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PROPERTY AND PERSONAL PRIVACY: INTERRELATIONSHIP, ABANDONMENT AND CONFUSION IN THE PATH OF JUDICIAL REVIEW

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The constitutional right of privacy has a textually-rooted tradition. Until recently, the notion was directly linked to a property standard and subsumed generally under the fourth and, to a lesser extent, the fifth amendment. The modern Supreme Court has abandoned this narrow textual basis in favor of a more general principle, one identified with the infinitely maleable term, "liberty." On the surface, this change appears to promote the expansion of protected personal rights against governmental encroachment. However, an examination of current cases reveals that this ostensible expansion, in fact, has not occurred. A return to a property-related understanding of privacy will in fact furnish a much stronger weapon in defense of these rights.

THE BACKGROUND

Throughout American history, judges reviewing the constitutionality of laws have debated and variously decided the question of whether to confine their inquiry to norms derived from the written Constitution or to principles of liberty and justice located beyond the document. Over time, three forms of extra-constitutional sources have been invoked in judicial review. The first and purest of these forms is the invocation of general principles of natural justice, which are thought to limit legislative authority quite independent of the terms (or even the existence) of a written constitution.[1] This approach was quite common in our early history and while vestiges of it occasionally recur, it has been largely superseded by the second type of review.

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1. *See generally* Corwin, *The Basic Doctrine of American Constitutional Law*, 12 MICH. L. REV. 247 (1914); Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149, 365 (1928-29). *See also* Grey, *Do We Have An Unwritten Constitution?* 27 STAN. L. REV. 703 (1975).

The dominant form of review since the middle of the last century has been the doctrine of substantive due process.[2] Courts have found in the due process clause, and in the law of the land clauses of state and federal constitutions, general authority to protect against legislative infringement those individual rights which they judge to be fundamental. Because these clauses do not specify the normative content of the basic rights in question, courts are required to look beyond the express language of the clauses to their legislative history and to the dictates of reason in order to interpret and apply them.

The third form of review involves judicial application of contemporary norms or values as restraints upon legislative power to certain clauses of the Constitution where the framers of the Constitution would have seen such clauses as embodying different, flexible standards.[3] The clearest example of this practice is the prevailing doctrine that the prohibition against cruel and unusual punishment is to be read in the light of evolving standards of decency.[4] Another use of this doctrine is the application of "community standards" in measuring obscenity against the protection of expression.[5] This notion of a "living Constitution" is distinguished from the essentially harmless and uncontroversial concept of the living Constitution that provides courts with the opportunity to apply norms or principles the framers laid down to new or changed factual circumstances the framers did not forsee without resort to constitutional amendment.

Unfortunately, by reaching beyond a simple interpretation of specific constitutional text,[6] courts have become vulnerable to several lines of criticism. One criticism has been that however high-sounding the names that judges give to these unwritten principles

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2. *See, e.g.*, Baggett v. Bullitt, 377 U.S. 30, 369 (1964) (freedom of the entire university community to be devoid of governmental intervention); NAACP v. Alabama, 357 U.S. 449, 462 (1960) (freedom to associate and to keep membership lists private); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (right to educate one's child as one chooses); Meyer v. Nebraska, 262 U.S. 390 (1923) (right to teach a foreign language).

3. See *infra* notes 4 & 5 for examples of this third form of review.

4. Robinson v. California, 370 U.S. 661 (1962). The Court held that it would be "cruel and unusual punishment" to imprison a person for being an addict by status alone without the presence of a correlating criminal act. *Id.* at 667. *Compare* Rhodes v. Chapman, 452 U.S. 337 (1981) (finding that the housing of two inmates in a cell designed for a single inmate does not violate the cruel and unusual punishment clause), *with* Estelle v. Gamble, 429 U.S. 97 (1976) (failure of prison authorities to provide for prison inmate's medical needs constitutes cruel and unusual punishment).

5. *See* Miller v. California, 413 U.S. 15 (1973).

6. *See infra* text accompanying notes 58-77 for an analysis of the modern Supreme Court and its apparent predilections for non-textual review in the area of personal privacy.

which are thought to override a statute, these doctrines are not *legal* principles. Judges, therefore, arguably have no superior ability to ascertain their contents than does a popularly elected legislature.

Other grounds for attack have been that non-textual judicial review has historically produced bad results. Typically, the cases of *Dred Scott v. Sandford*[7] and *Lochner v. New York*[8] have been cited to show what an injurious impact this approach to decision-making can have on the country. The Court itself has been critical of its earlier stand. Finally, the very legitimacy of this form of review has been questioned. The Constitution does not explicitly authorize non-textual review, nor does it prohibit it. Ironically, the question itself is one of constitutional interpretation.

In spite of the controversy surrounding non-textual review, it is apparent that the Supreme Court has utilized this approach from the beginning. For the generation that framed the Constitution, the concept of a "higher law," protecting "natural rights," which should take precedence over ordinary positive law as a matter of political obligation, was widely shared and deeply felt.[9] Although an essential element of American constitutionalism was the reduction of some natural rights to written form, it was generally recognized that written constitutions could not completely codify the higher law. Thus, in the framing of the original American constitutions, it was widely accepted that unwritten, but still binding, principles of higher law remained. The ninth amendment, protecting other rights not specifically embodied in the Constitution, is the textual expression of this idea.

Just as it was accepted that the judiciary had the power to enforce the commands of the written Constitution when these mandates conflicted with ordinary law, it was also widely assumed that judges would enforce as constitutional restraints the unwritten natural rights as well. The practice of the Marshall Court and many of its contemporary state courts, and the writings of the leading constitutional commentators during the early period of our history, confirm this understanding.[10]

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7. 19 How. 393 (1856).

8. 198 U.S. 45 (1905).

9. *See, e.g.*, Calder v. Bull, 3 U.S. (3 Dall.) 385 (1798). Justice Chase adamantly declared that "[t]here are certain *vital* principles in our *free Republican governments*, which will determine and overrule an apparent and flagrant abuse of *legislative* power; as to authorize *manifest injustice by positive law*; or to take away that security for *personal liberty*, or *private property*, for the protection whereof the government was established." *Id.* at 388 (emphasis added).

10. *See, e.g.*, Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810). In *Fletcher*, Justice Marshall flirted with a natural law-vested rights approach as an alternative means for invalidating Georgia's attempt to revoke a land grant. *Id.* Justice Johnson's concurrence repudiated any reliance on the contract clause of the

A parallel development during the first half of the 19th century was the frequent attachment of unwritten constitutional principles to the more vague and general clauses of the state and federal constitutions.[11] Natural-rights reasoning in constitutional adjudication persisted up to the Civil War, particularly with respect to property and contract rights, and to the "due process" and "law of the land" clauses. At the same time, an important wing of the anti-slavery movement developed a natural-rights constitutional theory, built around concepts of due process and human equality proclaimed in the Declaration of Independence.[12] This movement provided a formative theory underlying the due process, equal protection, and privileges and immunities clause of the fourteenth amendment. Section 1 of the fourteenth amendment was thus properly viewed as a reaffirmation and reenactment in positive law of the principle that fundamental human rights have constitutional status.

The late 19th century, the most controversial phase in our history of unwritten constitutional law, witnessed aggressively developing constitutional principles to protect "liberty of contract."[13] This doctrine protected against labor regulations and restrained taxation and private business' regulation of prices. The sharp reaction to this judicial practice marked the beginning of a sustained intellectual and political attack on the whole concept of unwritten constitutional principles. Under the combined assault of social and intellectual forces, courts eventually retreated from the doctrines of "economic due process," and finally abandoned it in the 1930's.[14]

Constitution and instead, he relied on the nature and reason of things. *Id.* at 43-48. *See also* Terrett v. Taylor, 13 U.S. (9 Cranch) 43 (1815) (state statute violated "principles of natural justice").

11. *See* Gelpcke v. Dubuque, 68 U.S. (1 Wall.) 175 (1864). In *Gelpcke*, Justice Swayne refused to follow the latest state supreme court interpretation of a state's own constitution, declaring that "the plainest principles of justice" prevented the state from nullifying a municipal bond obligation which was valid when written. *Id.* at 206-07. Similarly, in Loan Association v. City of Topeka, 87 U.S. (20 Wall.) 655 (1874), Justice Miller invalidated a municipal ordinance which had approved taxation to support the issuance of bonds to promote private industry. *Id.* Miller stated that "[t]here are rights in every free government beyond the control of the state," and that there are "limitations on such [governmental] power which grow out of the essential nature of all free governments." *Id.* at 662-63.

12. *See generally* Nelson, *The Impact of the Anti Slavery Movement upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513, 521-32 (1974).

13. *See* Allgeyer v. Louisiana, 165 U.S. 578 (1897), where the Supreme Court invalidated a Louisiana statute because it infringed upon the liberty to contract for insurance, thus violating the due process clause of the fourteenth amendment. *Id.*

14. *See* West Coast Hotel v. Parrish, 300 U.S. 379 (1937), where the Supreme Court reversed itself and permitted minimum wage legislation. *See also* United States v. Carolina Products Co., 304 U.S. 144 (1938), where the Supreme Court

Interestingly, almost simultaneously with the doctrines protecting the laissez-faire economy fading from judicial review, the judiciary began actively developing new civil libertarian constitutional rights whose protection were deemed "essential to the concepts of ordered liberty." For example, freedom of speech and religion,[15] rights to "fundamentally fair" proceedings,[16] and rights to familial autonomy in child-rearing and education[17] were judicially protected at the expense of state regulation. The present generation has seen the greatest development of constitutional rights not clearly derived from simple textual interpretation, most notably the right to vote, the right to travel, the right of privacy, and generally the rights resulting from application of "equal protection of the laws" to the federal government.[18] The intellectual framework upon which these rights have developed is theoretically different from the founding fathers' natural-rights tradition. Its rhetorical reference points are Anglo-American tradition and basic American ideals, rather than human nature, the social contract, or the rights of man. Yet, this development, in a direct and traceable line of descent, is essentially the modern offspring of the natural-rights tradition that is so deeply embedded in our constitutional origins.

TEXTUAL SUPPORT FOR THE RIGHT OF PRIVACY: THE TRADITION

In *Boyd v. United States*,[19] the Supreme Court broadly found that all governmental attempts to seize a person's private papers were unconstitutional under both the reasonableness clause of the fourth amendment and the self-incrimination clause of the fifth

announced that it would uphold an economic regulation if any state of facts either known or reasonably inferred provided support for the legislative action.

15. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444 (1969) (court declared state criminal syndicalism act unconstitutional as punishing mere advocacy); Sherbert v. Verner, 374 U.S. 398 (1963) (state cannot constitutionally apply eligibility provisions so as to constrain a worker to abandon his or her religious convictions respecting their Sabbath).

16. *See, e.g.*, Adamson v. California, 332 U.S. 46 (1947) (prosecution's comment on defendant's failure to take the stand was held a constitutional violation of due process rights).

17. *See, e.g.*, Pierce v. Society of Sisters, 268 U.S. 510 (1925) (right to educate one's child as one sees fit).

18. *See, e.g.*, Frontier v. Richardson, 411 U.S. 677 (1973) (right of female member of the armed forces to claim her spouse as "dependent"); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (right to vote). The court held that "wealth of fee paying has . . . no relation to voting qualification; the right to vote is too precious, too fundamental to be so burdened or conditioned." *Id.* at 670. *See also* Griswold v. Connecticut, 381 U.S. 479 (1965) (right to marital privacy); Edwards v. California, 314 U.S. 160 (1941) (state law punishing citizens who bring indigents into the state struck down as unconstitutional violation of right to travel).

19. 116 U.S. 616 (1886).

amendment. In that landmark case, the Court assumed that personality and the "privacies of life" were equated with the individual's inviolate property rights. Thus, the Court concluded that even a warrant or subpoena satisfying the probable cause and particularity requirements of the fourth amendment could not validate the use of private papers over the owner's objections in a trial.[20] Justice Bradley's opinion also successfully linked the Constitution to natural rights the common law secured and thereby created a defense in favor of an individual's sphere of privacy—a sphere composed of property rights and the privileges against self-incrimination.

Later cases, however, did not provide the breadth of protection for personal privacy which a literal reading of *Boyd* seemed to require. In early years of the 20th century, the Court began to limit *Boyd*'s application by stressing the personal nature of the protections and refusing to extend them to corporations.[21] The Court held that an individual could not assert a fifth amendment privilege against the use of papers which he no longer owned because of a transfer of title brought about in bankruptcy proceedings.[22] The Court also rejected plaintiffs' claims that, as custodians of corporate documents, they had protection in relation to materials the corporation owned.[23] The Court again moved toward greater personal privacy protection, however, in *Weeks v. United States*.[24] The Court's opinion reflected a property orientation consistent with that of *Boyd*.[25]

Weeks, which concerned a marshall's trespass, revived the earlier constitutionally-based exclusionary rule in a new form.[26] Seven years later, in *Gouled v. United States*,[27] a unanimous Court rested its decision to exclude a prosecutor's effort to introduce private papers into evidence upon *Boyd*'s holding that property in which the government could not assert paramount common law property rights was absolutely immune from search and seizure.[28] By 1925, the textual underpinnings of the fourth and fifth amendments had furnished the sources of constitutional protection for in-

20. *Id.* at 638.

21. *See* Hale v. Henkel, 201 U.S. 43 (1906).

22. *See* Johnson v. United States, 228 U.S. 457 (1913).

23. *See* Wilson v. United States, 221 U.S. 361 (1911).

24. 232 U.S. 383 (1914).

25. *Id.* at 386.

26. Justice Day's emphasis on the procedural requirements of the fourth amendment warrant clause may be a foreshadowing of the later realist jurisprudence, but his focus on the marhsall's trespass is nevertheless consistent with the property orientation of *Boyd*. *Id.* at 393-94.

27. 255 U.S. 298 (1921).

28. *Id.* at 309.

dividual privacy through the principles enunciated in *Boyd, Weeks*, and *Gouled*.

Unfortunately, because the sphere of privacy which emerged depended largely on traditional concepts of property for its definition, modern technical devices, such as wiretaps, presented problems the property perspective did not readily address. *Olmstead v. United States*[29] brought before the Court a situation in which no material property had been seized and no physical trespass had occurred, but a telephone wiretap was used to overhear defendant's conversations. Under the literal application of *Boyd* and *Weeks*, the Court held that no warrant was required and admitted the conversations into evidence.[30]

Olmstead failed to obtain protection because the Court applied the property doctrine developed in the *Boyd-Gouled* line of cases in a conservative and formalistic way.[31] Justices Brandeis and Holmes, dissenting separately, avoided a formalistic analysis.[32] Justice Holmes specifically abandoned the use of "logical deduction from established rules"[33] to find a solution, and instead attempted to balance the competing interests of detecting criminals and preventing government itself from fostering or committing crime.[34] Justice Brandeis, who emphasized that the Court had continually reinterpreted the Constitution, identified personal privacy, rather than property, as the central value underlying the fourth amendment guarantees.[35] Justice Brandeis' argument was a pragmatic one, and, his opinion, as well as Justice Holmes', signaled the development of a realist approach which was destined to replace the old formalism.[36]

Justice Butler also dissented, using formalistic reasoning to reach a conclusion quite opposite to that of the Chief Justice.[37] He argued persuasively that there existed a common law property right in the intangible conversations and telephone wires involved in the

29. 277 U.S. 438 (1928).

30. *Id.* at 465-66.

31. *Id.* at 442-43, 468 (court held that evidence to be excluded should be confined to cases where admission would violate constitutional rights).

32. Justice Holmes dissented but refused to find the defendant to be covered by the penumbra of the fourth and fifth amendments. *Id.* at 469 (J., dissenting). Justice Brandeis' dissent rested largely on the "unclean hands" doctrine. *Id.* at 483 n.16.

33. *Id.* at 470.

34. *Id.*

35. *Id.* at 473.

36. *Id.* at 471-85.

37. Justice Butler concluded that the fourth amendment "safeguards against all evils that are like and equivalent to those embraced within the ordinary meaning of its words." *Id.* at 488 (Butler, J., dissenting).

case.[38] Further, the government, by tapping the lines, had "literally" seized property in which it could claim no special title and the conversations, therefore, should have been excluded according to the *Boyd* principles. It should be noted in retrospect that Justice Butler refused to limit his analysis solely to physical invasions of privacy in the *Boyd* opinion.[39] Unfortunately, in *Olmstead*, Justice Butler was alone in attempting to reach a decision based completely on the individual's sphere of absolute property rights.[40]

By the 1930's, the old formalist approach, characterized by the controlling opinion of Chief Justice Taft in *Olmstead*, was beginning to give way to the newer jurisprudential theory of legal realism. This pragmatic emphasis resulted in a shift away from "stultifying metaphysics" and toward "social engineering."[41] One of the casualties of the shift was the *Boyd* and *Gouled* premise that private papers and other property were absolutely beyond the government's reach.[42] The total protection for any item which fell within common law property concepts was whittled down through a series of cases in which the Court allowed the police to seize an ever-expanding category of "instrumentalities" of crime, as opposed to mere evidence, where there was a search incident to an arrest.[43]

A gradual shift in determining the admissibility of evidence by analyzing the manner in which it was obtained, rather than its nature, marked a crucial turning point in the understanding of the fourth amendment's purpose. The old notion of absolute property rights gave way to an interpretation of the reasonableness clause.

In 1967, the Court applied its new fourth amendment focus by overruling *Olmstead* in the case of *Katz v. United States*.[44] In *Katz*, federal agents operating without a warrant attached a listening device to the outside of a public telephone booth and recorded incriminating information concerning the defendant's gambling activities. Justice Stewart, writing for the majority, flatly rejected the *Boyd* doctrine of "constitutionally protected areas" as being deceptive and misguided.[45] Justice Stewart noted that:

> [T]he fourth amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not

38. *Id.* at 487 (Butler, J., dissenting).

39. 116 U.S. at 630.

40. *Olmstead*, 277 U.S. at 485-88.

41. *See infra* text accompanying notes 42-57 for a discussion of how the Court gradually abandoned the old formalist approach.

42. *See supra* text accompanying notes 19, 20.

43. *See, e.g.*, Marron v. United States, 275 U.S. 192 (1927), where the Court allowed the seizure of account books and papers not described in the search warrant.

44. 389 U.S. 347 (1967).

45. *Id.* at 350.

> a subject of fourth amendment protection . . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.[46]

Justice Stewart's emphasis was on whether Katz justifiably relied on his privacy. The critical question did not focus on a "place," but rather on Katz's personal intent. A more subjective test of justifiable expectations supplanted the earlier and more objective standard which focused on a "place." While the change may have been due to the Court's desire to overcome the apparently narrow confines of *Olmstead* and expand constitutionally protected privacy, it was grievously flawed by not being rooted in either societal norms or constitutional text.

Justice Harlan, concurring, attempted to provide some rational justification for this new standard by adding a second element to the test:

> My understanding of the rule (i.e., "the fourth amendment protects people, not places") that has emerged from prior decisions is that there is a two-fold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable." Thus, a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the "plain view" of outsiders are not "protected" because no intention to keep them to himself has been exhibited.[47]

Although Justice Harlan's addition to the *Katz* test was a welcome step toward providing an empirical element—reasonableness as determined by society—to the subjective one Justice Stewart created, the test itself nevertheless suffered from the risk of opening fourth amendment guarantees to considerable dilution. Professor Amsterdam rightly observed that:

> [a]n actual, subjective expectation of privacy obviously has no place in a statement of what *Katz* held or in a theory of what the fourth amendment protects. It can neither add to, nor can its absence detract from, an individual's claim to fourth amendment protection. If it could, the government could diminish each person's subjective expectation of privacy merely by announcing half-hourly on television that 1984 was being advanced by a decade and that we were all forthwith being placed under comprehensive electronic surveillance.[48]

Undoubtedly, Justice Harlan was grasping toward a return to the *Boyd*-fostered doctrine of constitutionally protected areas. He was seeking to combine the importance of a "place" with an individual's expectations of privacy. For example, he emphasized that, "[t]he question is what protection it (the fourth amendment) affords to

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46. *Id.* at 351.

47. *Id.* at 361.

48. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974).

those people. Generally, as here, the answer to that question requires reference to a 'place.' "[49]

One year after *Katz*, the Court elaborated on this new doctrine in *Terry v. Ohio*.[50] The Court stated that "wherever an individual may harbor a reasonable 'expectation of privacy' . . . he is entitled to be free from unreasonable governmental intrusion."[51] The *Terry* Court further stated that "the specific content and incidents of this right (of privacy) must be shaped by the *context in which it is asserted*."[52]

It is fair to say that although the post-*Katz* Court did not abandon all property considerations in its fourth amendment protection formula, the role of property aspects—ownership, possession, occupancy—was unquestionably devalued. Instead of serving as legal touchstones for the amendment, these aspects came to be merely flexible standards by which expectations of privacy might be considered.[53]

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49. 389 U.S. at 361.

50. 392 U.S. 1 (1968).

51. *Id.* at 9.

52. *Id.* (emphasis added).

53. The problem with merging a traditional "property" approach and a "reasonable expectations" approach in an understanding of privacy becomes very clear in Rakas v. Illinois, 439 U.S. 128 (1978). In *Rakas*, passengers in a car claimed standing to raise fourth amendment exclusionary rule protections analogized their position to that of the defendant in Jones v. United States, 362 U.S. 257 (1960), where Jones was present in a friend's apartment at the time of a search. *Rakas*, 439 U.S. at 140-42. As an extension of the property principle, the Court had ruled that "anyone legitimately on premises where a search occurs may challenge its legality." *Jones*, 362 U.S. at 267. In denying the *Rakas* petitioners similar rights, Justice Rehnquist, for the Court, attempted to limit *Jones* in the following manner:

> We think that *Jones* on its facts merely stands for the unremarkable proposition that a person can have a legally sufficient interest in a place other than his own home so that the Fourth Amendment protects him from unreasonable governmental intrusion into that place. *See Jones*, 362 U.S. at 263, 265. In defining the scope of that interest, we adhere to the view expressed in *Jones* and echoed in later cases that arcane distinctions developed in property and tort law between guests, licencees, invitees, and the like, ought not to control. (Citations omitted.) But the *Jones* statement that a person need only be "legitimately on premises" in order to challenge the validity of the search of a dwelling place cannot be taken in its full sweep beyond the facts of that case.

Rakas, 439 U.S. at 142-43.

Concurring, Justice Powell, joined by Chief Justice Burger, sought to distinguish the "reasonableness" factor in *Rakas* from that of *Jones* by suggesting that the privacy expectation for automobiles was always treated differently from the expectation in other locations, *id.* at 154, and noting that "[n]one of the passengers [in *Rakas*] is said to have had control of the vehicle or the keys." *Id.* at 155.

Finally, Justice White wrote a dissent in which Justices Brennan, Marshall, and Stevens joined. He began by noting that "[T]he Court today holds that the Fourth Amendment protects property, not people, and specifically that a legitimate occupant of an automobile may not invoke the exclusionary rule and chal-

In this same period, the Court also abandoned the property-focused mere evidence rule in *Warden v. Hayden*.[54] Justice Brennan explicitly substituted a "privacy" orientation for the fourth amendment in place of the "discredited" property rationale.[55] The rejection in *Hayden* and *Katz* of the property principles of earlier cases enabled the Court to extend protection to tapped phone conversations, but it also allowed the seizure of evidence clearly not implicating the "privacies of life."[56]

Over the last decade, the Supreme Court has maintained *Katz*'s liberal understanding of the fourth amendment right of privacy, but nonetheless, has afforded less than liberal protection for personal privacy. The cause of this decline in personal privacy protection can be traced to the predominently "law and order" membership of the High Bench which has extended the number of exceptions to the warrant requirement and has relaxed the standard for probable

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lenge a search of that vehicle unless he happens to own or have a possessory interest in it." *Id.* at 156. Then he drew upon two established doctrines to support Rakas' claim. The first was recognition of "some cognizable level of privacy in the interior of an automobile," *id.* at 157, and the second was that "when a person is legitimately present in a private place, his right to privacy is protected from unreasonable governmental interference even if he does not own the premises." *Id.* at 157-58.

The reasonableness-property problem is ultimately compounded in Rawlings v. Kentucky, 448 U.S. 98 (1980). In *Rawlings*, petitioner, also claiming fourth amendment standing, was one of several visitors in a home at the time of its search. *Id.* at 100. In the course of events, some $4500 worth of drugs were discovered in the purse of another visitor and petitioner promptly admitted ownership of them. *Id.* at 101. Again, as in *Rakas*, Justice Rehnquist wrote for the Court in denying Rawlings' standing; he found, as the lower Kentucky courts had, that Rawlings had not sustained his burden of proving that he had a legitimate expectation of privacy in the purse of the other visitor. *Id.* at 104. Petitioner's further claim to standing, based upon *ownership* of the drugs, was dismissed with a reference to the earlier case: "While petitioner's ownership of the drugs is undoubtedly one fact to be considered in this case, *Rakas* emphatically rejected the notion that 'arcane' concepts of property law ought to control the ability to claim the protections of the Fourth Amendment." *Id.* at 105.

The dissenters, Justices Marshall and Brennan, took issue directly with the Court's reading of *Rakas*:

> No Fourth Amendment claim based on an interest in the property seized was before the Court, [in *Rakas*], and, consequently, the Court did not and could not have decided whether such a claim could be maintained. In fact, the Court expressly disavowed any intention to foreclose such a claim ("[t]his is not to say that such casual visitors could not contest the lawfulness of the seizure of the evidence of the search if their own property were seized during the search," 439 U.S. at 142, n.11), and suggested its continuing validity ("[P]etitioners' claims must fail. They asserted neither a property nor a possessory interest in the automobile, *nor an interest in the property seized*," *id.* at 148 (emphasis supplied).

Id. at 115 (Marshall, J., dissenting).

54. 387 U.S. 294 (1967).

55. *Id.* at 304.

56. 387 U.S. at 305.

cause.[57]

The interrelationship of property and privacy which framed Justice Bradley's opinion in *Boyd* was neglected and, in cases such as *Hayden*, was eliminated altogether. In reducing the importance of the *property* concept and abandoning *Olmstead*'s methodological use of technical property doctrines to protect privacy interests, the Court departed from what could have been, and should be, a useful tool for absolutely protecting a core of personal privacy under the reasonableness clause of the fourth amendment.

MODERN PRACTICE

As the Court reduced the linkage between privacy and property, the government expanded its role in the lives of Americans, causing a heightened sensitivity to the need for privacy. Thus, courts began to look upon calls for privacy protection sympathetically. Since the 1965 landmark birth control case of *Griswold v. Connecticut*,[58] the Supreme Court has developed a line of decisions involving the creation and expansion of a constitutionally guaranteed right of personal privacy. The Justices have openly debated that right's relationship to the constitutional text. Some have attributed the privacy right to a cluster of amendments in the Bill of Rights,[59] others to a substantive right required by due process of law,[60] and still others have considered it a right reserved to the people by the ninth amendment.[61] Because of the confusion over the connection between the right and the text, and indeed confusion over the controlling principle on which the right supposedly rests, there has been a common misapprehension that the right to privacy cases rest on legislative policy, rather than underlying judicial concepts.

Many critics have pointed out that the Court has also moved beyond the realm of privacy and into that of autonomy through the vehicle of sexual freedom cases. This shift is largely due to a loss of textual moorings. It can be argued that *Griswold* at least attempted a grounding in text through Justice Douglas' use of "penumbras" stemming from the "zones of privacy" found in the first, third, fourth, fifth, and (without explanation) the ninth amendments.

57. For a full analysis of the Court's post-*Katz* activities, see D. O'BRIEN, PRIVACY, LAW, AND PUBLIC POLICY (1979).

58. 381 U.S. 479 (1965).

59. *See, e.g.*, Synder v. Massachusetts, 219 U.S. 97 (1935). The due process clause of the Bill of Rights was established to protect those liberties that are "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* at 105.

60. *See supra* note 2.

61. *See, e.g., Griswold*, 381 U.S. at 486-99 (Goldberg, J., concurring).

The Court, however, moved away from reliance on any or all of these possible supports by 1973 in the momentous and controversial abortion case of *Roe v. Wade*.[62] This change, which has a parallel in the earlier *Boyd*-to-*Katz*-to-*Hayden* metamorphosis, is worth tracing.

In *Griswold*, the Warren Court analyzed explicit provisions of the Bill of Rights to recognize a right of privacy peculiar to the facts of the case.[63] Although it moved beyond specific constitutional provisions, it did so by relying upon rights penumbral to those expressly guaranteed. Justice Douglas' majority opinion focused upon questions of enforcement of Connecticut's anti-contraceptive statute and by so doing, avoided the pitfall of asserting judicial values or those of society in order to strike down the substantive policy under review. Even with this case, it must be noted that Justice Douglas reached his concept of constitutionally protected "zones of privacy" by citing examples from five different amendments,[64] thus at least opening the way for later interpretive imprecision.[65]

At the time of *Griswold*, Connecticut's neighboring state of Massachusetts had a contraceptive statute which, because it did not deal with "use," was unaffected by the 1965 ruling. One year later, advocates of birth control succeeded in lobbying the Massachusetts legislature to amend the law permitting physicians to prescribe contraceptives to married people. Nevertheless, William Baird, in *Eisenstadt v. Baird*,[66] challenged the amended statute because it still penalized a layman for exhibiting or distributing contraceptives.

Justice Brennan, writing for the majority, held the statute invalid on equal protection grounds.[67] Dismissing the Commonwealth's assertion that the objectives of the law were to protect

62. 410 U.S. 113 (1973).

63. *Griswold*, 381 U.S. 479 (1965). At issue in *Griswold* was the constitutionality of a state statute banning the use of contraceptives, even by a married couple, in the privacy of their home, pursuant to their physician's prescribing the contraceptives. In its decision, the Court limited consideration to married couples.

64. *Id.* at 482.

65. Indeed, in the same case, Justice Goldberg's concurring opinion relied exclusively on the text of the ninth amendment. *See* 381 U.S. at 486-99.

66. Eisenstadt v. Baird, 405 U.S. 438 (1972). Baird was convicted for exhibiting and distributing contraceptives because he was not a physician or pharmacist. His conviction was sustained by the highest Massachusetts court (on distribution grounds alone). Commonwealth v. Baird, 355 Mass. 746, 247 N.E.2d 574 (1969). The United States Supreme Court denied certiorari. Baird v. Massachusetts, 396 U.S. 1029 (1970). Thereafter, Baird challenged his conviction in a habeus corpus action before the federal district court for Massachusetts. His petition was denied, Baird v. Eisenstadt, 310 F. Supp. 951 (D. Mass. 1970), but he was successful in gaining an invalidation of the statute on substantive due process grounds in the United States Court of Appeals for the First Circuit. Baird v. Eisenstadt, 429 F.2d 1398 (1st Cir. 1970).

67. *Eisenstadt*, 405 U.S. at 454-55.

health and morals, Justice Brennan surmised that the "real reason" behind the statute was the opposition to contraception *per se*. From this, the Court concluded that a distinction between married and unmarried persons was irrational.[68] The Court thus made a major leap in privacy doctrine evolution. While admitting that "in *Griswold* the right of privacy in question inhered in the marital relationship,"[69] the Court nonetheless formulated a new, general right of privacy, not focused on the procedural incidents of a challenged regulation, not based on the Bill of Rights, and not limited to married couples. The Court explained this new concept of individual privacy:

> the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.[70]

For several reasons, *Eisenstadt* failed to receive much notice, in spite of its trail-blazing nature. As mentioned, only four of the nine members of the Court supported Justice Brennan's views. Additionally, his definition of privacy was not crucial to the resolution of the case and the Massachusetts law was unique among the states. Finally, by the time the decision was rendered, *Roe v. Wade*[71] had already been argued.

Justice Blackmun, writing for six justices in *Roe*, listed eight cases, including *Griswold*, in which the Court or individual Justices had found a right of personal privacy to be protected by the Constitution. Five additional cases, including *Eisenstadt*, were cited for establishing that the "right has some extension to activities relating to marriage, procreation, contraception, family relationships, and child rearing and education."[72] From these few cases, most of them dealing with particular fourth or fourteenth amendment rights, the Court derived a general right of "personal privacy."[73] Even this brief bow to textually related precedents was cast aside in *Roe*, for in the very next paragraph of his opinion, Justice Blackmun eschewed the efforts of his colleagues to locate privacy dimensions in the Bill of Rights. Justice Blackmun expounded that the majority "feel" a general right of privacy is "founded in the fourteenth amendment's concept of personal liberty and restrictions upon state

68. *Id.* at 454-55.
69. *Id.* at 453 (emphasis in original).
70. *Id.*
71. 410 U.S. 113 (1973).
72. *Roe*, 410 U.S. at 152-53.
73. *Id.*

actions."[74]

Finally, unencumbered by textual restraints, the *Roe* Court was able to address the real problem at hand: concern for a woman's autonomy when faced with the question of abortion.[75] Thus, by the mid-1970's, the idea of personal privacy existed without solid constitutional grounding, and the concept itself had become confused with autonomy, the latter right of self-determination sometimes being substituted for the former right to be let alone. It was predictable that the Court would have trouble distinguishing between its holdings in cases which presented privacy issues, such as *Stanley v. Georgia*,[76] where it held that a state may not prosecute a person for possession of obscene materials in his home, and those cases which presented autonomy issues, such as *Kelley v. Johnson*,[77] where the Court held that a county police department need only show a "rational basis" in order to uphold a regulation limiting the style and length of a policeman's hair.

More importantly, the Court was free to apply its new, unanchored doctrine of privacy, or autonomy, to a host of cases over the next five years which resulted in decisions whose only pattern of consistency was derived from the combination of personal predilictions which stamped the majority opinions. In short, the same root problem of applying a text-free approach which marked the Court's activities in the review of economic regulations in the 1905-1937 period, now haunts the modern Court in the area of personal privacy.

FORMING A PROPERTY-AUTONOMY LINKAGE

Although the Supreme Court has waffled in its application of the "property bias" in the traditional fourth and fifth amendment area of criminal law, as related to privacy, its complete abandonment in the newer realm of autonomy decisions is more serious because of two unhealthy results.[78] First, the Court has run a zig-zag course through post-*Roe* cases causing excessive litigation rather than resolving sensitive issues.[79] Second, the Court's decisions have

74. *Id.*

75. *Id.* at 153-54.

76. 394 U.S. 557 (1969).

77. 425 U.S. 238 (1976).

78. Justice Stevens refered to this distinction between traditional and modern types of privacy interests in his majority opinion in Whalen v. Roe, 429 U.S. 589, 599 (1977). "The cases sometimes characterized as protecting 'privacy' have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." *Id.* (footnotes omitted).

79. *Id.* at 598-600. Recent lower court decisions have mirrored the uncertainty of the United States Supreme Court. *See, e.g.*, Andrade v. City of Phoe-

not served the cause of civil liberties well.[80]

The creation of property orientation in the treatment of autonomy questions would help alleviate the problems noted above. A simple scheme, making use of the Court's "two tier" approach to judicial scrutiny of challenged statutes,[81] could involve the designation of property into two classifications, *exclusive* and *non-exclusive*. The first designation would apply to the ownership, possession, or occupancy of property used for personal purposes. The second designation would include public and private property used in public ways. The essential difference between the two is that the first carries with it a customary, community-shared expectation of privacy associated with the *place* while the second does

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nix, 692 F.2d 557 (9th Cir. 1982); Andrews v. Drew Municipal Separate School Dist., 507 F.2d 611 (5th Cir. 1975), *cert. dismissed*, 425 U.S. 559 (1976); Fisher v. Snyder, 476 F.2d 375 (8th Cir. 1973); Scott v. Macy, 349 F.2d 182 (D.C. Cir. 1965); Briggs v. North Muskegon Police Dept., 563 F. Supp. 585 (W.D. Mich. 1983); Baron v. Meloni, 556 F. Supp. 796 (W.D.N.Y. 1983); Swope v. Bratton, 541 F. Supp. 99 (W.D. Ark. 1982); Suddarth v. Slane, 539 F. Supp. 612 (W.D. Va. 1982); Shuman v. City of Philadelphia, 470 F. Supp. 449 (E.D. Pa. 1979); Wilson v. Swing, 463 F. Supp. 555 (M.D. N.C. 1978); Smith v. Price, 446 F. Supp. 828 (M.D. Ga. 1977), *rev'd on other grounds*, 616 F.2d 1371 (5th Cir. 1980); Hollenbaugh v. Carnegie Free Library, 436 F. Supp. 1328 (W.D. Pa. 1977), *aff'd*, 578 F.2d 1374 (3d Cir. 1978), *cert. denied*, 439 U.S. 1052 (1978) (Marshall, J., dissenting); Major v. Hampton, 413 F. Supp. 66 (E.D. La. 1976); Drake v. Covington County Board of Education, 371 F. Supp. 974 (M.D. Ala. 1974) (three-judge court); Mindel v. United States Civil Serv. Comm'n, 312 F. Supp. 485 (N.D. Cal. 1970). *See also* Phillips v. Bergland, 586 F.2d 1007, 1011 (4th Cir. 1978); Norton v. Macy, 417 F.2d 1161, 1164 (D.C. Cir. 1969); Meehan v. Macy, 392 F.2d 822, 834-35, 837 (D.C. Cir. 1968), *reh'g granted*, 425 F.2d 472 (D.C. Cir. 1969) (remanded with directions); Taylor v. United States Civil Serv. Comm'n, 374 F.2d 466, 469-70 (9th Cir. 1967).

80. Indicative of the rather cavaliere approach to civil liberties taken by the Court is the recent denial of a writ of certiorari is Whisenhunt v. Spradlin, 52 U.S.L.W. 3366 (1983). Petitioners, a patrolwoman and a police sergeant, were suspended from their jobs, and the sergeant was also demoted to patrolman because they dated and spent several nights together. The punishments were imposed even though the department failed to provide them with any reasonable warning that their conduct was prohibited and failed to come forward with any evidence that the activity adversely affected their job performance. Indeed, the sergeant had taken the precaution of asking his immediate supervisor about the propriety of the couple's activities before serious dating commenced, noting that they might spend some nights together. The supervisor's response was that it would be "fine, (but) I didn't want the two of them setting up housekeeping." Accordingly, they continued to maintain separate residences. *Id.* at 3367.

81. Two levels of judicial scrutiny evolved from the famous fourth footnote in the case of United States v. Carolene Products Co., 304 U.S. 144, 152 (1938). Basically, a lower tier came to be adopted for economic regulations legislation, in which the presumption would lie in favor of a statute's constitutionality as long as a plausible rationale could be accepted as a "rational basis" for an interference with private rights. A higher tier was established for legislation which appeared to violate a specific prohibition of the Constitution, or which restricted political processes which serve to bring about the repeal of undesirable legislation, or which reflected prejudice against "discrete and insular minorities." In the latter cases, the legislative body would have to demonstrate a "compelling interest" in interfering with the right asserted.

not. A crucial feature of this distinction, therefore, is whether the public has access to the property. Examples of exclusive property would be one's home, one's body, a reserved motel room, a camping tent in a campground, a massage parlor, and an enclosed stall in a restroom. Non-exclusive property would include theaters, parks, fields, public restrooms, and schools. Finally, challenged statutes involving privacy rights related to the first classification of property (exclusive) would trigger the "strict scrutiny" test, requiring the legislature to demonstrate a "compelling interest" in regulating those rights. Statutes permitting interferences with rights related to the second classification (non-exclusive) would survive if the legislature satisfied the less stringent "rational basis" test.

What follows is a capsule summary of recent leading autonomy cases. In each the reasoning and outcome will be presented as if the courts had utilized a property orientation in the treatment of these autonomy issues.

PRIVACY DECISIONS AND THE PROPERTY PERSPECTIVE

Reinforcing the right to an abortion declared in *Roe v. Wade*,[82] the Supreme Court in *Planned Parenthood of Central Missouri v. Danforth*,[83] invalidated several provisions of a Missouri statute. Two of the provisions included the requirements that, for an abortion, an unmarried woman under 18 must have her parents' consent and a married woman of any age must have her husband's consent. Although the decision correctly recognizes the exclusiveness of a woman's privacy claim regarding her own body, the Court's suggestion that parents have legitimate, cognizable interests in the abortion decision is rather troubling. The Court stated that:

> [W]e are not unaware of the deep and proper concern and interest that a devoted and protective husband has in his wife's pregnancy and in the growth and development of the fetus she is carrying. Neither has this Court failed to appreciate the importance of the marital relationship in our society.[84]

The Court undertook a balancing of possibly conflicting interests of man and woman in the abortion decision, concluding that the balancing weighs in the woman's favor "inasmuch as it is the woman who physically bears the child and who is more directly and immediately affected by the pregnancy."[85] As in *Roe*, however, the Court failed to attach the autonomy interest of the woman in controlling her body to a firm conceptual base.

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82. 410 U.S. 113 (1973).
83. 428 U.S. 52 (1976).
84. *Id.* at 69.
85. *Id.* at 71.

Relying heavily upon *Eisenstadt v. Baird*,[86] the Court determined in *Carey v. Population Services International*,[87] that a "decision whether or not to beget or bear a child is at the very heart" of constitutionally protected rights of privacy.[88] Accordingly, it struck down a New York statute that made it a crime (1) for any person to sell or distribute contraceptives to minors, (2) for anyone other than a licensed pharmacist to distribute contraceptives to persons over 16, and (3) for anyone to advertise or display contraceptives. Even though it was a plurality decision, *Carey* served to buttress an autonomy-based privacy formulation by protecting freedom of choice over reproduction in the realm of minors' sexual activity, an area not yet within accepted social mores.

Although the Court's holding was correct, its reliance upon *Eisenstadt*, a case devoid of conceptual moorings, was unsound. Particularly disturbing is a footnote which stated flatly that constitutional privacy had never been found to protect the private consensual sexual relations of adults.[89] To be sure, the Court has never squarely addressed that question and the *Carey* note was not a misstatement of privacy law. But it is troublesome because the motives behind it are not clear. It is arguable that the statement was merely a response to Justice Powell's expressed concern that any attempted state regulation of sexual conduct might trigger the strict scrutiny standard of review.[90] On the other hand, the footnote may suggest that a privacy right does not necessarily protect private sexual relations, particularly those of gay men and women. If the latter interpretation is correct, then it follows that the reproductive autonomy of minors and unmarried individuals is protected only because it is incidental to the protection of marital privacy. In short, *Carey* fails to produce a clear, independent basis for protection of consensual sexual conduct *per se*.

The Court did not lack opportunities to address the problem of privacy and sexual relations. In the term preceding *Carey*, the Court summarily affirmed without opinion the lower court's ruling in *Doe v. Commonwealth's Attorney for the City of Richmond*,[91]

86. 405 U.S. 438 (1972).

87. 431 U.S. 678 (1977).

88. *Id.* at 685.

89. The "Court has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults, . . . and we do not purport to answer that question now." *Id.* at 688 n.5.

90. "The Court apparently would subject all state regulation affecting adult sexual relations to the strictest standard of judicial review . . . . In my view, the extraordinary protection the Court would give to all personal decisions in matters of sex is neither required by the Constitution nor supported by our prior decisions." *Id.* at 703 (Powell, J., concurring).

91. 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976).

holding that the right of privacy did not protect homosexuals in their form of sexual expression. The Court ruled that the privacy right only protected the private sexual activity of married heterosexual couples.[92]

The Court should require strict scrutiny of all state regulations monitoring private, adult consensual sexual relations. Thus, the Court would have to find a compelling state interest for the regulation. The requirement of this strict standard is reasonable because these sexual relationships are typically confined to private property with no public access. In *Hollenbaugh v. Carnegie Free Library*,[93] two employees of a state-maintained library were discharged because they lived together and bore a child through an adulterous relationship. The district court found that under a minimum rationality test, there was no violation of the equal protection clause. The court further found that the constitutional right of privacy did not encompass the couple's behavior.[94] The United States Court of Appeals for the Third Circuit affirmed on the basis of the lower court opinion and the Court denied the plaintiff's petition for writ of *certiorari*. Justice Marshall wrote a vigorous dissent, arguing that:

> Such administrative intermeddling with important personal rights merits more than minimal scrutiny. One such right, clearly implicated by petitioners' discharge, is that 'of the individual . . . to engage in any of the common occupations of life' (citations omitted). Perhaps even more vital is 'the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy.' (citations omitted). Although we never have demarcated the precise boundaries of this right, we have held that it broadly encompasses 'freedom of personal choice in matters of marriage and family life.' (citations omitted)
>
> Petitioners' rights to pursue an open rather than a clandestine personal relationship and to rear their child together in this environment closely resemble the other aspects of personal privacy to which we have extended constitutional protection.[95]

Although Justice Marshall was altering the grounds upon which he thought the case should be decided, it is clear that his sympathies moved him to greatly expand the constitutional protection of personal decisions in sexual matters.

Before moving to other areas of autonomy decisions, it should be noted that *Doe*, *Hollenbaugh*, and other such cases are disturbing in that they reinforce the idea that the protections afforded in *Carey* and *Danforth* exist only because the conduct involved is typi-

92. *Id.* at 1202.

93. 436 F. Supp. 1328 (W.D. Pa. 1977), *aff'd mem.*, 578 F.2d 1374 (3d Cir. 1978), *cert. denied*, 439 U.S. 1052 (1979).

94. *Id.* at 1334.

95. *Hollenbaugh*, 439 U.S. 1052, 1054-55 (Marshall, J., dissenting from denial of certiorari).

cally associated with the marital context. Accordingly, it implies a serious limitation in both the Court's allegiance to autonomy-based rights and in its willingness to vindicate the privacy right of minority groups which should ostensibly form the core of a civil right.

In *Paris Adult Theater I v. Slayton*,[96] the Court attempted to curtail the effects of its *Stanley* decision. In *Slayton*, the Court upheld an injunction against the commercial exhibition of pornographic films in an adults-only theater, making it clear that the privacy right would not encompass such public exhibitions: "This privacy right encompasses and protects the personal intimacies of the home, the family, marriage, motherhood, procreation and child rearing."[97] It is clear from this statement that the marital context is important to Chief Justice Burger and his majority opinion colleagues. Interestingly, the Court's use of the term "intimacies" also seems to suggest that a "place" has particular relevance when drawing the privacy line. This is even more apparent later in the opinion when the Court noted that intimacy is the basis for extending privacy rights to "the doctor's office, the hospital, the hotel room, or as otherwise required to safeguard the right to intimacy involved. Obviously, there is no necessary or legitimate expectation of privacy which would extend to marital intercourse on a street corner or a theater stage."[98] Although the Court was correct in distinguishing a public theater from one's home for privacy purposes, there is a critical underlying difference between a property-based concept of privacy and one based upon "intimacy," which is essentially a notion of expectations.[99]

A related suggestion that privacy is a place-bound right, limited to the familial sphere of the home, was made in *United States v. Orito*.[100] In *Orito*, the Court ruled that Congress may forbid the interstate transportation of certain pornographic materials for the transporter's private use because the zone of privacy does not extend beyond the home. Similarly, in *United States v. 12,200-ft. Reels of Super 8MM. Film*,[101] the Court upheld Congress' power to prohibit the importation of contraband into the United States, even though the contraband was for the importer's private personal use. The Court's reasoning in these transportation cases is questionable. Obviously, personally addressed and stamped mail should be considered private property of an exclusive nature. Further, there is a

96. 413 U.S. 49 (1973).

97. *Id.* at 65. A similar recital was issued in Whalen v. Roe, 429 U.S. 589, 600 n.26 (1977).

98. *Slayton*, 413 U.S. at 66 n.13 (citations omitted).

99. *See supra* note 22.

100. 413 U.S. 139 (1973).

101. 413 U.S. 123 (1973).

seductive logic in the notion that the right to read or to observe materials in private (*Stanley*) necessarily carries with it a corollary right to purchase such materials.[102] Nevertheless, in the Court's defense, Congress can muster considerable authority under the commerce clause. Perhaps it is sufficient to say that materials in transit have not yet come into one's possession and, therefore, they do not enjoy the special level of protection the exclusive private property concept affords.

Lovisi v. Slayton[103] is a classic example of a place-oriented line-drawing dilemma in the privacy realm. The Lovisi couple and another person got together at the Lovisi's home and engaged in a number of sexual acts, some of which were photographed. These activities came to the police's attention when the Lovisi's children took several of the pictures to school. Both the district court and the court of appeals applied an "expectations" analysis in deciding to affirm the convictions. Judge Mehrige, for the district court, argued that consenting adults—married or single—have a protected right of privacy in sexual activity, even with the presence of a third party. That right was waived, however, when the couple failed to protect themselves in allowing pictures to be taken:

> By electing to photograph their sexual relations, thus creating the possibility that the intimacy of their acts would be destroyed by future viewing by others, the Lovisis took upon themselves an especially heavy burden to protect their privacy. They did not meet that burden . . . because of their failure to deny other persons access to the photographs.[104]

Again, the "expectations" test, under the guise of "intimacy," is attractive but insufficient. The logic of Judge Mehrige's position might lead to the conclusion the court of appeals reached, that the invitation to include a third party in the activity constituted a waiver of privacy. The rational position is simply that the Lovisis' exclusive right to privacy, regardless of the number of "invited guests" involved, is overcome only at the point where the pictures are produced for public scrutiny in the school. In other words, it is the home's border that renders one kind of property distinguishable from another.

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102. In response to this argument Chief Justice Burger stated that:

> The seductive plausibility of single steps in a chain of evolutionary development of a legal rule is often not perceived until a third, fourth, or fifth 'logical' extension occurs. Each step, when taken, appeared a reasonable step in relation to that which preceded it, although the aggregate or end result is one that would never have been seriously considered in the first instance.

Id. at 127.

103. 363 F. Supp. 620 (E.D. Va. 1973).

104. *Id.* at 627.

Two other cases, *Smayda v. United States*[105] and *People v. Triggs*,[106] combine to further demonstrate the confusion which can arise with application of the "expectations" formula. Both cases involved homosexual activity in public restrooms which clandestine law enforcement officers observed. The only factual distinction between the cases is that in *Smayda* the toilet stall where the act was committed had a door whereas in *Triggs* the stall did not. The *Triggs* court found for the defendants, arguing that the officers had no articulable reasons for believing that the individuals involved were about to perform forbidden acts.[107] Further, their peering into the stall constituted an unjustified invasion of the defendants' privacy.

The *Smayda* court reached a contrary conclusion. It held that the appellants vitiated their claim to privacy either because one, if there had been a search they had impliedly consented to it, or because two, there not having been an actual invasion of the area of the stall, there had been no search.[108] The first line of reasoning seems unpersuasive because any use of a restroom stall would carry with it *some* expectation of privacy, and the second approach is contrary to the holding in *Katz*.[109]

The holding in *Smayda* should be reversed. Under the "exclusive" and "non-exclusive" approach urged here, the question of whether a stall has a door is critical. It is that feature which enables an individual to gain total control and possession of his surroundings thus creating an exclusive, albeit temporary, property-based claim to privacy.

Another noteworthy case, *People v. Livermore*,[110] serves to illustrate the formula proposed here. In *Livermore*, state police were called to investigate a disturbance emanating from a tent in a public campground. The officers approached the tent, identified themselves, and, upon receiving no response, unzipped the tent flap and discovered two female occupants engaging in sexual activity. Petitioners were subsequently arrested and convicted of violating the state's gross indecency statute. They appealed, claiming that the tent was being used as a residence and was not, therefore, a "public place." The appellate court, on the basis of statutory construction, affirmed the conviction.[111] The court's holding was correct because

105. 352 F.2d 251 (9th Cir. 1965), *cert. denied*, 382 U.S. 981 (1966).

106. 506 P.2d 232, 106 Cal. Rptr. 408 (1973).

107. *Id.* at 235-37, 106 Cal. Rptr. at 410-11.

108. *Smayda*, 352 F.2d at 256-57.

109. In fairness, it should be noted that *Smayda* was decided two years prior to *Katz v. United States*. *See supra* notes 18-30 and accompanying text.

110. 9 Mich. App. 47, 155 N.W.2d 711 (1968).

111. *Id.*

although a tent should be considered a residence, the activity that takes place inside it is not totally immune to governmental encroachment. In *Livermore*, the privacy protection gave way when the actions of the petitioners disturbed the peace. With that disturbance, the police justifiably opened the tent flap and charged the occupants with "gross indecency."

Finally, the Supreme Court in *Kelley v. Johnson*[112] was asked to review a county regulation limiting the length of a county policeman's hair. Justice Rehnquist, writing for the Court, determined that the regulation did not violate any asserted fourteenth amendment right.[113] The Court gave considerable deference to the legislature and allowed the county virtually free rein to determine the nature of the "uniform" and general appearance of its police officers despite Justice Marshall's dissent that:

> To say that the liberty guarantee of the fourteenth amendment does not encompass matters of personal appearance would be fundamentally inconsistent with the values of privacy, self-identity, autonomy, and personal integrity that I have always assumed the Constitution was designed to protect.[114]

Justice Marshall's view is commendable because the control of one's person is unquestionably an "exclusive" form of property which should require the government to satisfy the "compelling interest" test.

CONCLUSION

The decline of a property-related standard of privacy over the last half century combined with the recent surge of interest in personal protection from governmental encroachment has caused the Supreme Court to wrestle continuously with these personal autonomy cases. Unfortunately, it appears that no firm constitutional standard has been constructed to replace the earlier fourth amendment orientation. The Court has shifted away from the property orientation of the fourth amendment in *Katz* and related cases with the clear intent of widening the protective umbrella for individuals. Ironically, the net result has been a weakening of the constitutional right of privacy, especially in matters of autonomy. Consequently, the cause of strengthening the civil rights of individuals has not been well served and the Court's inconsistency has generated unnecessary litigation and confusion in the lower courts. In place of the new privacy emphasis on "expectations," "intimacy," "familial or marital rights," or simply a vague notion of "liberty" as contained in the fourteenth amendment, the Supreme Court should re-

112. 425 U.S. 238 (1976).
113. *Id.* at 247-49.
114. *Id.* at 251 (Marshall, J., dissenting).

turn to an expanded concept of property as a basis for asserting constitutionally protected privacy claims. This necessary return would further the aims of enhancing personal privacy and provide greater predictability in an important area of constitutional law.