Penumbras and Privacy: A Study of the Use of Fictions in Constitutional Decision-Making

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PENUMBRAS AND PRIVACY: A STUDY OF THE USE OF FICTIONS IN CONSTITUTIONAL DECISION-MAKING

I. INTRODUCTION

In June 1965, the Supreme Court announced a landmark decision striking down a state law which banned the use of contraceptives. The opinion was authored by a giant among the Court’s liberals, and could rightly have been hailed as an endorsement of the growing sexual revolution. But the true significance of the decision did not lie in its masterful defense of the marital relationship or in the advancement of sexual freedom. Rather, the decision was to become the source of a new branch of jurisprudence extending constitutional protection to various aspects of privacy. The Court’s opinion was cleverly tied to the Constitution, not directly, but through the use of a fiction of “penumbral” rights. This fiction would be revived as the infant privacy right grew, but would be deftly set aside when the need arose to broaden the right beyond its constitutional roots.

This Note shall discuss the origin and development of the Court’s penumbra fiction. Unlike other studies in this area, it is not the writer’s intention to survey the case law defining the scope of the privacy right, or to analyze the constitutional issues involved. This discussion will endeavor to approach the topic from a uniquely jurisprudential perspective. Generally, the objectives of this Note are two-fold. First, it shall consider the role of fictions as judicial tools. More specifically, it will attempt to offer a definition of the legal fiction and examine the manner in which fictions accommodate conflicting social demands. Second, it will chronicle the rapid growth of the right of privacy, paying particular attention to the waxing and waning of the penumbra fiction over its twenty year history.

II. THE TWIN GOALS OF ORDER AND FAIRNESS

Possibly the oldest and most widely cited justification for the development of law is the need to maintain order in human affairs. Law is, in a sense, a natural outgrowth of civilization. The most significant step in man’s social

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2 Justice Douglas wrote the opinion for a five-member majority. Justices Harlan and White concurred in the judgment only.
3 See generally P. STEIN & J. SHAND, LEGAL VALUES IN WESTERN SOCIETY (1974). For many ancient peoples, law and the organization of the community were interwoven through the agency of religion. In the Old Testament, for example, the Israelites were bound to their God by a “b’rit” or “covenant.” Under the terms of this covenant, God obligated Himself to protect and assist the Israelite people who, in turn, pledged their loyalty and obedience. This provided the basic structure of the social order. All civil and criminal laws were given by God through the priests, and were merely additional terms of this covenant relationship. B. ANDERSON, UNDERSTANDING THE OLD TESTAMENT 85-91 (3d ed. 1975).
evolution, Aristotle keenly suggested, was his voluntary cooperation with others to pursue common goals. It was this willingness to form combinations of men for the betterment of all that provided the seed of civilized society. But the growth of social groups did not come without a price: to reap the benefits of cooperative effort, each member of the community was obliged to surrender a portion of his liberty. A system of rules was typically established to better secure the orderly workings of the community and the welfare of its individual members. Of course, the nature of the rules which were adopted and the methods by which they were to be enforced varied according to the needs of each group. Even so, the common thread uniting all primitive communities was the desire to achieve social order and uniformity.

From this general expectation of order in society flows another closely-related goal: certainty. Order implies some degree of fixity and definiteness in man’s relations with other group members. As laws became more complex and a separate “state” arose to administer them, this public demand for certainty also came to apply to relations between the state and its citizens. For the state, “certainty” seemingly requires the absence of any arbitrariness or caprice in legal decision-making. This is to say that the rules adopted by the community should be applied generally to all members, and that the legal consequence of any given act should be fully predictable. So if a group of tribesmen agree that murder shall be a crime, each tribe member should be informed of the penalty for violation of this law, and the rule should be applied unyieldingly to all. No

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4 The Great Legal Philosophers 27 (C. Morris ed. 1957). Aristotle’s view of law, which emphasized the importance of rules and rule-making, reflects the traditional Western approach to this topic. Under the rule-oriented model, social order is believed to be achieved through the development of a series of rules and sanctions. See E. Hoebel, The Law of Primitive Man (1954). Of course, other writers have rejected this approach in favor of a systemic or process-oriented model. For members of the “process” school, law is not a system of rules enforced by some authoritative figure, but any means by which the social order is maintained. These may include such stabilizing forces as tradition or the interdependence of groups within a society. See, e.g., B. Malinowski, Crime and Custom in Savage Society (1926) (a pioneer work in this field).

5 John Locke and Thomas Hobbes, notable seventeenth century legal philosophers, spoke of the relinquishment of personal liberty in discussing their views of the “social contract.” This is not precisely the meaning I wish to convey here. By the phrase “surrender . . . his liberty,” I refer only to the natural quid pro quo which must accompany any peaceful co-existence with others.

6 Marcus Cicero, a Roman statesman and jurist of the first century B.C., summarized this point well: “[L]aws were invented for the safety of citizens, the preservation of States, and the tranquility and happiness of human life . . .” The Great Legal Philosophers, supra note 4, at 51.

7 Aristotle observed that “man is by nature a political animal.” Id. at 27. Law was thus common to all communities: “[H]e who by nature and not by mere accident is without a state, is either above humanity, or below it. . . .” Id.

8 P. Stein & J. Shand, supra note 3, at 32-37.

member's fate should hinge on the whim of the lawgiver. By making known the punishment in advance, the law operates to deter socially undesirable conduct and to assure that the rules are no respecter of person.11

At the other end of the spectrum, society has a legitimate interest in promoting fairness and equity in legal decisions.12 The mechanical application of a rule of law fails to take into consideration the particular circumstances of each case. It is naive to suggest that all conduct is equally culpable or praiseworthy because it comes within the command of the same legal rule.13 Take, for example, the illustration of the tribal rule forbidding murder. If this rule was meant to apply to all "intentional killings," it would be grossly unfair to treat a killing committed in self-defense in the same way as one which was premeditated. Even where the killings were otherwise similar, extenuating circumstances may move the magistrate to be more lenient toward one offender. A rule of law is truly intended to offer guidance to those who are charged with administering justice. It should not shackle their hands, and so frustrate their efforts to apply the law fairly and equitably in individual cases.14

These two competing social values—order and fairness—have continued to enjoy vitality throughout modern history. To be sure, the public demand for order has become even more pronounced. Beginning in the eighteenth century, many social groups embarked on experiments in self-government and introduced the practice of framing written constitutions. Primary among the objects of a constitution is the effort to codify in a definite, tangible form the balance between the powers of state and the rights of people.15 A written constitution is intended to be a far-sighted document. It demonstrates the community's solemn belief that matters affecting the fundamental structure and powers of its government should be definite.16

Under the constitutional scheme in this country, the judicial branch of government is responsible for interpreting and applying the law, including the Constitution itself.17 When a court must decide a vexing constitutional question, it is immediately faced with a formidable obstacle: courts are not permitted to legislate. The authority to make law is given exclusively to that branch which is popularly elected and accountable. On the other hand, courts must seek to apply

11 Id.
12 See generally P. Stein & J. Shand, supra note 3, at 59-82.
13 Id.
14 Id.
15 This insistence upon a written constitution stemmed in part from John Locke's treatment of the relationship between a government and the governed as a form of "social contract." See C. Swisher, AMERICAN CONSTITUTIONAL DEVELOPMENT 11-12 (1943).
16 Id.
17 Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
established principles in fulfilling its judicial role. In the words of Chief Justice Marshall, they must "[look ] into" the Constitution and "say what the law is." Thus, courts do not purport to make law, but merely to discover and apply it. This reinforces the generally accepted view that the body of law is certain, stable, and predictable.

The popular belief that law is a gapless system, and that courts apply rules a priori, has been referred to by Jerome Frank as the "basic myth." In truth, however, our Constitution provides only the most cursory outline of our government's structure. Because of the lack of guiding principles, judges who are called upon to interpret the Constitution are largely free to engraft their notions of fairness, or to construe the law in a way which comports with prevailing social views.

III. THE ROLE OF FICTIONS

It is not surprising that society's demand for order and regularity is often at odds with commonly held standards of fairness. These two goals often stand in opposition, one pulling the law in the direction of certainty, the other pulling with equal force toward justice in decision-making. The tension between these values has, throughout the course of Western history, given rise to numerous measures to harmonize the competing demands of society.

As legal systems matured, "escape valves" were developed in order to permit the accommodation of these competing interests. One such method was the establishment of democratic institutions. By allowing the people to participate directly in the lawmaking process, the rules of law which were enacted incorporated generally accepted notions of fairness. The balance between order and fairness would therefore be struck in legislative chambers, rather than on fields of battle. This, however, provided only a partial answer. As government grew increasingly complex in its structure, and the judicial branch became more independent, popular input alone ceased to be an effective means to insure that the law was just. Early English judges began to fashion a body of principles to be applied commonly to all citizens in suits brought before them for civil wrongs. Later caretakers of this "common law" sought to ease the rigid application of these principles, while preserving the consistency and uniformity which served as its trademark. The tool which was almost universally relied upon was what is now termed the "legal fiction."

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18 Id. at 177.
19 J. FRANK, LAW AND THE MODERN MIND 3-12 (1930)
20 Id.
21 See also J. FRANK, supra note 19, 26-27.
24 Id.
25 Id.
A legal fiction often seems to defy definition, and one is tempted to avoid the task by admitting only that he "knows it when he sees it." This purely intuitive approach closely resembles the manner in which lawyers most often identify fictions. For example, it is well-established that a gift is valid only if the donor delivers possession of the subject matter to his donee. If a party attempts to make a gift by delivering a key, which will permit his donee to obtain access to the gift, a court may speak in terms of "constructive" or "symbolic" delivery. We know from our experience, however, that there has been no actual physical transfer of the gift. Likewise, when a physician gives emergency treatment to an unconscious patient, he may recover for his services upon what is referred to as a "quasi-contract." Yet we know that no contract, in the proper meaning of the term, could be formed because the minds of the parties were incapable of meeting. These examples highlight what is perhaps the most significant characteristic of the legal fiction, namely, its falsity.

Lon Fuller, in his extensive treatment of the role of fictions in law, has offered a useful framework for analysis. Using falsity as a springboard, Fuller has proposed an operative definition of the legal fiction. A fiction is any false statement which is either (1) made with consciousness of its falsity, or (2) recognized as having some utility. It is the second prong of this definition, the utilitarian aspect of the fiction, which merits special attention.

The greatest utility of the fiction is its ability to reconcile a legal result with some extra-legal premise. A fiction seeks to give effect to the spirit or intention of a legal rule by limiting, to some extent, the precision of its letter. In this way, the rigidity of the law (that is, the demand for order) is tempered by considerations of fairness. To some small degree, the goal of certainty and predictability is impaired because the "bright line" rules have been diminished. Yet fictions work within the existing rule system, and so allow courts to project the appearance of merely applying long-established principles. They are, in truth, a sleight of hand which enables courts to reach just decisions by giving rules almost unlimited flexibility.

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26 Jacobellis v. Ohio, 378 U.S. 184, 197 (1963) (Stewart, J., concurring). This was Justice Stewart's feeble attempt to formulate an approach to deal with obscenity issues.


29 RESTATEMENT (SECOND) OF CONTRACTS § 4, comment 'b' (1979).

30 L. FULLER, LEGAL FICTIONS (1967).

31 Id. at 9.

32 Id. at 51-53.

33 Id.

34 Jerome Frank commented in a related context that lawyers are fond of using "weasel words"—words without any precise meaning—to project the appearance of continuity and completeness in the law. Thus, terms such as "good faith," "ordinary care," and "due process" are routinely used as if they had definite substantive content. J. FRANK, supra note 19, at 27.
of the subject of the gift. But, for the limited purpose of determining the validity of a gift, the law recognizes it as such. Therefore, in applying this principle, delivery of a means of obtaining possession of the gift is a delivery of the subject matter. In this way, a rule of law may be expanded to cover a new factual situation, while in its appearance the rule remains unaffected.\textsuperscript{35}

Many motivations may prompt a court to utilize a fiction in rationalizing its decision. Jeremy Bentham and other early writers viewed the fiction with disdain, and accused the courts of using the device to engage in judicial legislating.\textsuperscript{36} Fuller, too, acknowledges that policy-making is an objective frequently underlying the use of fictions.\textsuperscript{37} Another common motive is what Fuller terms "emotional conservatism."\textsuperscript{38} This category focuses primarily on the judge's emotional makeup. The fiction is employed because the judge believes in the "basic myth" and seeks to perpetuate it.\textsuperscript{39} Finally, Fuller also mentions two other related reasons which may prompt the resort to fictions. The judge may simply use a fiction as a matter of convenience, a shorthand expression of the result he seeks to obtain.\textsuperscript{40} Similarly, the judge may be unable to articulate any other \textit{ratio decidendi}, and the fiction is merely an effort to lend credibility to a result reached by "hunch."\textsuperscript{41} The distinction between these motives appears to rest on the judge's ability to offer any rationale for his decision aside from the fiction itself.

The fiction has been described by modern writers as a form of intellectual "scaffolding."\textsuperscript{42} It is not intended to serve as a permanent fixture in our legal analysis, but is merely a stop-gap measure which is employed to attain a short-range goal: to reconcile the legal result in a given case with some premise of fairness or justice. It is an artificial construct used to bring a wayward set of facts within established principles, and so to reach some preordained result.\textsuperscript{43}

\textsuperscript{35} It is the use of "word magic," by which a court seemingly "transforms" an object or act into something else for purpose of analysis, that makes the fiction so offensive. Strangely, legal fictions would not appear to be nearly so deceptive if rules of law were simply compiled in massive indexes. In reviewing such a volume, an attorney searching under the title, "Effect of Delivery of a Key," might find the entry, "See 'Delivery of Subject matter.' " In this way, a legal fiction would not smack of voodoo or transubstantiation of matter. It would merely provide a cross-reference to the rule to be applied.

\textsuperscript{36} See generally L. Fuller, supra note 30, at 57-58.

\textsuperscript{37} Id.

\textsuperscript{38} Id.

\textsuperscript{39} "[T]he motive of emotional conservatism . . . proceeds, not from any clearly formulated theory of the process of law making, but from an emotional and obscurely felt judgment that stability is so precise a thing that even the form of stability, its empty shadow, has a value." Id. at 38.

\textsuperscript{40} Id. at 59-63.

\textsuperscript{41} Fuller refers to this as "intellectual conservatism." Id. at 63-64. For a more complete discussion of the role of the "hunch" in judicial decision-making, see J. Frank, supra note 19, at 100-17.

\textsuperscript{42} L. Fuller, supra note 30, at 116-23.

\textsuperscript{43} Id.
A fiction is not so much an attribute of our legal system as it is, more generally, of our thinking process. Fictions allow us to deal more effectively with multiple variations of facts. Perhaps the most notable aspect of Anglo-American law is its generality. Rules are typically cast in the form: "If X is the case, then Y is the legal result." In so structuring rules, lawmakers seek to subject an almost infinite variety of transactions to the common application of a single rule. The task of making such an all-inclusive rule is difficult, if not impossible. Many factual situations intended to be covered will, because of the inadequacy of human language, fall outside of the strict letter of the law. In the same way, a fact pattern not addressed by the rule may so closely resemble that contemplated by the drafters that it should be analyzed under the rule as well. A legal fiction allows the courts to recognize the shortcomings of general rules and to mold them so as to include other factual variations. In this way, a variant on the facts which is not specifically covered by the rules may be readily compartmentalized and brought within the reach of existing rules for analysis.

The most troublesome aspect of legal fictions is what should be done by the courts once they are in place. It has already been stated that a fiction is a device which is used for a limited purpose. Bentham urged that all fictions be swept from the law, but this stemmed from his belief that they were merely deceptive devices used to enhance the power of the judiciary. Even so, Bentham's plea has some merit. A fiction's status as a temporary measure seemingly calls for its eventual removal. This was the view proposed by Hans Vaihinger, a jurisprudential scholar whose innovative ideas did much to shape nineteenth century legal thinking. A fiction, Vaihinger contended, is a form of "intentional error" which is used merely as an expedient in legal analysis. It may be likened to mathematical concepts such as "infinity" or \( \sqrt{-1} \). Any such construct has no counterpart in reality and, after it has served its utilitarian purpose, must be removed from the equation. In the same way, a legal fiction must "drop out of the final reckoning."

Why must a fiction by removed after it has outlived its utility? Possibly the most compelling reason to discard an outmoded fiction is the likelihood of its

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44 See generally id. at 106-16.
46 Id.
47 See generally L. Fuller, supra note 30, at 106-13.
48 Id.
49 Id. at 3-5.
50 See supra text accompanying notes 42 & 43.
51 L. Fuller, supra note 30, at 2-3.
52 Id. at 116-23.
53 Id. at 98.
54 Id. at 117.
misapplication in the future. Obviously, a court which is making use of a fiction will not announce that it is doing so. One of the hallmarks of the fiction is, after all, its representation of truthfulness. Further, a court will not identify the short-range goal which is to be realized by calling upon the fiction. Once the fiction has been put in place, it becomes little more than a false statement in the guise of truth, without any indication of the factors which required its use. The potential for misuse by other courts, unaware of the fiction's origin, is obviously quite high. This is especially so after a long passage of time, when the historical roots of the fiction have become obscured. Because of the need to avoid improper or abusive applications the fiction must be exposed.

Take, for example, the common law rule that one who was absent for seven years without explanation was presumed to be dead. The policy which underlay this rule was the desire to promote certainty in legal transactions by fixing the time of death of a missing person. The presumption was never intended to imply that the absentee was truly dead and to carry with it all of the legal implications of death. So if a missing traveler returned to his country after seven years abroad, for what purposes should he be treated as "dead"? It would be meaningless to deny him the right to own, buy, or sell property, to make contracts, or to exercise other civil rights. Yet this result would be mandated by a blind application of the rule. Moreover, the traveler could be killed with impunity by any of his countrymen for, so far as the law is concerned, he is already dead. The absurdity of these results underscores the need to minimize the risk of misuse of the fiction by calling for its removal.

IV. THE GRISWOLD FICTION

The constitutional draft which was approved by the Philadelphia Convention in 1787 was a bold innovation in self-government. It embodied novel principles of federalism and comity which would serve to regulate the relationship between the states and the national government. The powers of the new government, advocates of the proposal urged, were limited by the terms of the instrument itself, and the states were free to check any excesses. Many people nevertheless feared the potential for abuse and, as a condition of ratification, demanded the enactment of the Bill of Rights to protect the civil liberties of citizens from intrusion by government. With these concerns in mind, as well as the abuses of the English monarchy, the first ten amendments quickly received the approval of Congress and the legislatures of all thirteen states.

Our federal Constitution makes no mention of a right of privacy. The Bill of Rights does, however, contain a number of limitations on the power of the

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56 The Federalist Nos. 45 & 46 (J. Madison).
57 L. Swisher, supra note 15, at 42.
government to intrude upon highly cherished liberty interests. Many of these constitutionally protected rights involve interests which, under modern terminology, undoubtedly touch upon aspects of "privacy." But it is important to recall that the Bill of Rights was largely a popular reaction to America's colonial and revolutionary experiences, and that the limits imposed upon the national government were aimed at curing particular evils. Simply put, legal thinking at that time had not advanced to the point of positing the existence of a separate right of privacy. Even so, the Bill of Rights was not intended to exhaust the reservoir of rights reserved to the people by the Constitution. After a heated debate in Congress, the ninth amendment was added to give some pliability to these rights: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The door was thus left open for the development of new rights to be brought within the umbrella of constitutional protection.

Throughout the ensuing century, the common law systematically began to give recognition to incidental privacy rights. The courts first gave protection to these rights by analyzing them under longstanding principles of property, contract, and tort law. In 1890, Samuel Warren and Louis Brandeis made an impassioned plea for the recognition of an independent right of privacy to protect the "inviolate personality" of the individual. Their recommendation of an expansive privacy right, based upon the "right to be let alone," provided the spark which kindled a fire of reform. This newly-generated interest in privacy law culminated in the activist privacy decision of the Warren Court seventy years later.

**Griswold v. Connecticut** was the first decision by the Supreme Court which specifically recognized that privacy interests per se were constitutionally protected. The facts in Griswold were not disputed. A Connecticut statute forbade the use by any person of "any drug, medicinal article or instrument for the purpose of preventing conception. . . ." The defendants were directors of a family planning center whose medical staff gave advice and information to persons regarding parenthood, including the use of contraceptives. They were charged and fined a sum of $100.00 each, under the state's aiding and abetting statute, for services which were rendered to married couples.

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58 D. O'BRIAN, PRIVACY, LAW, AND PUBLIC POLICY (1979).
59 U.S. CONST. amend. IX.
60 D. O'BRIAN, supra note 58, at 182-83.
62 Id.
63 Id. at 205.
64 Id. at 195 (citation omitted).
The argument of counsel before the Court in the Griswold case focused on the due process clause as the basis upon which the Connecticut law should have been invalidated. Rather than relying on the vagaries of the fourteenth amendment, or revitalizing the doctrine of "substantive due process," the Court resolved to establish a constitutionally-based privacy right.

It has been noted that the Constitution contains no express right of privacy, and Justice Douglas, writing for the Court, proceeded on that assumption. The absence of any such express right was not, however, regarded as a bar to the existence of constitutional protection. Express rights may give rise to implied ones. For example, the right of assembly guaranteed by the first amendment was said to include a correlative right of association. In other words, the first amendment was broad enough to protect the right of an individual to join with others to share and communicate his views. This peripheral right of association allowed the full enjoyment of the protected assembly right. Moreover, the specific rights enumerated in the Bill of Rights often touched upon privacy interests. The third amendment, for example, forbids the quartering of troops in a house during peacetime without the owner's consent. Similarly, the protection from unreasonable searches and seizures and the privilege against self-incrimination demonstrated the regard of the Framers for privacy in one's person and property.

With these constitutional and case law principles as building blocks, the Court was fully equipped to construct a fiction which would bring the right of privacy within the letter of the Constitution. The express guarantees of the Bill of Rights, viewed collectively, were said to have "penumbras" or "emanations" which "help to give them life and substance." In other words, the courts may imply the existence of other incidental rights which are necessary to fully effectuate

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67 Griswold, 381 U.S. at 481-82.
68 Indeed, prior to the Griswold case many rights which had no constitutional basis were given protection as "liberty" interests under the fourteenth amendment. See id. at 482. Of particular interest to the Court were Pierce v. Society of Sisters, 268 U.S. 510 (1925) and Meyer v. Nebraska, 262 U.S. 390 (1923). In Pierce, a state law regulating private education was found to infringe upon "the liberty of parents and guardians to direct the upbringing and education of children under their control." Pierce, 268 U.S. at 534-35. Similarly, the Meyer court struck down a law forbidding the teaching of foreign languages as an unjustifiable intrusion upon the right of a parent to rear and educate his children. Meyer, 262 U.S. at 399-400.
71 Griswold, 381 U.S. at 483.
72 U.S. Const. amend. III.
73 U.S. Const. amend. IV.
74 U.S. Const. amend. V.
75 Griswold, 381 U.S. at 484.
express ones. More specifically, the protection of individual privacy is often essential to insure the meaningful exercise of secured constitutional rights, especially those protected by the first amendment. There are "zones of privacy" formed by the extensions of these express rights which must receive constitutional sanction to stay governmental incursions.76

Turning to the facts of the Griswold case, the majority laid particular emphasis on the marital status of the individuals to whom advice and instruction had been given by the defendants. This single fact, despite the broad sweep of the opinion, was critical to the Court's reasoning. Marriage, Douglas observed twice in his concluding paragraph, is an association which enjoys a sanctity reinforced by the passage of time.77 It was this associational right which was impinged by the Connecticut law. By forbidding the use of contraceptives, rather than merely regulating them, the measure was calculated to have the "maximum destructive impact" on the marital relationship.78 For this reason, the law was found to be constitutionally infirm.

The most significant aspect of the Griswold opinion is the manner in which the right of privacy is ultimately tied to some express language in the Constitution. The Court's analysis exhibits a superficial simplicity: the privacy right arises as a necessary adjunct to the express rights in the Constitution. In the words of one writer, "the right of marital privacy is implied from an aggregate of specifics."79 The rationale of Douglas' opinion, when reduced to its elemental parts, is far more attenuated. The analysis presented by the Court may be characterized as follows:

(1) The right of assembly guaranteed by the first amendment contains an "associational" component;

(2) Marriage is a protectable form of association;

(3) To give the fullest protection to this marital association, the constitutional guarantee also embraces a "zone of privacy"; and

(4) The Connecticut law unreasonably impinged on the zone of marital privacy.

The Court clearly strained to establish a link between the right of privacy and the provisions of the Constitution. This short-range goal was accomplished

76 Id.
77 Id. at 486.
78 Id. at 485.
by resorting to the fiction of "penumbral" rights, whose existence is vital to the efficacy of those given express protection. The "zones of privacy" which enveloped these guarantees were depicted as a type of umbilical cord which serves to nurture and sustain constitutionally-based rights. In truth, however, the reverse is true: it is the Constitution which gives the penumbra fiction its vitality. *Griswold* did not purport to establish a general right of privacy. The right it recognized was limited to those privacy interests which were essential in carrying out rights secured in the Bill of Rights. It was the reference to some particularized language in the Constitution that legitimized the fiction. *Griswold* was not judicial lawmaking; the right of privacy was merely discovered by "look[ing] into" the Constitution.

V. THE FALL AND RISE OF THE PENUMBRA FICTION

A. The Fiction Exposed

The *Griswold* opinion served an important legitimizing role. The privacy right it created had no existence apart from the specific constitutional guarantees in whose shadow it reposed. In this way, the amendments which gave rise to the right also served to mark off its bounds. The right of privacy was not broader than the amendments responsible for its birth. Once the fiction was firmly in place, however, and the origin of the right had been successfully traced to the Constitution, the fiction could safely be discarded. The right established in *Griswold* was, immediately upon its inception, a free-standing unit which could be reshaped to the Court's liking without the necessity of recalling the fiction. By relying on the penumbra fiction, the task of reconciling the values of order and fairness was completed. Afterward, the Court did not need to repeat this labored constitutional inquiry to substantiate the basis of the right. *Griswold*'s privacy right became a bundle of interests, separable from the language of the Constitution, which had its own substantive content.

This phenomenon is vividly shown by Justice Brennan's plurality opinion in *Eisenstadt v. Baird*. *Eisenstadt* involved the constitutional validity of a Massachusetts law which banned the distribution of contraceptives by anyone other than a licensed pharmacist. The defendant, who had delivered a lecture at a university on the use of contraceptives, gave a package of vaginal foam to an

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80 See supra text accompanying note 74.
81 The fact that some constitutional provision is implicated gives the right of privacy currency. The express guarantees set forth in the Bill of Rights provided a type of "superstructure" from which *Griswold*'s privacy right was suspended.
82 See generally *Griswold*, 381 U.S. at 484-85.
83 See supra notes 32-35 and accompanying text.
85 Id. at 440-41 & n. 2.
unmarried woman. Though the right of an unmarried person to obtain contraceptives was plainly beyond the reach of Griswold,\footnote{Griswold was based upon the marital relationship as a protectable form of first amendment association. See supra text accompanying note 76. An unmarried individual could not assert any comparable constitutional source for his right to purchase or use contraceptive devices.} the Court had little trouble extending the right:

If under Griswold the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. It is true that in Griswold the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.\footnote{Eisenstadt, 405 U.S. at 453 (citation omitted).}

This subtle shift of focus in the beneficiary of the privacy right—from the marital couple as a unit to the individual, whether married or not—was undertaken without attempting to identify its constitutional basis. The Griswold fiction, requiring a nexus between the zone of privacy to be protected and some constitutional guarantee, was not employed. Rather, the analysis in the opinion turned solely on an interpretation of Griswold itself. The result of this case law interpretation is astonishing. The privacy right was, in a single paragraph, transformed from a protection of the "sacred precincts of the marital bedroom"\footnote{Griswold, 381 U.S. at 485.} to a full-fledged decisional right inhering in the individual. This right found expression in the personal autonomy of the individual, regardless of marital status.

The recasting of the Griswold right as one protecting individual autonomy was later reaffirmed by a majority of the Court in Carey v. Population Services International.\footnote{Carey v. Population Serv. Int'l, 431 U.S. 678 (1977).} Carey involved a constitutional challenge of a New York statute which forbade the sale of contraceptives to minors, and permitted sale to non-minors only by a licensed pharmacist. This law was struck down on the ground that it improperly impinged on the right of the individual, regardless of age, to purchase and use contraceptives.\footnote{Id. at 691-99.} Justice Brennan, writing for the Court, cited Griswold, Eisenstadt, and other privacy cases, and concluded that the "decision whether to beget or bear a child is at the very heart of [the] cluster of constitutionally protected choices."\footnote{Id. at 685.} The protective cloak of the Constitution, the Court emphasized, extended to individual decisions in matters of child-bearing, free from unjustified intrusion by the state.\footnote{Id. at 693.}
B. The Fiction Revisited

The foregoing cases must not be read as a wholesale rejection of the penumbra fiction, nor as the "dropping out of the final reckoning" urged by Vaihinger.\textsuperscript{93} The fiction continues to play an important legitimizing role in the further expansion of the privacy right. Once the \textit{Griswold} decision was handed down, and the required task of "look[ing] into" the Constitution was completed, the Court presumably could have severed all ties with the Constitution and developed its new privacy principles solely on the authority of case law. This is to say that the Court might have opted, in later privacy cases, to cite \textit{Griswold} as the source of a generalized right of privacy. Significantly, the Court has largely refused to do so.

\textit{Eisenstadt} and \textit{Carey} show the Court's willingness to extend the particular right of privacy which was recognized in \textit{Griswold}, namely, unencumbered access to contraceptives. This right was first demonstrated to arise under specific provisions of the Constitution, and was then reshaped without the necessity of additional constitutional inquiry. But where a litigant has urged the existence of some other penumbral privacy right—such as abortion, private possession of obscene matter, or confidentiality—the Court has moved more cautiously. Rather than relying exclusively on the case law, and so bypassing the often perplexing constitutional analysis,\textsuperscript{94} the Court has generally insisted on reviving penumbra fiction. The Court's reluctance to extend the \textit{Griswold} holding more liberally can be traced to at least three factors. First, the members of the Court may suffer from what Fuller referred to as "intellectual conservatism."\textsuperscript{95} To give life and substance to \textit{Griswold} and its progeny by extending it beyond the limits imposed by the penumbra fiction would be a bold move. It is undoubtedly less controversial to simply resurrect the convenient fiction. Second, continued reliance on the penumbra analysis, and repeated references to the right's constitutional roots, adds legitimacy to such decisions. Where a novel aspect of privacy is sought to be brought within the bounds of constitutional protection, it is more palatable if accomplished by referring to the Constitution itself. Third, policy considerations may also underlie the desire to retain the fiction.\textsuperscript{96} By foregoing the penumbra fiction, there would be no meaningful guidelines available to determine the scope of the privacy right.\textsuperscript{97} On the other hand, retaining the fiction, and requiring the constitutional analysis, places some limits on the potential reach of that right.

\textsuperscript{93} See supra note 54 and accompanying text.
\textsuperscript{94} See supra text accompanying notes 78-79.
\textsuperscript{95} L. Fuller, supra note 30, at 63-64.
\textsuperscript{96} See supra text accompanying note 37.
\textsuperscript{97} A wholesale rejection of the penumbra fiction would reintroduce the uncertainty associated with "substantive due process." See \textit{Griswold}, 381 U.S. at 481-82.
A few examples of the manner in which the Court has treated these attempts to broaden privacy protection may be instructive. On some occasions, *Griswold* and its penumbra fiction have been cited by name. On other occasions, the Court has relied upon the same analytic tools as it did in *Griswold*, but no specific reference to that case is made. In either event, the focus of that analysis remains the same: the Court labors to establish a vital link between the genre of privacy sought to be protected and the constitutional mandate.98

*Stanley v. Georgia*99 was decided only four years after *Griswold*. In *Stanley*, the defendant was suspected of unlawful bookmaking activity, and a warrant was issued authorizing the search of his home. While executing this warrant, police officers discovered three reels of film which, they concluded, were obscene under Georgia law. The defendant was arrested and convicted under a criminal statute making it an offense to "knowingly have possession of . . . obscene matter."100

On appeal, the Supreme Court addressed the question whether a state may, consistent with the first amendment, criminally punish the mere possession of obscene material. In reaching the merits of the case, the Court was confronted with case law holding that obscenity is not a constitutionally protected form of expression under the first amendment.101 The Court struggled to overcome this hurdle, and to establish a nexus between the defendant's right of possession and the first amendment guarantees of free speech and press. Clearly, the right to communicate ideas and information is at the very heart of the first amendment. The right to communicate them, suggested the Court, necessarily implied a right to receive them.102 This right to freely receive ideas is fundamental and, in the context of the "privacy of a person's own home," was said to "take[] on an added dimension."103 Citing *Griswold* as authority, the Court held that a citizen enjoys the right to be free from unwarranted intrusions by government into his activities at home.

[The defendant] is asserting the right to read or observe what he pleases—the right to satisfy his intellectual and emotional needs in the privacy of his own home. He is asserting the right to be free from state inquiry into the contents of his library . . . . If the First Amendment means anything, it means that a state has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch.104

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98 See supra text accompanying notes 78-79.
102 Stanley, 394 U.S. at 564.
103 Id.
104 Id. at 565.
Though Justice Marshall did not use the term "zones of privacy" in his discussion, he made reference to the *Griswold* case and plainly resorted to its underlying fiction. To say that private possession of printed matter is a form of "speech" or "press" worthy of first amendment protection, or that the right to possess an item flows from the right to make or distribute it, is but another way to say that some protection of privacy is required to assure full enjoyment of constitutional rights. Mere possession is not communicative in nature, but it is nevertheless an element whose protection is necessary to enable one to communicate. We may, without much difficulty, rephrase *Stanley*'s result in the language of *Griswold*. The right of privacy, which includes the right of private possession, is necessary to give life and substance to first amendment liberties.

Of all the subsequent extensions of the right of privacy, the freedom of a woman to choose whether to terminate her pregnancy seemed most likely to come within the broad mandate of *Griswold*. Indeed, *Eisenstadt*’s extension of *Griswold* to "the decision whether to bear or beget" a child was reportedly an effort to provide a foundation for a constitutional right of abortion. However, the Supreme Court in *Roe v. Wade* was not content to merely cite *Griswold* or the helpful dictum in *Eisenstadt*. By employing a "scattergun" technique, Justice Blackmun's majority opinion in *Roe* implicated the first, fourth, fifth and ninth amendments as possible sources of the abortion right. In addition, the Court cited *Griswold* and its penumbra fiction, the due process clause, and the "fundamental freedoms" concept articulated in *Palko v. Connecticut*. The suggestion of the Court was that the right of abortion inhered in the concept of "liberty" under the due process clause, an approach which was specifically rejected in *Griswold*. However, by tracing the abortion right to so many independent sources, the Court actually invoked *Griswold*'s fiction in its purest form: the right arises not from any one identifiable constitutional provision, but from a collectivity of specific guarantees.

The constitutional grounding of the *Roe* decision is weak at best. This lack of precision in the Court's analysis probably resulted from the serious moral and social overtones of the abortion question, and the inability to develop a consensus among the justices regarding the source of the abortion right. Even so, the most important observation for purposes of this discussion is that the Court refused to simply expand the right by citing available case law. Rather, it was deemed necessary to repeat the constitutional analysis which was undertaken initially in the *Griswold* case.

107 *Id.* at 152-53.
109 *Roe*, 410 U.S. at 153; *but see Griswold*, 381 U.S. at 481-82.
110 Kauper, supra note 78, at 252-54.
The right recognized by *Roe*, like that in the post-*Griswold* contraceptive cases, was one of autonomy: a woman is free to make the basic decision whether to bear an unwanted child.\(^{111}\) This decisional right, however, was not absolute and had to be balanced against the legitimate interest of the state in protecting the lives of the mother and fetus.\(^{112}\) However, within the range permitted by *Roe*'s trimester scheme, a woman's freedom of choice could not be infringed upon by government regulation.

Again, with the constitutional groundwork already laid, the Court was free to modify the substance of *Roe*'s abortion right on the strength of that decision alone. In a long line of cases, numerous state laws seeking to limit that right by requiring parental notification or consent for minors,\(^{113}\) and spousal consent for married women,\(^{114}\) have been struck down.

The issue presented in *Whalen v. Roe*,\(^{115}\) decided four years later, was whether the constitutionally-based right of privacy included the freedom from non-disclosure of private information. The statute under review in *Whalen* was part of a comprehensive drug control program aimed at stopping the diversion of potentially harmful prescription drugs into illegal markets. The names and addresses of patients who received prescriptions were to be recorded on specially prepared forms, a copy of which was to be submitted to a state administrative agency. This information was then to be coded and stored on a computerized data system.\(^{116}\) A group of patients who were regularly prescribed drugs regulated by the statute, as well as several physicians' and medical groups, challenged the validity of this statute.

The analysis of the privacy issue in *Whalen* reveals a willingness to embark on a course of interpreting the right of privacy as a separate constitutional right, but the Court's hesitancy in doing so is highlighted by moving the constitutional analysis from the text of the opinion to the footnotes.\(^{117}\) Justice Stevens, in the opinion for the majority, remarked that counsel for the contestants had briefed the constitutional issues along the lines of penumbra fiction, "rely[ing] on the shadows cast by a variety of provisions in the Bill of Rights."\(^{118}\) He then proceeded to differentiate two strains of privacy rights arising out of the case law, namely, autonomy and confidentiality.\(^{119}\) His textual discussion then turned to a consideration of whether either of these privacy rights had been violated. This was a

\(^{111}\) *Roe*, 410 U.S. at 153.

\(^{112}\) See generally id. at 153-55.


\(^{116}\) Id. at 592-93.

\(^{117}\) For *Whalen*'s constitutional analysis, see generally id. at 604 n.32.

\(^{118}\) Id. at 598 n.23.

\(^{119}\) Id. at 599-600.
notable shift in the treatment of the privacy question. Rather than tracing, as a threshold matter, the specific rights from which the plaintiff's confidentiality claim arose, the Whalen majority simply inquired whether it fit within the confines of existing case law. This was not merely an attempt to avoid reaching the constitutional question, because the Court rejected the contention that either the first or fourth amendments swept so broadly as to invalidate this law.\textsuperscript{120}

*Whalen* may signal a change in the Court's approach to privacy cases but, more likely, it demonstrates a mere shortcut in the method of analysis. It should not be forgotten that *Whalen* used this novel approach only in *rejecting* the claim of a violation of privacy. Whether the Court would be willing to address the issue in the same way when extending the privacy right remains unclear and, in view of the Court's current makeup, quite unlikely.

A few final remarks should be made to offer some guidance in analyzing privacy law and to suggest areas for future inquiry. The view taken here is that the continued use of the penumbra fiction has resulted from a conscious effort by judges to legitimize privacy decisions. It is recognized that other telling factors may also underlie the Court's reliance on the fiction. For example, the political ideology of individual judges may affect their willingness to be bound by the limitations imposed by *Griswold*. In addition, the decision whether to call upon the fiction may be dictated by considerations of social policy. The use of a direct constitutional approach may be too blunt an instrument of social reform in some delicate areas of privacy. In such cases, resort to the penumbra fiction may be preferred as a means to tailor the scope of protection to political-social realities. Finally, the fiction may continue to find its way into modern privacy analysis only as the vestigial remains of the Warren Court era. *Griswold* was the progenitor of modern privacy law, and its stilted constitutional approach may be carried forward in blind reverence to its command. Each of these factors undoubtedly may play some part in charting the course of the fiction as privacy law matures. But a more complete determination of the impact of these and other forces on the Court's choice of constitutional analysis will have to await future developments in the privacy arena.

VI. CONCLUSION

The primary importance of the *Griswold* decision is, of course, its legitimation of the right of privacy. The use of the cumbersome penumbra fiction was plainly an effort to avoid criticism that the Court was unjustifiably creating new constitutional rights.\textsuperscript{121} But the fiction was not simply a means to rationalize the invalidation of "an uncommanlly silly law."\textsuperscript{122} It was more properly a tool which

\textsuperscript{120} *Id.* at 604 n.32.

\textsuperscript{121} D. O'Brien, *supra* note 58, at 178.

\textsuperscript{122} *Griswold*, 381 U.S. at 527 (Stewart, J., dissenting).
permitted the Court to engage in constitutional lawmaking. By tying its privacy right to others expressly guaranteed in the Constitution, the Court could safely say that it had merely undertaken to interpret those provisions.

Once the Griswold fiction had been launched, the newly-recognized right of privacy was developed without further invocation of the Constitution. But, importantly, when the Court has been asked to expand the right into other areas, the fiction has been reintroduced. It is apparent, then, that the penumbra fiction has not been "drop[ped] out of the final reckoning." The retention of the fiction is necessary to promote stability in the constitutional decision-making process. It lends credibility to new applications of the privacy right and provides a ready framework for analyzing privacy issues.

For the constitutional litigator, the message of Griswold's progeny is clear. Where some innovative aspect of privacy is sought to be given constitutional protection, it must be traced to one or more express rights. Many such privacy issues make their way into the courts—the "right to die," consensual sexual activity (whether it be homosexual or heterosexual), personal appearance, and acts styled as "victimless" crimes. The Court, in reviewing these and other such issues, will undoubtedly insist that they be briefed and analyzed along the lines of the penumbra theory. The imprint of Griswold is unmistakable, and its underlying fiction will continue to shape future developments in privacy law.

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