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PRIVACY IN CONNECTICUT

*Arthur E. Sutherland**

OCCASIONALLY a judgment of our Supreme Court, delivered in a superficially petty case, suddenly before our startled eyes displays fundamentals of our constitutional theory. Thus, in *Griswold v. Connecticut*,¹ holding unconstitutional an 1879 Connecticut statute forbidding all persons to use contraceptive devices, the Court found it necessary to discover a "right of privacy" latent in the Bill of Rights and incorporated into the due process clause of the fourteenth amendment. The outcome of the case is satisfying; all nine Justices joined in saying, in one way or another, that Connecticut's statute was nonsense. I am happy to see this limit on public intrusion into private affairs. But the dramatic traits of the case were the necessity felt by five Justices for some comfortingly specific rule in the Constitution which would outlaw Connecticut's statute, and their choice of a "right of privacy" as such a rule. These are five wise and thoughtful judges; one is struck by their sense that they must explain their decision by discovering some pre-existing rule, more definite than "due process" with its vague contours.

From time to time the American intellectual, like all human beings, changes his ideas as to the ideal balance of power in government. Between about 1920 and 1940, wise men at Faculty Club tables and in *New Republic* editorials viewed the federal judiciary with dismay. Throughout this period, the typical academician was a man deeply imbued with faith in majorities. He was certain that all men were inherently good and wise, and that if it were not for the evil machinations of a series of tyrannies, democratic processes would long since have made the world a pleasant place in which to live. There was always some person or organization that was blamed for the non-arrival of Eden: Attorney General Mitchell Palmer, big business, Wall Street, munitions-makers, and, recurrently of course, the Supreme Court of the United States. At that time we felt that if only we could strike off the shackles imposed on majorities by such bad people, mankind, born free but in many places in chains, would again rule itself benignly, and we should all be quite happy.

Between 1938 and 1948, a change of political theory developed in the intellectual life of the United States, a change so profound that men even now hesitate to see it plainly. Some thinkers during

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1. 381 U.S. 479 (1965).

that sad decade were revising their evaluation of majoritarian institutions; things done in Germany, Italy, and Russia, as well as certain activity in the United States, had unsettled previous premises of democratic political thinking. Hitler's popularity among the German people, public support of the Un-American Activities Committee and the McCarthy hearings, ancient racial wrongs, recurring state censorship statutes attempting to suppress books which might disturb the social and political ideas of the young—all these brought about a certain amount of revisionism in our ideas about the Supreme Court. Ever since 1905 we academics had poked fun at Mr. Justice Peckham for asking with dismay, "are we all . . . at the mercy of legislative majorities?"² In the 1950's these jests of ours came to seem a little less droll than they had a half-century earlier. In 1952 Professor Rostow of the Yale Law School stated our revised credo when he published his distinguished essay, "The Democratic Character of Judicial Review."³ Upon some of us who had been votaries of unreviewed majoritarianism, there had suddenly burst fearful demonstrations that unrestricted majorities could be as tyrannical as wicked oligarchs. Maybe Peckham's views were not so absurd after all!

This revolution in concepts left us with explanations to make. We still had to sacrifice to the old gods, as men always must. We could not say in so many words that democratic societies should be permitted to produce cruelty, injustice, and stupidity simply because these are traits occasionally exhibited by all mankind. We could not say in plain terms that occasionally we have to select wise and able people and give them the constitutional function of countering the democratic process, at least for a time, until a sober second thought can correct a first thought which had opposite characteristics. To avoid the open challenge to our political faiths involved in appealing from the many to the Nine in order to correct the injustice of the majority, we have sought from time to time to reassure ourselves by repeating the comforting statement that the Supreme Court does not simply say that this or that state or federal measure is so cruel or outrageous that it clashes with an undefinable, but nevertheless effective, constitutional negation of cruelty or outrage. We feel obliged to maintain our abiding democratic orthodoxy by telling ourselves that if we really try hard enough we can rediscover a pre-existing set of hard and fast rules instituted long ago by majority vote of our ancestors, which the Supreme Court has only

2. *Lochner v. New York*, 198 U.S. 45 (1905).

3. 66 *HARV. L. REV.* 193 (1952).

to read and apply and which will nullify the outrageous state or federal prescription.

This tension between traditional statements of democratic policy and realism of present-day perceptions emerged in 1947 and 1952 in a classic dialogue between Justices Black and Frankfurter.⁴ Mr. Justice Black, seeking to document the existence of certain fundamental rights which must not be violated by the states, found the requisite specifics in the first eight amendments, which he felt were "incorporated" in the fourteenth amendment. Mr. Justice Frankfurter, although dissatisfied with the position of Mr. Justice Black, could find no substitute adequate to explain the revisory function of the Supreme Court. Indeed, Mr. Justice Frankfurter could not bring himself to say, in so many words, that the Court was performing a necessary, albeit anti-democratic, function. In *Rochin v. California*⁵ he stoutly affirmed:

The vague contours of the Due Process Clause do not leave judges at large. We may not draw on our merely personal and private notions and disregard the limits that bind judges in their judicial function. Even though the concept of due process of law is not final and fixed, these limits are derived from considerations that are fused in the whole nature of our judicial process. . . . These are considerations deeply rooted in reason and in the compelling traditions of the legal profession.⁶

The trouble is that Mr. Justice Frankfurter still left us as much at large as we were with mere "due process of law" or with Coke's "common right and reason" in *Doctor Bonham's Case*.⁷

Griswold v. Connecticut is the most recent demonstration of this tension between the necessity for majoritarianism and the aspiration to an undefinable "justice" in government. The extraordinary thing about this case is not its result, but rather the divergencies in the theories of the Justices who wrote the opinions to explain it. Every newspaper reader now knows that the two Connecticut statutes in question provided a fine or imprisonment for the use of any drug or instrument for the purpose of preventing conception, and directed punishment of any person who counseled or assisted another in the use of contraceptive devices, as if he were himself the principal offender. The Connecticut court convicted and fined the

4. This debate appeared in *Adamson v. California*, 332 U.S. 46 (1947), and *Rochin v. California*, 342 U.S. 165 (1952).

5. 342 U.S. 165 (1952).

6. *Id.* at 169-71. See CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* (1928); CARDOZO, *THE GROWTH OF THE LAW* (1924); CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921).

7. 8 Co. Rep. 107a, 113b (1610).

Executive Director of the Planned Parenthood League of Connecticut and a cooperating physician for giving information about contraception to married persons. Seven of the nine United States Supreme Court Justices found this state action unconstitutional for a diversity of reasons. The other two, Justices Stewart and Black, expressed the view that this was "an uncommonly silly law . . . obviously unenforceable, except in the oblique context of the present case."⁸ Nevertheless, after examining the first, third, fourth, fifth, and ninth amendments, which were relied upon by the various prevailing opinions, the two dissenters found nothing which would invalidate a law proscribing contraceptives. Similarly, they found the due process clause of the fourteenth amendment to be insufficiently explicit to satisfy our aspiration to leave repeal of legislation to legislators.

The opinion of the Court expressed the views of only five Justices—Douglas, Clark, Goldberg, Brennan, and Chief Justice Warren—and the last three felt obliged to add some further views in a separate concurring opinion. Justices Harlan and White did not accept the opinion of the Court, although both agreed that the statute was unconstitutional.

The Court's five-Justice opinion found in the fourteenth amendment certain latent guarantees "penumbral" to the specifics of the Bill of Rights; these penumbral guarantees include "privacy and repose," which were regarded as specific enough to justify the finding of unconstitutionality. The Court's reasoning ran something like this: The fourteenth amendment forbids certain matters which are specified in the first eight amendments. These specifications of the first eight amendments are of two classes—explicit and "penumbral"; in the latter category is a "right of privacy," not mentioned by name in the Constitution, but still an identified and established right. The Court is therefore finding the law, not making it according to its own predispositions, and it is not sitting "as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions."⁹

To this day, no one knows precisely what the words "due process of law" meant to the draftsmen of the fifth amendment, and no one knows what these words meant to the draftsmen of the fourteenth amendment, or to the many other men who took part in the ratification of either of these provisions. However, the subjective reactions

8. 381 U.S. at 527.

9. *Id.* at 482.

of long-dead constitution-makers are not now significant. What is important is the use which the Supreme Court has made of these words. A common element runs through the several judgments of constitutional invalidity of state action in which states were found to have extorted a confession by long and wearying questions; obtained a confession by fraud; pumped out a man's stomach against his will to provide evidence against him; exposed a school child to schoolroom prayers unwelcome to the child or his parents; censored motion pictures on religious grounds; put a lecturer at a state university in jail until he explained his lectures to the state attorney general; used race as a criterion by which to separate people in public schools even when the education is as good, in objective quality, for one race as it is for another; denied parents the privilege of sending their children to a private rather than a public school; ransacked a doctor's office to find a list of his patients; searched a woman's house and found indecent pictures in a trunk; or punished a physician who gave advice to a husband and wife on how to avoid having unwanted children. The common element is a sense of outrage produced by official pressure on an individual; in the reasoning of the Supreme Court, such pressure produces no good social result and produces undue hardship on the oppressed individual. But is "outraging the Supreme Court's sense of justice" any more definite than "denying due process of law?"

The unspecific quality of this statement of the common element in all these situations raises the question of the Supreme Court's sitting "as a super-legislature to determine the wisdom, need, and propriety of laws." However, it was precisely this characterization of its function which the Court's *Griswold* opinion disclaimed. Not every state measure that arouses a sense of outrage in the minds of some people is unconstitutional; such a rule would render most state legislation invalid. In describing the early nineteenth century concept of the relationship between federal and state power, Mr. Justice Holmes once stated:

In those days it was not recognized as it is today that most of the distinctions of the law are distinctions of degree. If the States had any power it was assumed that they had all power, and that the necessary alternative was to deny it altogether.¹⁰

Thus, whereas a great outrage perpetrated by a state violates the due

10. *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U.S. 218, 223 (1928) (dissenting opinion). Mr. Justice Holmes was commenting on Mr. Chief Justice Marshall's statement in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 159, 164 (1819), that "the power to tax involves the power to destroy."

process clause of the fourteenth amendment, a small outrage does not, and the Supreme Court of the United States decides when a little becomes too much. Since the difference between too-much and not-too-much is no more definite than the difference between the just and the unjust, pursuit of synonyms for "injustice" is elusive. Shall we then denounce this judicial power? If anyone rebels at the thought of entrusting this power to the nine Justices, he may well consider for a little while to whom he would prefer to entrust it; this can be a sobering experience.

Obviously, some "right of privacy" ought to be guaranteed by the due process clauses. A sensible and rather common modern regulation requires a medical certificate as a precondition to the issuance of a marriage license; but I assume that if some state should require that the necessary medical examination be conducted in public view, no Justice of the Supreme Court would be found to declare this senseless requirement constitutional. The Court might explain this as a violation of "a right of privacy," but just as good an explanation is the outrage perpetrated on the citizen with no compensating benefit.

The Supreme Court has recently been subjected to a great deal of criticism on all sides. Understandably, the Court seeks in its opinions to justify its action by conformity to a tradition of continuity and reliance upon matters already adjudicated. The Supreme Court was clearly right in the *Griswold* result, but there is food for thought in the five Justices' feeling that they had to search for an identifiable, traditional "right of privacy" to justify this decision. Their explanation demonstrates an uneasy sense that a canon of unreasonableness or of injustice is inconsistent with the majoritarian dogma underlying our Constitution and with the tradition that our judges do not make the law, but rather find it all written for them. For this reason, we must continue to pursue the elusive adjective describing that which is constitutionally intolerable. I wish this necessity were not present and that we might, like Justices Harlan and White, rely simply on the idea that such a statute as that in *Griswold* is inconsistent with the undefinable concept of reasonable liberty, which due process of law has come to connote for us and which we must let our nine Justices apply. For this, we must avow when we are frank with ourselves, is our constitutional system.