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Evolving Constitutional Concepts of Privacy

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Good afternoon, and welcome to our panel discussion on "Evolving Constitutional Concepts of Privacy." This program is one in a series sponsored by New York Law School in celebration of the Bicentennial of the United States Constitution. It seems quite fitting that this particular symposium be convened at New York Law School, because the most distinguished alumnus of the School, Supreme Court Justice John Marshall Harlan, was an important contributor to the evolution of a concept of privacy embraced in the liberty aspect of the due process clause.

According to one treatise, "[t]he right to privacy was given its first exposition by Justice Harlan in his dissent in Poe v. Ullman." In that case, which preceded Griswold v. Connecticut by four years and involved the same Connecticut contraceptive statute challenged in Griswold, Harlan's dissent included these words: "I think the sweep of the Court's decisions, under both the fourth and fourteenth amendments, amply shows that the Constitution protects the privacy of the home against all unreasonable intrusions of whatever character."

The Poe case is not often referred to because the majority found no justiciable issue in view of the fact that there had been only one prosecution under the Connecticut statute during the past seventy-five years. It was not until later that

somebody got himself arrested and the Court was constrained to meet the issue head-on in Griswold. Justice Douglas there wrote of "emanations" and "penumbras" for the majority; Justice Harlan, concurring, adhered to the position he had staked out in the earlier case; Justice Goldberg danced around the ninth amendment; there were other opinions, concurring and dissenting, and history was made. So much for the New York Law School connection.

It is our purpose to examine, in the course of this discussion, the nature, origins, validity and prospects for future development of the constitutional right of privacy. To that end, there will an an interchange among the panel members for an hour or so, and I shall then open the discussion to questions and comments from the floor. We anticipate a lively debate all around. Now, it is my pleasure to introduce the members of the panel:

John O. McGinnis is Deputy Assistant Attorney General of the United States in the Justice Department's Office of Legal Counsel. He is a graduate of Harvard Law School, where he was a member of the Law Review. He served as a clerk for Judge Kenneth Starr of the United States Court of Appeals for the District of Columbia Circuit, the second most important Circuit Court in the nation. He was an associate at Sullivan & Cromwell and an attorney-advisor in the Justice Department before his promotion to his present position.

David Chang is a colleague on the New York Law School Faculty, where he serves as Associate Professor. He is a

graduate of Yale Law School and was an Assistant-in-Instruction there. He was a law clerk to United States District Judge W. Arthur Garrity of the District of Massachusettts. He teaches constitutional law here and has published in several areas, including racial discrimination and equal opportunity.

Norman Dorsen is Stokes Professor of Law at New York University Law School, where he has been a faculty member since 1961. He is a graduate of Harvard Law School and was an editor of its Law Review. He served as a clerk in the chambers of Justice Harlan in the Supreme Court and has himself argued several landmark cases there. He is the author of a number of books and articles on constitutional law and civil liberties and, since 1976, he has been President of the American Civil Liberties Union.

Harlan L. Dalton has been a member of the faculty of the Yale Law School since 1981. He is a 1973 graduate of Yale Law School. Following graduation, he served as a law clerk to a US District Judge Robert J Carter in the So. Dist. He was a staff attorney, Legal Action Center, N.Y. 1974-79. Asst. to the Solicitor General of the United States, 1979-81. Member of Editorial Board, Journal of Legal Educ.

I am Roger J. Miner, Adjunct Professor of Law, New York Law School and also Judge of the United States Court of Appeals, Second Circuit, the nation's premier appellate court. I have been designated to act as Moderator of this panel.

Without further ado, we turn to our interesting, provocative and controversial topic, "Evolving Constitutional Concepts of Privacy." I would like to start out by defining our terms, so to

open the discussion I pose this question to each member of the panel: "What do you understand the phrase "constitutional right of privacy" to mean"? What is your definition of the right, Professor Dorsen?

I. Definition of the Constitutional Right of Privacy.

(a) Harlan definition -- right that protects "the privacy of the home against all unreasonable intrusions of whatever character."

(b) Right to engage in certain highly personal activites relating to reproduction, contraception, abortion and marriage.

(c) Rights of freedom of choice in marital, sexual and reproductive activities.

(d) Constitutional condemnation of legislation that trespasses upon the incidents of marriage, the sanctity of the home or the nurture of family life.

(e) Right that allows the formation and preservation of certain kinds of highly personal relationships -- marriage; childbirth, raising and education of children, cohabition -- a substantial measure of sanctuary from unjustified interference by the State.

(f) Blackmun in Thornburgh dissent refers to decisional and spatial aspects of right.

(g) Brandeis in Olmstead -- "the right to be let alone."

II. Sources of the Right.

(a) Douglas -- Specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guaranties;

various guarantees create zones of privacy -- 1st, 3rd, 4th, 5th or 9th. Griswold "concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees."

(b) Harlan -- 4th, 14th liberty interests.

(c) Goldberg -9th amendment -- pre-existed Constitution.

(d) Associational Liberties.

(e) Unenumerated rights by marriage.

(f) NO SOURCE -- pick and choose protected liberty interest.

III. Protected Areas and Activities.

1. Marriage
2. Contraception
3. Abortion
4. Sterilization
5. Sodomy (homosexual and heterosexual)

IV. The Basis of Governmental Authority for Interference with the Right.

1. Police power
2. The right as pre-existing
3. Residual powers of the states - 10th amendmemt

V. The Cases

1. Skinner v. Oklahoma
2. Griswold v. Connecticut
3. Eisenstadt v. Baird
4. Carey v. Population Services
5. Loving v. Virginia

6. Roe v. Wade

7. Thornburgh v. American College

8. Stanley v. Georgia

VI. Bowen v. Hardwick & Future of Concept.

1. 5-4 decision

2. Blackmun dissent refers to right of individual to conduct intimate relationships in the intimacy of his or her home.

3. How about application to heterosexuals?

4. Stevens dissent -- "Liberty" -- that animated development of law in Griswold "embraces the right to engage in nonreproductive, sexual conduct that others may consider offensive or immoral."

Stages of Abortion Decisions.

Stage I: Roe v. Wade (1973): Right of women to decide whether or not to terminate pregnancy. State interest to regulate becomes compelling after first trimester. May prohibit abortions only after viability. Between end of first trimester and viability, states may regulate insofar as regulation is related to protection of maternal health. No interference by state to end of first trimester. 1973-1977 -- Court struck down series of state statutes -- Georgia provision requiring abortions to be performed in accredited hospitals; that all abortions be approved by Hospital Commission and two doctors. Missouri requirement for permission from spouse; Miss. requirement that minors have parents' permission.

Stage II - 1977 cases -- upheld state medicaid disbursement scheme providing for support for childbirth but not for non-therapeutic abortions. Upheld St. Louis policy prohibiting abortions in city hospitals. 1980 Cases upheld statutes refusing financial aid for all abortions, therapeutic and non-therapeutic, except as necessary to save life of mother. Relaxed right of privacy in face of legitimate state interest in encouraging childbirth. 1981 case -- upheld state statute (Utah) requiring notification to parents of minor women. Allowed state incursion into areas of privacy.

Stage III - Thornburgh v. American College

(1) Informed consent provision -- list of specific information to be furnished to woman; detrimental physical and psychological effects; probable gestation age and probable anatomical characteristics; medical assistance benefits; liability of father to assist in support of child; twenty-four hour wait before consent.

(2) Reporting requirements -- physician who performs abortion after first trimester to report basis for medical judgments that child not viable; report available to public with detailed information about doctor, facility, age, race, marital status, etc.

(3) Level of care of fetus during aboritons performed after viability. Required to use techniques to provide best opportunity for unborn child to be aborted alive unless greater

risk to life or health of mother. Also, presence of second physician required at all abortions where viability is possible.

Held: Coercive effect. Act tells women that state considers abortion immoral. Statute intends restriction on access to abortion. Makes physician agent of State. Interferes with dialogue between woman and her physician. Possible disclosure of identity -- chilling effect.