 565, 572-573 (1971).

79. Ringold, *supra* note 24, at 46. Elsewhere, Justice White has written in dissent, "[w]hat the deeply rooted traditions of this country are is arguable." *Moore v. City of East Cleveland*, 97 S. Ct. 1932, 1962 (1977). This is undoubtedly a truism. Historical research is not a panacea, but it should help to inform judicial opinion and minimize the risk of subjectivity. As Lawrence Tribe points out, however, it will not absolve judges of responsibility for developing and defending a theory of what rights are 'preferred' or 'fundamental' and why." L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 573 (1978).

ries, statutes and governmental enactments. While our primary concern is clearly with the English and American precedents, it is interesting to note that perhaps the earliest indication of a legal right of privacy comes from second century Jewish law.<sup>80</sup> Whether there is any connection between these early pronouncements and the later situation in England and America is highly problematic, but still intriguing.

The relationship between English and American colonial law is, of course, much more direct and significant. For this reason, it is important to briefly examine the legal status of privacy in England in the period before American independence.

At early English law, there appears to be no recognition of an enforceable general right of privacy.<sup>81</sup> However, some privacy interests were protected through decisions based upon trespass *vi et armis* or property law concepts.<sup>82</sup>

The key English case in this area is *Entick v. Carrington*,<sup>83</sup> reported by Coke and later cited in the leading nineteenth Century Fourth Amendment case *Boyd v. U.S.*<sup>84</sup> *Entick* was part of a larger controversy that raged in England and the colonies during the 1760's over the use and abuse of general search warrants.<sup>85</sup> These warrants were frequently used to seize the personal papers of political dissidents.<sup>86</sup> In *Entick* the use of general search warrants was disallowed on a trespass theory. However, the language of the opinion appeared to be groping toward a significantly larger concept of privacy.<sup>87</sup>

80. S. HOFSTADTER, *THE DEVELOPMENT OF THE RIGHT OF PRIVACY IN NEW YORK* 1 (1954).

81. *Id.* at 4.

82. In a very general sense, of course, the concept of trespass to persons was a kind of privacy interest in personal autonomy that developed very early in tort law. See *I de S et ux. v. W de S*, Y.B. Lib. Assis. f. 99, pl. 60 (1348). More significantly, the American constitutional protection against "unreasonable searches and seizure" is foreshadowed by several English trespass cases dating back as far as 1499. Those cases stand for the proposition that a "man's home is his castle." See Y.B. Mich. 21 Hen 7, F. 39, pl. 50 (1499), as noted in 2 *THE REPORTS OF SIR JOHN SPELMAN* 316 n.2 (94 Selden Society, J. Barker ed. 1978). See also *Semayne's Case*, 5 Co. Rep. 91a, 91b, 77 Eng. Rep. 194, 195 (1605).

83. *Entick v. Carrington*, 19 Howell State Trials 1029 (1765).

84. *Boyd v. United States*, 116 U.S. 616, 625-626 (1886).

85. According to O'BRIEN, *supra* note 4, at 38, colonists also complained against the use of writs by royal officers. See also *Paxton's Case*, Quincy's Reports 51 (Mass. 1761).

86. O'BRIEN, *supra* note 4, at 38.

87. *Entick v. Carrington*, 19 Howell State Trials 1029 (1765). The Court in *Entick* held that papers are the owner's goods and chattels; they are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection; and though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away, the *secret nature* of these goods will be an aggravation of the trespass." (emphasis added) The broad privacy underpinnings of *Entick* were not lost upon the U.S. Supreme Court when it had an op-



During the eighteenth century the English court also faced the issue of privacy in a case involving the unauthorized publication of personal letters. In *Pope v. Curl*,<sup>88</sup> the court relied upon property law to vest ownership of the letters in the author, famed essayist Alexander Pope, rather than the publisher. Thus, a clear privacy interest was upheld on the basis of a property right.

While certain privacy interests were protectible under English law, it would be misleading to state that a legally protected general right of privacy existed in this period. The most significant development appears to be the movement *sub silentio* to protect a reasonably broad sphere of personal privacy in *Entick*.

It has been suggested that the concept of privacy as a legal entity did not exist in the seventeenth century American colonies.<sup>89</sup> For example, one of the first recorded instances of an invasion of privacy occurred at the Plymouth Colony in 1624, where mail was intercepted and read by the governor.<sup>90</sup> Further to the south, loyalty oaths were used in Virginia and Maryland to harass and invade the personal privacy of Catholics.<sup>91</sup>

On the other hand, certain privacy interests were recognized even in the earliest period of colonial settlement. For example, the Fundamental Agreement of New Haven (Conn.) of 1639 provided that persons who had committed "private offenses," would still be eligible for high community office, while those whom they had offended were told to "deal with the offender privately."<sup>92</sup> During this same period the Massachusetts Body of Liberties of 1641 protected privacy by sharply limiting the affirmative duty to inform on wrong-

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portunity to raise the issue more than one hundred years later. In *Boyd v. U.S.*, Justice Bradley argued that "the principles laid down in *Entick* . . . affect the very essence of constitutional liberty and security . . . they apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life." *Boyd v. U.S.*, 116 U.S. at 630.

88. *Pope v. Curl*, 26 Eng. Rep. 608 (1741).

89. O'Connor, *The Right to Privacy in Historical Perspective*, 53 MASS. L.Q. 101, 102 (1968).

90. *Id.* at 101-102. Governor William Bradford intercepted a batch of incriminating letters sent to two colonists suspected of plotting against the leadership. When confronted with the evidence, which was read to the public, the men were outraged, but refused to say a word when asked if they thought the governor had been wrong. This violation of what today would almost certainly be regarded as a privacy interest, apparently went unchallenged. Elsewhere it has been argued that "there can be little doubt that many of the colony's achievements were accomplished at the expense of individual personal liberty." G. HASKINS, *LAW AND AUTHORITY IN EARLY MASSACHUSETTS* 223 (1960).

91. Asper, *The Long and Unhappy History of Loyalty Testing in Maryland* 13 AM. J. LEGAL HIST. 97 (1969). The oath in Maryland required disavowal of "that damnable Doctrine and Position, that Princes may be excommunicated or deprived by the Pope, or any Authority of the See of Rome." *Id.* at 100.

92. 2 SOURCES AND DOCUMENTS OF U.S. CONSTITUTIONS 125 (W. Swindler ed. 1973).

doers in the community,<sup>93</sup> providing a limited privilege against self-incrimination,<sup>94</sup> and allowing free movement of persons.<sup>95</sup>

The Laws and Liberties of 1648, an outgrowth of the Body of Liberties, formed the basis of civil and criminal administration in Massachusetts throughout most of the colonial period.<sup>96</sup> Several provisions of that document also promoted privacy interests. For example, it recognized a right to be silent before any court, council or civil assembly, when called upon for advice, vote, or verdict.<sup>97</sup>

According to one author, the court systems of colonial New England showed a definite sensitivity about the privacy of individuals. Although courts were generally open to the public, they might be closed when delicate matters, often involving sexual offenses, were before the courts.<sup>98</sup> Moreover, the pattern of actual statutory enforcement should not be overlooked as a factor affecting privacy. Flaherty admits that many Massachusetts laws would be regarded as intrusive today, but points out that many of the New England laws that threatened personal privacy were not consistently and conscientiously enforced in any colony.<sup>99</sup>

Despite the examples above, the social and political structure of tightly-knit colonies like Massachusetts undoubtedly intruded into what would today be the private sphere of the individual. Nonetheless, these early legislative enactments and court procedures lend strong support to the view that the privacy rights of colonists were more substantial than those enjoyed in England at the same time. Moreover, as Haskins suggests, the political and legal arrangements instituted by the colonists, as well as the assumptions that underlay them, contained the seeds of ideas that later became and still remain part of the American heritage.<sup>100</sup>

An examination of later colonial charters,<sup>101</sup> state governing documents from the period of the Articles of Confederation,<sup>102</sup> and amendments proposed by the states as part of the Constitutional ratification process<sup>103</sup> is inconclusive on the issue of a general right of privacy. Certainly the enumerated rights were widely recognized

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93. 5 SOURCES AND DOCUMENTS OF U.S. CONSTITUTIONS 56 (W. Swindler ed. 1973).

94. D. FLAHERTY, *PRIVACY IN COLONIAL NEW ENGLAND* 232 (1972).

95. HASKINS, *supra* note 90, at 130.

96. Wolford, *The Laws and Liberties of 1648* 28 B.U.L. REV. 430 (1948).

97. *Id.* at 438.

98. FLAHERTY, *supra* note 94, at 219.

99. *Id.* at 167.

100. HASKINS, *supra* note 90, at 229.

101. See the excellent multi-volume collection of colonial charters in *THE FEDERAL AND STATE CONSTITUTIONS* (F. Thorpe ed. 1909).

102. *Id.*, *passim*.

103. DUMBALD, *supra* note 43, at 173-205.

during this period, but there is no explicit statement about a general right to privacy. Given the complexity of the privacy issue, of course, no such statement should have been expected. What emerges most clearly from the later documents is a basic concern for fundamental human rights, frequently expressed as natural rights.<sup>104</sup>

Read in context, the legal materials do provide some support for the prior recognition of a right to privacy. However, the historical search for a privacy right should not be limited to case law, statutes or constitutional materials. Fundamental rights not spelled out in the Constitution are likely to have been omitted either because they were patently obvious and widely respected, or because they were difficult to express in precise legal terminology. The search for a right of privacy, therefore, must go beyond case law and statutory analysis to consider insights from philosophy and religion, anthropology and social history.

According to one author, the development of a right of privacy is intimately tied up with the development of individualism in religion and philosophy.<sup>105</sup> Equally important are the developing concepts of natural law, so frequently expressed in the foregoing constitutional documents. According to Haskins, the colonists of Massachusetts "identified man-made rules with the law of God, the law of nature and the law of reason."<sup>106</sup> From natural law comes the idea that man in a state of nature was an autonomous person with all rights, presumably including a right of privacy. Man entered society to protect those pre-existing rights.<sup>107</sup>

One may also search for a right of privacy in anthropological studies of mankind. For example, Westin traces modern American privacy notions back to the ancient Greeks, and tries to demonstrate the universality of privacy by citing various ethnological studies.<sup>108</sup>

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104. 7 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 101, at 3812.

105. Konvitz, *supra* note 12, at 273. According to Konvitz, "Once a civilization has made a distinction between the 'outer' and the 'inner' man, between the life of the soul and the life of the body, between the spiritual and the material . . . between the realms of God and the realm of Caesar, between Church and state . . . it becomes impossible to avoid the idea of privacy by whatever name it may be called."

106. HASKINS, *supra* note 90, at 228.

107. While rights may be limited in society, this does not mean that they have been, or can be abolished. As an example of this idea, protection against self-incrimination has sometimes been justified on natural law grounds. See, e.g., J. ANTICAN, *RIGHTS OF OUR FATHERS* 104-108 (1968); Connery, *Morality and the Fifth Amendment*, 3 CATH. LAW. 137 (1957).

108. WESTIN, *supra* note 5, at, 7-13. Possibly the most thorough study of privacy from a social science perspectives was undertaken by Westin, a Professor at Columbia University with degrees in both law and political science. Westin was selected to direct a research project on privacy organized by the Special Committee on Science and Law of the Association of the Bar of the City of New York in 1959. According to Westin: "Privacy derives first from man's animal origins and is shared, in quite real terms, by men and women living in primitive societies." *Id.* at 7. Among others, Wes-

Writing in a similar vein, popular author Robert Ardrey, in his work *The Territorial Imperative*, utilizes studies of animal behavior to conclude that animals and man seek privacy in the form of "individual distance."<sup>109</sup> While the conclusions of Westin and Ardrey about the universality of privacy are somewhat controversial, they are definitely supportive of the notion that privacy would have been a recognized value in American society before 1791.

The social history of Colonial New England is also supportive of the widespread existence of and demand for privacy. Flaherty points out, for example, that as soon as the colonists could afford to do so, they built homes with separate bedrooms and avoided multiple occupancy of homes.<sup>110</sup>

After evaluating the substantial evidence available from colonial records, Flaherty concludes that his study supports the existence of a constitutional right of privacy as expounded by the majority in *Griswold*.<sup>111</sup> The Supreme Court sensed the true dimensions of the colonial and revolutionary situation with respect to privacy, even though the existing scholarly literature did not shed much light on the matter. The colonists believed they had a general right of privacy and had asserted it long before the writing of the Bill of Rights; it flourished in the Eighteenth Century on an individual basis. The Founding Fathers had no reason to anticipate the consequences of modernization that would require a much more comprehensive development of legal protections for the right of personal privacy. Privacy was needed at that time.

The preceding material illustrates the manner in which social history, including the study of religion, philosophy and anthropology, can be used to give substantive content to the Ninth Amendment. Thus, a substantial argument can be made for a general pre-existing right of privacy. Nevertheless, the state of historical knowledge may preclude a definitive consensus on certain issues of importance. To some extent this appears to be the case with regard to the historical basis for a right of privacy in sexual matters such as contraception and abortion.

The definition of privacy as a ninth amendment right retained by the people began, for all practical purposes, with *Griswold*<sup>112</sup> and

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tin cites the work of cultural anthropologist Dorothy Lee on the Utopia of Polynesia and Margaret Mead's famous study of Samoan life to support his thesis that a demand for privacy in some form is found in all societies. See D. LEE, *FREEDOM AND CULTURE* 31-32 (1959); M. MEAD, *COMING OF AGE IN SAMOA* 82-85 (1949).

109. R. ARDREY, *THE TERRITORIAL IMPERATIVE* 158 (1966).

110. FLAHERTY, *supra* note 94, at 26-112.

111. *Id.* at 249.

112. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

its progeny in the field of abortion law, *Roe v. Wade*.<sup>113</sup> It is appropriate therefore, to briefly examine at this point the historical basis for a right to personal autonomy or privacy in contraception and abortion decisions.<sup>114</sup>

The principal question here is the extent to which a right to privacy in sexual matters existed in England and the United States prior to 1791. Certainly there is evidence based upon an analysis of demographic trends and popular literature, that contraception and abortion were practiced in English society. One study of demographic change in the Colyton parish of east Devon concluded that "*coitus interruptus* may well have been the most important method of family limitation . . . in the seventeenth and early eighteenth century."<sup>115</sup> And Angus McLaren, relying upon "quack" literature, has compiled a fascinating study of the wide variety of prophylactic devices and abortifacients available in the eighteenth century.<sup>116</sup>

The legal status of abortion, however, is subject to controversy. The first English statute dealing with abortion, Lord Ellenborough's Act, was not enacted until 1803.<sup>117</sup> Prior to 1821, when Connecticut passed a similar provision, there was no American statute concerning abortion, and prosecution of abortion as violative of common law was virtually nonexistent.<sup>118</sup> These facts are indicative of a lenient attitude toward this subject during this period.

Moreover, the commentators are in disagreement. Early pronouncements by Bracton and Fleta dating from the thirteenth century indicate that abortion of an animated fetus is homicide.<sup>119</sup> But the sixteenth century commentator, Sir William Stanford, concluded that "the contrary of this seems to be the law," going so far as to say that it was not a felony, nor even what we would today call a misdemeanor.<sup>120</sup>

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

114. Abortion, for example, has a long history, dating back to ancient China and Egypt. For a review of the subject see, Symposium, *History of Abortion Law*, 1980 ARIZ. ST. L.J. 73.

115. WRIGLEY, *Family Limitation in Pre-Industrial England*, in *POPULAR ATTITUDES TOWARD BIRTH CONTROL IN PRE-INDUSTRIAL FRANCE AND ENGLAND* 92 (O. Ranum & P. Ranum eds. 1972).

116. A. McLAREN, *BIRTH CONTROL IN NINETEENTH-CENTURY ENGLAND* 19-39 (1978).

117. Symposium, *supra* note 114, at 91.

118. *Id.* at 93.

119. Means, *The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1968*, 14 N.Y.L.F. 411, 419 (1968).

120. As quoted in Means, *The Phoenix of Abortional Freedom*, 17 N.Y.L.F. 335, 341 (1971). According to Means, the discredited dictum of Bacton was partly resurrected by Sir Edward Coke as part of his struggle against the ecclesiastical courts. Coke concluded that abortion after quickening was "a great misprison, but no murder." Whatever the merits of this argument, Coke's version of the common law prevailed among later writers including Blackstone, thus setting the stage for even-

The modern continuation of this debate about the common law of abortion is crystallized in the contemporary writings of Cyril Means, Jr.<sup>121</sup> and Joseph Dellapenna.<sup>122</sup> Means is a strong advocate of elective abortion. The critical element of Means' analysis, is the common law status of abortion. Means bases his argument directly upon the ninth amendment, explicitly stating that "only if in 1791 elective abortion was a common law liberty, can it be a ninth amendment right today."<sup>123</sup> Means relies heavily upon an interpretation of several early Year Book cases as evidence that an expectant mother and her abortionist had a common-law liberty of abortion at every stage of gestation.<sup>124</sup>

A well-researched and well-reasoned argument to the contrary, however, has been made in a recent article by Dellapenna.<sup>125</sup> In essence, Dellapenna argues that Means misinterpreted key cases from the common law. According to Dellapenna, "[p]rior to 1600, there is very little reference to abortion in either treatises or reported common law cases. The two fourteenth century cases are inconclusive as to the state of abortion law or the impact of abortion technology on that law."<sup>126</sup> In general, Dellapenna argues that Means reads too much into the cases, where the most reasonable interpretation is that the actions were dismissed for lack of proof. As he points out, a dismissal due to problems of proof or procedures does not make the underlying conduct lawful.<sup>127</sup>

For both Means and Dellapenna the role of technology is critical. For Means, the risk of shock and infection during surgery in the nineteenth century led to anti-abortion statutes as a health measure.<sup>128</sup> Dellapenna indicates that it is the interactive development

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tual legislative enactments. It is not clear, however, that the commentators such as Coke and Blackstone, actually reflected the common law on this point, since there is a lack of case support for Coke's view. *Id.* at 345-349. See also, Symposium, *supra* note 114, at 91.

121. Means, *supra* note 119 and 120.

122. Dellapenna, *The History of Abortion: Technology, Morality and Law*, 40 U. Prrt. L. Rev. 359 (1979).

123. Means, *supra* note 120, at 336.

124. *Id.* at 337-343. The first and most important of these cases is *The Twin-slayer's case*, *Y.B. Mich.* 1 Edns. 3, F. 23, pl. 18 (1327), dating from 1327, where D., accused of beating a woman in an advanced stage of pregnancy was released despite the fact that one child died at birth, while the other was baptised but died, "two days afterwards, through the injury he sustained." From this Means concludes that it "establishes beyond all cavil that an abortion . . . was not a felony at all at common law." *Id.* at 338.

125. Dellapenna, *supra* note 122, *passim*. See also J. NOONAN, JR., *A PRIVATE CHOICE* (1979). Noonan's discussion is wide-ranging and thoughtful.

126. Dellapenna, *supra* note 122, at 336. With regard to *The Twin-slayer's case*, "the action was adjourned without decision because the defendant was being prosecuted on another, unrelated charged," also a felony punishable by death. *Id.* at 337.

127. *Id.* at 367.

128. According to Means, since the right of privacy in the abortion decision is

of abortion and evidentiary technology, along with the decline of ecclesiastical jurisdiction that made criminal prosecutions for abortions more feasible in the nineteenth and twentieth century.<sup>129</sup> As abortions became safer, they presumably became more common, and the rise of prosecutions and statutes were "a solemn reaffirmation of social policy, warning both mothers and would be abortionists of the consequences of their acts."<sup>130</sup> Based upon this analysis, he concludes that the Supreme Court's discussion of history is inaccurate and inconclusive, and, in any event, unrelated to its later conclusion.<sup>131</sup>

Who has the better view in this debate? The evidence is exceedingly complicated. I tend to agree with Dellapenna that Means has overstated the case for a common law right to abortion. Nonetheless, certain privacy rights in sexual matters do seem to have a solid historical basis that would justify their protection under the ninth amendment. For example, the availability of contraceptive devices seems to have been widespread in England. Presumably they would also have been available in the colonies, since technology knows no boundaries. Moreover, it seems clear that early abortions, those before quickening, were historically not punished at all. To this degree the decisions in *Griswold* and *Roe v. Wade* seem to have correctly, but intuitively, identified limited historical rights of privacy in sexual matters. Nevertheless, from a scholarly viewpoint the analyses are not entirely satisfactory. Perhaps the most that can be said is that the historical evidence for aspects of sexual privacy is inconclusive. Under the circumstances additional research should be encouraged.

### CONCLUSION

In this paper I have attempted to outline the historical development of the legal concept of privacy in America, the legislative history and interpretation of the ninth amendment, and the historical underpinnings for the existence of a right of privacy in the constitutional period. I believe that the evidence supports the view that the proper interpretation of the ninth amendment is as a source of substantive rights *retained by the people*. There is also substantial evidence that a general right of privacy, including some aspects of sex-

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not an absolute right, nineteenth century laws designed to balance interests of autonomy and maternal health were then constitutional. However, the fact that abortions are today safer than childbirth, means that the reason underlying the statutes are invalid, and the acts themselves are now unconstitutional. Means, *supra* note 120, *passim*.

129. Dellapenna, *supra* note 122, at 435.

130. *Id.* at 395.

131. *Id.* at 424.

ual activity, existed in the United States prior to the adoption of the ninth amendment, and thus should be considered one of those rights “retained by the people.”

In appropriate situations, the legal profession should stimulate and encourage additional research to further define the rights retained by the people.<sup>132</sup> In that manner the courts in future cases may be more able and willing to rely upon the ninth amendment as a source of additional substantive rights retained by the people.

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132. See, e.g., the discussion of historical evidence for the right of the public to attend trial in *Richmond Newspapers, Inc. v. Commonwealth of Virginia*, 488 U.S. 555 (1980). This case is briefly discussed *supra*, at note 64. The use of historical evidence here is indicative of the use which could be made of such material in other cases.



