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Richard E. Warner

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the work to the union. In this situation, the union's demand is not for preservation of work but for work it never had. Consequently, the union has no claim that the subcontractor has breached his agreement to give to the union all work preserved by the bargaining agreement.

### CONCLUSION

When work preservation agreements are enforced, prefabricated materials are kept off the jobsite. Manufacturers of these materials are foreclosed from competing in the construction industry. It is the elimination of competition between skilled labor and manufacturers of prefabricated materials that is the vice of work preservation agreements. Enforcement of such agreements in "right-to-control" cases deprives the general contractor of the freedom to choose between use of prefabricated materials and employment of skilled labor. It is this freedom of choice that *Enterprise* protects. Work preservation agreements remain valid; the preservation of bargaining unit work is a primary goal, but neither the agreement nor activities in pursuit of work preservation are protected when the union seeks to influence by economic pressure the business decisions of one outside the collective bargaining agreement.

DIANE AUSTIN

### **Carey, Kids and Contraceptives: Privacy's Problem Child**

*In Carey v. Population Services International the Supreme Court held that a New York state statute restricting access to nonprescription contraceptives violated the right to privacy of both adults and minors. In order to include access to contraceptives within the protection of the privacy right and maintain consistency with the constitutionality of state laws prohibiting adultery, fornication and sodomy, the Court found it necessary to reformulate the rationale of its decisions in Griswold v. Connecticut and subsequent privacy cases. The author of this note first considers the validity of the Court's new interpretation of Griswold as creating a right to privacy which protects activities related to the decision whether or not to bear or beget children. He then assesses the possible results of applying this newly-defined privacy right to those private consensual activities traditionally forbidden by state laws.*

New York Education Law section 6811(8)<sup>1</sup> prohibited advertisement of contraceptives and, in conjunction with section 6807(b)<sup>2</sup> of the same law, restricted access to nonprescription contraceptives by authorizing distribution only by licensed pharmacists to persons above the age of sixteen and only by licensed physicians to persons below that age. Population Planning Associates, Inc., (PPA), a North Carolina firm which advertised nonprescription contraceptives in the state of New York and sold them there by mail without regard to the age of the purchaser, was threatened with prosecution by New York officials under this law. PPA, along with several other concerned parties,<sup>3</sup> sought declaratory and injunctive relief before a three-judge United States District Court. The act was declared unconstitutional as to both the advertising prohibition and access restrictions.<sup>4</sup> On direct appeal,<sup>5</sup> the Supreme Court, *held*, affirmed:

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1. N.Y. EDUC. LAW § 6811(8) (McKinney 1972). The enactment provides:  
It shall be a class A misdemeanor for:

...  
8. Any person to sell or distribute any instrument or article, or any recipe, drug or medicine for the prevention of conception to a minor under the age of sixteen years; the sale or distribution of such to a person other than a minor under the age of sixteen years is authorized only by a licensed pharmacist but the advertisement or display of said articles, within or without the premises of such pharmacy, is hereby prohibited.

2. N.Y. EDUC. LAW § 6807(b) (McKinney 1972). The enactment provides:

1. This article shall not be construed to affect or prevent:

...  
(b) any physician . . . who is not the owner of a pharmacy, or registered store, or who is not in the employ of such owner, from supplying his patients with such drugs as the physician . . . deems proper in connection with his practice . . .

Nonprescription contraceptives fall within the definition of "drug" in the statute. *Population Serv. Int'l v. Wilson*, 398 F. Supp. 321, 329 n.8 (S.D.N.Y. 1975).

3. *Population Serv. International*, a nonprofit corporation for the dissemination of birth control information; a minister who directed a venereal disease prevention program; three New York physicians specializing in obstetrics and family planning; and an adult New York resident who claimed that the statute restricted his access to contraceptives and his freedom to distribute them to his children. *Carey v. Population Serv. Int'l*, 431 U.S. 678, 682 n.2 (1977).

4. *Population Serv. Int'l v. Wilson*, 398 F. Supp. 321, 336-39 (S.D.N.Y. 1975).

5. 431 U.S. 678 (1977). The Court found that PPA had standing sufficient to satisfy the article III requirement of a case or controversy because of the imminent threat of prosecution. The New York State Board of Pharmacy had written two letters to PPA, the first of which advised them of their violation of the statute under consideration while the second letter stated that if PPA failed to comply with the statute, the matter would be turned over to the state attorney for legal action. *Id.* at 682-83. See *Steffel v. Thompson*, 415 U.S. 452, 459-60 (1974). But see *Poe v. Ullman*, 367 U.S. 497 (1961) (statute had not been enforced for over 80 years). Furthermore, the Court found that PPA, as a vendor, could assert the rights of its potential customers and therefore there was no need to determine the standing of the other appellees. *Craig v. Boren*, 429 U.S. 190 (1976) (vendor of beer could assert rights of potential purchasers). See also *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Barrows v. Jackson*, 346 U.S. 249 (1953); Comment, *Recent Standing Cases and a Possible Alternative Approach*, 27 HASTINGS L.J. 213 (1975).

The complete advertising ban was violative of appellees' first amendment right to free speech<sup>6</sup> and the restrictions on access to nonprescription contraceptives were violations of fourteenth amendment due process in breaching the right to privacy of both adults and minors in their decisions "whether or not to beget or bear a child."<sup>7</sup>

While arousing some interest from the media,<sup>8</sup> the *Carey* holding that blanket prohibitions on nonobscene commercial advertising are unconstitutionally broad did not appreciably alter or extend the law in the area of free speech.<sup>9</sup> The prime importance of *Carey* is the manner in which it expands the scope of the right to privacy. Specifically, the case helped define the indistinct boundaries of the "privacy zone" established in *Griswold v. Connecticut*.<sup>10</sup> More importantly, it presents an insight into the Court's future position in the conflict between this expanding right to privacy and traditional state laws forbidding private consensual acts of sodomy, fornication and adultery.<sup>11</sup>

## I. THE RIGHT TO PRIVACY

The right to privacy as a distinct legal entity is of rather recent origin. The concept and the name were first developed in the famous article<sup>12</sup> by Brandeis and Warren in 1890 where the authors synthesized several separate tort theories of recovery<sup>13</sup> into one general

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6. 431 U.S. 678, 700 (1977).

7. *Id.* at 684-85. See also *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

8. *E.g.*, N.Y. Times, June 10, 1977, § 1, at 15, col. 1; Wash. Post, June 10, 1977, § A, at 1, col. 1.

9. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). Because the advertised articles were neither obscene nor likely to incite unlawful action, and because the information contained in the advertising was concededly truthful, the complete ban on advertising at issue in *Carey* was squarely analogous to the prohibition on opticians' price advertising struck down in *Virginia State Bd.* 431 U.S. at 700-01. Additionally, first amendment protection of expressions having nonobscene sexual implications had already been invoked to allow the publication of a more pointedly offensive expression. *Cohen v. California*, 203 U.S. 15 (1969) (wearing in public of jacket bearing a phrase commanding passersby to commit sexual intercourse with the Selective Service Administration). See also *Bates v. State Bar of Ariz.*, 97 S. Ct. 2691 (1977); Alexander, *Speech in the Local Marketplace: Implications of Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., for Local Regulatory Power*, 14 SAN DIEGO L. REV. 357 (1977).

10. 381 U.S. 479 (1965).

11. See notes 44-46 *infra* and accompanying text.

12. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). See generally Davis, *What Do We Mean by "Right to Privacy"?*, 4 S.D.L. REV. 1 (1959); *Griswold, The Right to be Let Alone*, 55 NW. U.L. REV. 216 (1960); Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).

13. The theories relied upon were appropriation of plaintiff's name or likeness, intrusion

theory called the "right to privacy." As this innovation in tort law steadily gained acceptance, the concept of privacy as one aspect of due process cropped up in various constitutional cases.<sup>14</sup> Finally, in *Griswold*, the Supreme Court declared a state law prohibiting use of contraceptives by married persons unconstitutional because it violated their "right of privacy." The Court determined that this "right" was lodged in the "penumbras" of the first, third, fourth, fifth and ninth amendments to the Constitution. The "penumbras," or fringe areas, evidently combined synergistically to produce the distinct right.<sup>15</sup> Justice Douglas, writing for the Court, conceived of the right as creating a zone of privacy within which activities could not be disturbed without a justified governmental interest. He found that, due to its intimate and personal nature, marriage was one of the activities or relationships which would be protected within the zone. His vision of police searching bedrooms for telltale

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upon plaintiff's physical seclusion, public disclosure of private facts, and imposing upon plaintiff false light in the public eye. Warren & Brandeis, *supra* note 12, at 195-98, 205, 213.

14. *E.g.*, *Mapp v. Ohio*, 367 U.S. 643, 656 (1961); *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); *Boyd v. United States*, 116 U.S. 616, 630 (1886); *see, e.g.*, *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); *Union Pac. R.R. v. Botsford*, 141 U.S. 250, 251-52 (1891).

15. *Griswold v. Connecticut*, 381 U.S. 479, 481-85 (1965) ("We do not sit as a super-legislature . . ."). *But see id.* at 486-99 (Goldberg, J., concurring) (marital privacy a fundamental right per se lodged in ninth amendment); *id.* at 502-07 (White, J., concurring) (marital privacy an aspect of fourteenth amendment due process). Douglas' majority opinion reflected the then current antipathy for the theory of substantive due process. This disdain was best articulated by Justice Holmes in his dissenting opinion in *Lochner v. New York*, 198 U.S. 45, 74 (1905). The theory as it then existed gave the Court broad power to pass upon the basic rationality or feasibility of laws, a discretion which Holmes contended was exclusive to the legislative branch. Unlike the more narrowly structured concepts of procedural and jurisdictional due process, *substantive* due process involves a determination of whether the governmental action is reasonable under the circumstances. In a series of cases culminating in *Ferguson v. Skrupa*, 372 U.S. 726 (1963), the Court attempted to eliminate the theory. Justice Black, writing for the Court, stated: "We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." *Id.* at 730.

Barely a decade passed before the Court exhumed the theory and rejuvenated it as the vehicle for the right to privacy in *Roe v. Wade*, 410 U.S. 113, 153 (1973). In *Paul v. Davis*, 424 U.S. 693, 712-13 (1976) the Court fully revitalized the theory by specifically using the term "substantive due process" and avoiding any discussion of the penumbra or ninth amendment theories. One may speculate as to the reason for the Court's rejection of the penumbra theory as the vehicle for the right to privacy. It may have been the Court's uneasiness with the seemingly boundless potential of Douglas' innovative penumbra theory which prompted them to substitute the more familiar, albeit discredited, theory of substantive due process. *Carey*, however, has foreclosed the possibility that privacy will be reassimilated completely into the concept of due process because activities which are not fundamental rights have been elevated to that status as components of the right to privacy. *See* note 53 *infra* and accompanying text. *See generally* Perry, *Substantive Due Process Revisited: Reflections On (And Beyond) Recent Cases*, 72 Nw. U.L. Rev. 417, 420 (1976) (right of privacy a facade for direct application of substantive due process).

signs of contraceptive use histrionically demonstrated the repulsive intrusion of the eminently "silly" law.<sup>16</sup>

After *Griswold* the Court increased the number of activities to be included in the zone by adding the use of contraceptives by unmarried persons<sup>17</sup> and the decisions of adults<sup>18</sup> and minors<sup>19</sup> to receive an abortion. In these cases the Court, through dictum, also gathered retroactively into the zone several activities and relationships which it had already deemed protected either through equal protection or by virtue of their inclusion in due process: decisions related to marriage,<sup>20</sup> procreation,<sup>21</sup> child education<sup>22</sup> and family relationships.<sup>23</sup>

## II. THE CASE

*Carey* affirmatively answered the question expressly left open in *Eisenstadt v. Baird*<sup>24</sup> as to whether access to contraceptives would be placed within the zone of privacy. Writing for the Court, Justice Brennan applied the two-tiered analysis of equal protection and substantive due process<sup>25</sup> in almost textbook fashion. Firstly, he

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16. *Griswold v. Connecticut*, 381 U.S. 479, 485, 527 (1965) (Stewart, J., dissenting).

17. In *Eisenstadt v. Baird*, 405 U.S. 438 (1972), unmarried persons, because of their equal protection right, were held to be protected by the same zone of privacy enveloping married persons:

If under *Griswold* the distribution of contraceptives to married persons can not 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.

*Id.* at 453.

18. *Roe v. Wade*, 410 U.S. 113 (1973) (state interest becomes compelling after the end of the first trimester of pregnancy).

19. *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976). See note 32 *infra* and accompanying text.

20. *Loving v. Virginia*, 388 U.S. 1 (1967).

21. *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (compulsory sterilization of habitual criminals struck down on equal protection grounds).

22. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (choice of parochial education for children protected); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (choice of studying foreign languages in school protected).

23. *Prince v. Massachusetts*, 321 U.S. 158 (1944) (parental employment of child protected).

24. 405 U.S. 438, 453 (1972).

25. In analyzing whether a discriminatory state action is valid under the equal protection clause of the fourteenth amendment, the Court has formulated two tests. If the state action touches a fundamental right (voting, citizenship, free movement, the incorporated rights of the first eight amendments and now, privacy; see, e.g., *Shapiro v. Thompson*, 394

included access to contraceptives within the zone by applying what he considered to be a new reading of *Griswold*. This reading capsulized the rationale of the privacy cases from *Griswold* to the present as holding that "the decision whether or not to beget or bear a child"<sup>26</sup> is protected from unjustified government intrusion. He then assumed that access to contraceptives directly concerns the decision to beget children and, therefore, warranted inclusion in the zone.<sup>27</sup> Secondly, Brennan concluded that the overly broad restrictions on access in the statute substantially frustrated the exercise of the right to privacy by greatly limiting the availability of contraceptives on the market.<sup>28</sup> Thirdly, he concluded that the state's interests in prohibiting youths from selling contraceptives, promoting quality control in distribution, and facilitating administration of other related laws were not compelling enough to warrant this substantial intrusion.<sup>29</sup> Finally, he decided that even if the state could have shown these interests to be compelling, this statute would not have subserved them.<sup>30</sup> Part IV of the Court's decision, although reflecting the views of only Brennan and three of the justices, is important insofar as it supplies the reasoning that prompted the Court to include access to contraceptives within the zone of privacy and indi-

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U.S. 618 (1969)) or a "suspect factor" (race, color and status as an alien; see, e.g., *Brown v. Board of Educ.*, 349 U.S. 294 (1955) (race and color)) the state, to sustain the validity of the action, must demonstrate a compelling interest for imposing the discrimination. If the state action concerns neither a fundamental right nor a suspect factor, the state need only show a rational basis for the discrimination. *City of New Orleans v. Duke*, 427 U.S. 297 (1976). This analysis applies to federal action as well, since the equal protection concept has been read into the fifth amendment. *Bolling v. Sharp*, 347 U.S. 497 (1954). With the resurgence of fourteenth amendment substantive due process in *Roe v. Wade*, 410 U.S. 113 (1973), the Court virtually transferred the two-tiered analysis from equal protection into substantive due process. *Id.* at 155-57. This analysis has also been applied against federal action involving fifth amendment substantive due process. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). While the rational basis test can be readily overcome by well-considered legislation, it is important to note that in only a few instances has legislation subject to the compelling interest test been validated. *Roe v. Wade*, 410 U.S. 113 (1973) (certain Georgia abortion restrictions subsequent to the end of the first trimester of pregnancy); *Korematsu v. United States*, 323 U.S. 214 (1944) (Japanese nationals' relocation enactment during World War II); *Hirabayashi v. United States*, 320 U.S. 81 (1943) (Japanese nationals' curfew enactment during World War II). For a good discussion, although somewhat dated, of the balancing tests as originating in equal protection, see Tussman and tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341 (1949).

26. 431 U.S. at 684-85.

27. *Id.* at 687-88.

28. *Id.* at 689-90.

29. *Id.* at 690-91.

30. The Court concluded that frequently minors work in pharmacies where in fact the statutes allow contraceptives to be sold. Moreover, pharmacists would have no special knowledge as to the quality of the prepackaged contraceptives to effectuate any "quality control" over the articles. Under no circumstances would the Court recognize "administration of other laws" as a valid interest in restricting a fundamental right. *Id.*

cates the Court's disinclination to address the question of to what extent states may regulate the moral qualities of their citizens.<sup>31</sup> Brennan reasoned that if adults and minors<sup>32</sup> could enjoy a right to privacy in *terminating* a pregnancy, it would be illogical to deny them the right to privacy in *preventing* it.<sup>33</sup>

Justice White apprehensively concurred to the extent that the Court's decision did not disturb state laws prohibiting extramarital sexual activities.<sup>34</sup> Justice Stevens dwelled upon the counterproductive effects of the state statutes in his concurring opinion. He was disturbed by the fact that not only did the statutes *not* subserve a compelling state interest, but also that they promoted serious social damage as enforced.<sup>35</sup> In his opinion which concurred in part and concurred in judgment, Justice Powell agreed with the outcome but disagreed with the rationale used in the majority opin-

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31. *Id.* at 694 n.17. In response to appellees' contention that any state regulation of private consensual activities is unconstitutional, Brennan stated that the Court had not definitely answered that "difficult" question and was not passing on it in this case. *But see* Doe v. Commonwealth's Attorney, 425 U.S. 901 (1976), *aff'g mem.* 403 F. Supp. 1199 (E.D. Va. 1975); California v. LaRue, 409 U.S. 109, 132 n.10 (1972) (Marshall, J., dissenting). *See also* Hughes, *Morals and the Criminal Law*, 71 YALE L.J. 662, 672-73 (1962); Note, *On Privacy: Constitutional Protection for Personal Liberty*, 48 N.Y.U.L. REV. 670, 732-38 (1973).

32. *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976). The holding of this decision struck down, as violative of the right to privacy, parental and spousal consent requirements for a minor having an abortion. Like *Carey*, *Planned Parenthood* dealt with the right to privacy as it related to both adults and minors. However, the Court in neither case even partially resolved the present confusion concerning minors' rights. Brennan in *Carey* called the question of minors' rights a "vexing problem" for which there is no precise answer. 431 U.S. at 692. The Court seems to be in a quandary as to whether minors should be afforded only qualified fundamental rights or, correlatively, full scale fundamental rights but with a lowering of the stringent compelling interest standard. 431 U.S. at 692-96. This uncertainty is generated by the Court's feeling that the power of the state to control minors reaches beyond its power to control adults. *Ginsberg v. New York*, 390 U.S. 629 (1968); *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944). With respect to procedural safeguards, the Court has granted equal treatment to children. *In re Gault*, 387 U.S. 1 (1967). A perhaps overly simplistic method of clearing up this conceptual problem is to grant total equality in fundamental rights to minors and then simply use the fact of minority as a naturally important aspect in assessing the governmental interest. For a discussion of *Planned Parenthood*, see Note, *Third Party Consent to Abortions Before and After Danforth: A Theoretical Analysis*, 15 J. FAM. L. 508 (1976-77). For a discussion of minors' rights incorporating the *Carey* decision, see Hafen, *Puberty, Privacy, and Protection: The Risk of Childrens' "Rights,"* 63 A.B.A.J. 1383 (1977).

33. 431 U.S. at 694.

34. *Id.* at 702.

35. *Id.* at 712-16. Justice Stevens' analogy is quite apt: trying to discourage sexual promiscuity among youngsters by prohibiting the use of contraceptives would be as ineffective and counterproductive as attempting to discourage motorcycle driving by prohibiting the use of safety helmets. For rather convincing evidence that restricting access to contraceptives does not deter sexual promiscuity, see, Settlege, Baroff & Cooper, *Sexual Experience of Younger Teenage Girls Seeking Contraceptive Assistance for the First Time*, 5 FAM. PLAN. PERSPECTIVES 223 (1973).



ion. He concluded that Brennan's evaluation of the privacy cases was unnecessary and would place every consensual sex act by adults within the zone.<sup>36</sup> The Chief Justice dissented without opinion.<sup>37</sup> Justice Rehnquist's dissenting opinion melodramatically suggested that access to contraceptives was not fundamental to a free society and therefore did not warrant protection within the zone of privacy.<sup>38</sup>

### III. IMPLICATIONS OF CAREY

A review of the abortion decisions and a consideration of the deleterious effects of the statutes under consideration indicate that Brennan correctly reasoned that *Planned Parenthood* virtually mandated the outcome of *Carey*.<sup>39</sup> The decision to prevent conception is very likely just as personal and intimate an activity as the decision to abort. The intriguing aspect of the *Carey* decision is the process of reasoning by which the Court included access to contraceptives in the zone of privacy. In the previous privacy cases the scope of the right grew as the Court considered whether the activities at issue were so personal, intimate or fundamental as to warrant inclusion within the zone. If so, the right to privacy was invoked and the regulating statute was then subjected to the strict compelling interest test.<sup>40</sup> The *Carey* Court could have confined itself to this direct extension approach, as the district court had,<sup>41</sup> by merely finding that access to contraceptives was a highly personal and intimate activity into which the government could not intrude without a compelling interest. The Court chose to take a more circuituous route, however, by retrospectively formulating the "bear or beget" rationale to encompass access to contraception within the

36. 431 U.S. at 703-07. Powell's opinion went beyond the issue of minors' rights into the propriety of governmental intrusion into the family relationship. *Id.* at 707-10.

37. *Id.* at 702.

38. *Id.* at 717-19.

39. *Id.* at 694.

40. *Roe v. Wade*, 410 U.S. 113, 153 (1973) ("This right to privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) ("[I]t is the right . . . to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) ("The present case, then, concerns a relationship lying within the zone of privacy . . ."). Compare *Whalen v. Roe*, 429 U.S. 589, 598-600 (1977) with *Paul v. Davis*, 424 U.S. 693, 712-13 (1976), where the Court considered, respectively, confidential information and reputation as irrelevant to the concept of privacy.

41. *Population Serv. Int'l v. Wilson*, 398 F. Supp. 321, 330-31 (S.D.N.Y. 1975): "[T]his Court has no doubt that access to contraceptives is an aspect of the right to privacy, that is, a right encompassed within the personal liberty protected by the Due Process Clause of the Fourteenth Amendment." *Id.* at 331.

right to privacy notion.<sup>42</sup> It would appear that by using this methodology the Court could include access to contraceptives in the zone of privacy without undermining the constitutionality of the state laws prohibiting private acts of sodomy or homosexuality which the Court had recently affirmed in the case *Doe v. Commonwealth's Attorney*.<sup>43</sup>

As was evidenced by the fears of Justices White and Powell,<sup>44</sup> a continuing problem for the Court had been how to allow various private and intimate activities into the zone of privacy without also permitting inclusion of certain private consensual activities which have been prohibited as being morally degenerate: fornication, adultery, sodomy and homosexuality.<sup>45</sup> With the exception of Justices Marshall and Stevens, all the members of the Court have either jointly or individually supported the proposition that the right to privacy should not extend to these acts even if committed in the privacy of the home.<sup>46</sup> The only intelligible rationale offered for this distinction was that privacy protected only fundamental or traditionally acceptable activities or relationships.<sup>47</sup> With only *Griswold* on the books, one could easily view the activity protected,

42. 431 U.S. at 687:

These decisions [*Eisenstadt*, *Roe* and *Whalen*] put *Griswold* in proper perspective. *Griswold* may no longer be read as holding only that a State may not prohibit a married couple's use of contraceptives. Read in light of its progeny, the teaching of *Griswold* is that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the state.

43. 425 U.S. 901 (1976), *aff'g mem.* 403 F. Supp. 1199 (E.D. Va. 1975). The rationale offered by the lower court in *Doe* conforms to that mentioned in the text accompanying note 47 *infra*. See generally Perry, *supra* note 15, at 436-51; 15 Duq. L. Rev. 213 (1976); 65 Ky. L.J. 748 (1977).

44. See notes 34 & 36 *supra* and accompanying text.

45. Fornication is defined as unlawful sexual intercourse other than between a man and his wife. Adultery is any sexual intercourse between a married person and one to whom he or she is not married. Sodomy is any carnal copulation committed unnaturally between human beings. BLACK'S LAW DICTIONARY 781, 71, 1563 (rev. 4th ed. 1968). As of this writing 22 states have retained some form of fornication or lewd cohabitation statute. *E.g.*, FLA. STAT. § 798.03 (1975). Twenty-seven states have adultery statutes. *E.g.*, FLA. STAT. § 798.01 (1975). Thirty states retain sodomy laws. *E.g.*, FLA. STAT. § 800.02 (1975).

46. *Doe v. Commonwealth's Attorney*, 425 U.S. 901 (1976), *aff'g mem.* 403 F. Supp. 1199 (E.D. Va. 1975); *California v. LaRue*, 409 U.S. 109, 132 n.10 (1972) (Marshall, J., dissenting: "I have serious doubts whether the State may constitutionally assert an interest in regulating any sexual act between consenting adults."); *Griswold v. Connecticut*, 381 U.S. 479, 498-99 (1965) (Goldberg, J., concurring, joined by Brennan, J.). See generally 431 U.S. at 702 (White, J., concurring); *Poe v. Ullman*, 367 U.S. 497, 552-53 (Harlan J., dissenting).

47. See, *e.g.*, *Poe v. Ullman*, 367 U.S. 497, 546 (1961):

The laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up, as well as laws forbidding adultery, fornication and homosexual practices which express the negative of the proposition, confining sexuality to lawful marriage, form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis.

marital relations in the home, as at least traditionally acceptable, if not a fundamental right in and of itself.<sup>48</sup> However, when *Eisenstadt* extended *Griswold*'s right of privacy to unmarried persons,<sup>49</sup> this rationale weakened as it became apparent that the activities protected by the zone need not be traditionally acceptable. The long-standing law prohibiting fornication and adultery would preclude considering use of contraceptives by unmarried persons as fundamental or traditional. It became more apparent when the Court faced the abortion question that the activity protected within the zone did not have to be a fundamental right per se. The Court in *Roe v. Wade* did not find that the mother had a fundamental right to abort her developing embryo,<sup>50</sup> nor could it find that abortion was a traditionally acceptable activity.<sup>51</sup> It was more logical and in keeping with the historic meaning of the phrase "fundamental right" to hold that the mother had a fundamental right to privacy in certain very personal decisions which included the decision to abort.<sup>52</sup> Finally, in *Carey*, the Court expressly recognized<sup>53</sup> that the activities protected within the zone need not be fundamental rights per se if they are necessary to the enjoyment of the right to privacy. It would be a misleading use of terms to assert that access to contraceptives, especially for minors, is either fundamental to a free and ordered society or a traditionally acceptable activity.

With the breakdown of the rationale that only fundamental rights are protected within the zone of privacy, an unqualified extension of the zone to include access to contraceptives would have removed any impediment to the inclusion of the "illicit" sexual activities mentioned above. Surely a consensual act of fornication or sodomy between adults in the privacy of the home is as intimate, personal and expectant of privacy as a youth's journey to the drug store counter to purchase a package of prophylactics. However, by

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48. See *Griswold v. Connecticut*, 381 U.S. 479, 486-89 (1965) (Goldberg, J., concurring). Justice Goldberg looked directly to the marriage relationship as a fundamental right in and of itself, constitutionally derived through the ninth amendment. This would make superfluous the concept of a zone of privacy since, as discussed in note 25 *supra*, fundamental rights trigger the compelling interest test without any aid from the right to privacy. This fact points up the unique and troublesome characteristic of the right to privacy as set forth in *Griswold*: nonfundamental activities are elevated to the status of fundamental rights.

49. See note 17 *supra*.

50. *Roe v. Wade*, 410 U.S. 113, 153 (1973).

51. *Id.* at 138-140.

52. *Id.* at 153.

53. 431 U.S. at 688-89.

This is not so because there is an independent fundamental "right of access to contraceptives," but because such access is essential to exercise of the constitutionally protected right of decision in matters of childbearing that is the underlying foundation of the holdings in *Griswold*, *Eisenstadt v. Baird*, and *Roe v. Wade*.

taking the longer route of crystallizing the rationale of the *Griswold* cases in terms of "the decision whether or not to beget or bear a child,"<sup>54</sup> the Court could include access to contraceptives within the zone without undercutting their affirmance of the laws prohibiting sodomy. The "decision to beget" language has no meaning in the context of sodomy or homosexual acts. Only with the greatest stretch of the imagination could one conclude that the sodomitic act is a necessary aspect of the decision to beget, especially where homosexuals are involved. Fornication and adultery, on the other hand, are acts which may result from certain decisions whether or not to bear or beget children and because of this relevance, the bear or beget language could serve to include acts of fornication and adultery within the zone.<sup>55</sup> Notwithstanding Brennan's assertions to the contrary,<sup>56</sup> it seems Justice Powell's fears that *Carey* will place every adult sex act within the zone of privacy<sup>57</sup> are well-founded to the extent that the act involves heterosexual intercourse; however, *Carey* has left *Doe* and its support of sodomy laws relatively secure behind the "bear or beget" language.

#### IV. COMMENT

In considering the possibility that the "bear or beget" language could be used effectively to include acts of fornication or adultery within the zone of privacy, *Carey* may seem to expand the scope of the right to privacy well beyond the facts of the privacy cases. Nevertheless, the *Carey* Court's reading of *Griswold* to the exclusion of homosexual acts and relationships in the privacy of the home presents a distorted definition of the word "privacy." A fairer reading of *Griswold* would not include the criterion of procreative concern injected by *Carey*.<sup>58</sup> Often overlooked is *Griswold's* assertion that marriage was just *one* relationship which would be included within the zone of privacy.<sup>59</sup> Additionally, the only elements of privacy in

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54. 431 U.S. at 684-85.

55. One may surmise that the fornication and adultery laws will be able to pass the compelling interest test because of the substantially greater governmental interest inherent in each. See 23 U. MIAMI L. REV. 231, 235 n.18, 236 (1968).

56. See note 31 *supra*.

57. See text accompanying note 36 *supra*.

58. See *Cotner v. Henry*, 394 F.2d 873, 875 (7th Cir. 1968); Annot., 58 A.L.R.3d 638, 639-40 (1974); Comment, *On Privacy: Constitutional Protection For Personal Liberty*, 48 N.Y.U.L. Rev. 670, 733 (1973).

59. *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965): "The present case, then, concerns a relationship lying within the zone of privacy . . ." (emphasis added). *Id.* at 485; Beane, *The Griswold Case and the Expanding Right to Privacy*, 1966 Wis. L. Rev. 979, 982. "[H]e [Justice Douglas] is in effect saying that the Constitution lays down a wider, more

*Griswold* which were determinative of inclusion within the zone were intimacy, consensuality and autonomy in one's person and homelife.<sup>60</sup> While Douglas extolled the nobility of marriage, this aspect was not dispositive. Any doubts as to this were dispelled by *Eisenstadt*'s extension of privacy to unmarried persons.<sup>61</sup> Nowhere in *Griswold* or in *Eisenstadt* is there the requirement of procreative concern. Yet the *Carey* Court posits the decision to bear or beget as the "underlying foundation of the holdings in *Griswold*, *Eisenstadt v. Baird*, and *Roe v. Wade*."<sup>62</sup> When reconciled with the Court's affirmance of the sodomy laws in *Doe*, this narrow view of the right to privacy in *Carey* presents some paradoxes in the use of the word "privacy." Although the youngster remains protected by the right to privacy while window shopping for condoms, the homosexual committing a consensual act of sodomy with another adult in the bedroom of his home is beyond the protection of the right. Evidently the vision of police searching bedrooms in private homes for telltale signs of sexual activity somehow becomes repulsive only when the participants are doing something relevant to child bearing. The artificiality of the "decision whether or not to beget or bear a child"<sup>63</sup> becomes even more apparent when one surmises that in *Carey* the minor's only concern is to have worry-free sex. Yet, in view of the Court's outlook in *Carey*, it may be more appropriate to rename this area "the right to pregnancy."

## V. CONCLUSION

Although the narrow holding of *Carey* is that the New York statute is unconstitutional because it breaches the appellees' right to privacy without the support of a compelling interest, the great

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general guarantee of privacy, within which specific claims may appropriately claim and deserve recognition." *Id.* at 982.

60. *Doe v. Bolton*, 410 U.S. 179, 213 (1973) (Douglas, J., concurring) (right of privacy encompasses: caring for one's health and person; freedom to walk, stroll, and loaf); *Lovisi v. Slayton*, 539 F.2d 349, 355 (4th Cir.) (Craven, J., dissenting), *cert. denied*, 429 U.S. 977 (1976). See *Doe v. Commonwealth's Attorney*, 403 F. Supp. 1199, 1203 (E.D. Va. 1975) (Merhige, J., dissenting), *aff'd mem.*, 425 U.S. 901 (1976); *cf.* *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (possession of obscene material at home protected by first amendment, although privacy questions were posed); Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1429 (1974) (attempt to define right of privacy without regard for element of consensuality). But see 431 U.S. at 688-89 (decisions in matters of childbearing as the underlying foundation of privacy cases); *cf.* *Griswold v. Connecticut*, 381 U.S. 479, 497-99 (1965) (Goldberg, J., concurring) (only fundamental rights ought be protected). See generally Paul v. Davis, 424 U.S. 693, 712-13 (1976) (Rehnquist, J., describing the privacy cases as "defying categorization").

61. See note 17 *supra*.

62. 431 U.S. at 688-89. See note 53 *supra*.

63. 431 U.S. at 684-85.

dependence placed by the Court on the "bear or beget" rationale may not be easily discounted when the Court finally hears a challenge to the adultery, fornication and sodomy laws. For the reasons stated above, the "bear or beget" language of *Carey* may be quite incongruously used as support by those attacking the fornication and adultery laws and also by those supporting the sodomy and homosexuality laws.

For all the anomaly, however, one ought not condemn the Court for contorting logic in its effort to reflect the often capricious values of society.<sup>64</sup> Well-entrenched public policies are often not amenable to consistently logical analysis. On the other hand, it must be remembered that the right to privacy is the Court's own adolescent child. The Court conceived, beget and shaped it as a new constitutional force. So now, if the Court has great difficulty in making it behave rationally, it can look only to its own lack of foresight.

RICHARD E. WARNER

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64. *Berkey v. Third Ave. Ry.*, 244 N.Y. 84, 95, 155 N.E. 58, 61 (1926) (Cardozo, J.,: "The logical consistency of a juridical conception will indeed be sacrificed at times, when the sacrifice is essential to the end that some accepted public policy may be defended or upheld.").