FBI LAW ENFORCEMENT BULLETIN

OCTOBER 1982, VOLUME 51, NUMBER 10

Contents

Aircraft 2 — **Aircraft Theft**
By Udy C. Wood, Jr.

Management 7 — **Leadership and Transformation**
By Arnold R. Gerardo

Crime Problems 12 — **Outlaw Motorcyclists: A Problem for Police (Part I)**
By Roger H. Davis

Law Enforcement Role 18 — **Public Safety on Campus**
By David Nichols

The Legal Digest 24 — **The Constitutional Right to Privacy and Regulations Affecting the Sexual Activity of Law Enforcement Employees**
By Daniel L. Schofield

32 — **Wanted By the FBI**

The Cover
Both aircraft owners and law enforcement personnel can take steps to minimize the problem of aircraft theft. See story page 2.

Federal Bureau of Investigation
United States Department of Justice
Washington, D.C. 20535

William H. Webster, Director

The Attorney General has determined that the publication of this periodical is necessary in the transaction of the public business required by law of the Department of Justice. Use of funds for printing this periodical has been approved by the Director of the Office of Management and Budget through February 21, 1983.

Published by the Office of Congressional and Public Affairs,
Roger S. Young, *Assistant Director*

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Reprints—Mary Ellen Drotar

ISSN 0014-5688 USPS 383-310

Director's Message

This month marks the beginning of the 51st year of publication for the FBI Law Enforcement Bulletin. Initially called, in 1932, "Fugitives Wanted by Police," the first issue of the Bulletin simply contained a listing of wanted persons. However, an article on explosives, reprinted from the St. Louis, Mo., Police Department training publication, appeared in the third issue, in November 1932. Subsequent issues featured articles on fingerprint evidence, ciphers, examination of metals, and glass fractures—all subjects that were beginning to be addressed by law enforcement in those early days of scientific crime detection. This led to the renaming of the publication in October 1935, when it officially became known as the FBI Law Enforcement Bulletin.

Over the years, the Bulletin took on a new direction and emphasis, perhaps more so in the 1980's than in any other decade, as law enforcement gained the hallmarks of a professional service. Readers can now benefit from articles on management techniques, personnel matters, special operations, legal developments, and computer management, as well as training, investigative techniques, current crime problems, forensic science developments, and state of the art training.

The Bulletin is still a "national periodical of interest and value in the field of law enforcement." This was the summation of a young lawyer, John Edgar Hoover, when he described the Bulletin in a 1935 Director's Message and wrote "the publication should provide a clearinghouse for police officials regarding successful police methods, a medium for the dissemination of important police information, and a comprehensive literature pertaining to the scientific methods in crime detection and criminal apprehension."

To observe this 50th anniversary, I would like to recall Director Clarence M. Kelley's Message just 5 years ago, that the Bulletin's most fundamental aspect has been "the remarkable degree of cooperative assistance that it has sustained in this and preceding years."

The thousands of articles contributed over the years by law enforcement personnel have amounted to a great, and valuable, contribution to the professionalization of the business of crime detection. To all these authors, may I offer the FBI's sincere thanks.

William H. Webster
Director
October 1, 1982

THE CONSTITUTIONAL RIGHT TO PRIVACY AND REGULATIONS AFFECTING THE SEXUAL ACTIVITY OF LAW ENFORCEMENT EMPLOYEES

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Law enforcement officers of other than Federal jurisdiction who are interested in any legal issue discussed in this article should consult their legal adviser. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.

Many law enforcement agencies have an internal policy which regulates in varying degrees the personal conduct of employees. This policy frequently includes standards of conduct relating to an employee's off-duty sexual activity. In recent years, law enforcement agencies and managers have been confronted with litigation initiated by employees who claim that the implementation and enforcement of those policies impermissibly infringes on their constitutional right to privacy.

This article examines the constitutionally based right to privacy and alerts law enforcement personnel to the significant privacy issues that are involved in the development of a standards of conduct policy. The article will begin with a discussion of some U.S. Supreme Court decisions involving the constitutional right to privacy. Next, it will examine some decisions of State and Federal courts where law enforcement employees have alleged privacy deprivations. In the final section, specific recommendations will be offered concerning factors that a law enforcement manager should consider in formulating a standards of conduct policy.

It is important to note at the outset what this article will not address. First, this article does not consider the full range of issues that are included within the constitutional right to privacy. Instead, the focus will be on the relationship between the right to privacy and private consensual sexual activity. Second, the article will not address privacy rights an employee might derive from State constitutions, State or Federal legislation, or union agreements. Third, the article will not examine other constitutionally based rights such as freedom of speech, freedom of association, equal protection, or due process.[1]

One final point deserves mention. This article does not purport to set forth any views on the morality of particular sexual activity. People have different views on this sensitive and emotional subject which are shaped and colored by one's philosophy, experiences, religious training, attitudes toward life and family, and moral values. In short, the article is a legal analysis, not a moral judgment, and accordingly, any recommendations or conclusions should be considered only in that vein.

CONSTITUTIONAL PRIVACY AND THE U.S. SUPREME COURT

Overview

While the Supreme Court has decided a number of cases involving the constitutional right to privacy, it is important to emphasize two points which tend to complicate the job of assessing the scope of protection afforded by those decisions to a law enforcement employee's sexual activities. First, the U.S. Constitution does not contain any clear textual support for a constitutional right to privacy. Second, the Supreme Court has not decided a case which clearly addresses the extent to which sexual activity is protected by the right to privacy.

Special Agent Schofield

Nevertheless, an examination of several Supreme Court opinions involving right to privacy claims should provide a useful foundation from which we can begin to make some principled judgments concerning the proper resolution of privacy claims in the context of employee sexual activity. However, one ultimately is faced with the difficult task of reasoning by analogy from these decisions which leave unanswered some important questions and reflect some disagreement among individual Justices.

Privacy Development

In 1965 in the case of *Griswold* v. *Connecticut*,[2] the Supreme Court declared unconstitutional a Connecticut statute which made the use of contraceptives a criminal offense. Griswold and a physician had been convicted because they gave information, instruction, and medical advice to married persons regarding means of preventing conception. While the six Justices who comprised the majority expressed some disagreement over the basis for the holding, they all concluded that the State birth-control law unconstitutionally intruded upon the right of privacy emanating from the U.S. Constitution.[3] In a concurring opinion, Justice Goldberg noted that the holding in *Griswold* should not affect the constitutionality of State statutes which prohibit adultery and fornication, and it in no way interferes with a State's proper regulation of sexual promiscuity or misconduct.[4]

The scope of privacy protection recognized in *Griswold* was expanded in 1972 in the case of *Eisenstadt* v. *Baird*.[5] In that case, a majority of six Justices invalidated a Massachusetts statute which prohibited the distribution of contraceptives except to married persons.[6] Writing for the majority, Justice Brennan said:

> "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." [7]

In addition, the Court quoted with approval the following language from an earlier Supreme Court decision which appears to offer increased possibilities for privacy protection:

> "(A)lso fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy.
>
> "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfaction of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man." [8]

". . . the right to privacy, where applicable, deserves special protection from governmental interference."

One point that emerges clearly from the majority opinions in *Griswold* and *Eisenstadt* is that the right to privacy, where applicable, deserves special protection from governmental interference.

In 1973, the Supreme Court decided another important case involving the right to privacy. In *Roe* v. *Wade,*[9] a majority of seven Justices declared unconstitutional a Texas abortion law that made it illegal to procure an abortion except by medical advice for the purpose of saving the life of the mother. Writing for the majority, Justice Blackmun noted that while the Constitution does not explicitly mention a right of privacy, the Court in prior decisions had recognized that such a right is contained in the concept of personal liberty and that it protects fundamental personal rights from governmental intrusion.[10] The majority then concluded that this right is broad enough to encompass a woman's decision whether to terminate her pregnancy.[11]

However, this right to privacy is not absolute or unqualified and may be restricted where the government can demonstrate compelling reasons for such restriction.[12] In that respect, the Court determined that the State's interest in proscribing abortion is compelling when the stage of pregnancy is reached where the fetus is deemed viable.[13]

It is difficult to discern from the opinions in *Griswold, Eisenstadt,* and *Roe* whether they establish a constitutional right of privacy or personal autonomy in private consensual sexual activity.[14] However, several cases decided since those decisions suggest that the Supreme Court has not extended the constitutional right in personal autonomy to encompass claims beyond those activities relating to marriage, procreation, contraception, abortion, family relationships, and the rearing and education of children.[15]

Scope of Privacy Protection

In *Kelley* v. *Johnson,*[16] the Court refused to expand the right to privacy to invalidate a regulation of a law enforcement agency concerning the length and style of a policeman's hair. The court distinguished the claim in *Kelley* from those in prior cases like *Griswold* and *Roe* by noting that the latter cases involved a substantial infringement of an individual's freedom of choice with respect to certain basic matters of procreation, marriage, and family life.[17]

In another case, *Paris Adult Theater* v. *Slaton,*[18] the Court rejected a right to privacy claim involving the viewing of allegedly obscene films in a public theater. The Court drew a sharp distinction between public and private conduct and limited the holding of an earlier case, *Stanley* v. *Georgia,*[19] to the viewing of such films in the privacy of the home.[20] The Court said the constitutionally protected privacy of family, marriage, motherhood, procreation, and child rearing is not just concerned with a particular place, but with a protected intimate relationship which can extend to the doctor's office, the hospital, the hotel room, or as otherwise required to safeguard the right to intimacy involved.[21] In contrast, the Court said there is clearly no necessary or legitimate expectation of privacy which would extend to marital intercourse on a street corner.[22]

With respect to private consensual sexual behavior, there is disagreement among individual Justices and legal scholars concerning the extent to which the right of privacy affords constitutional protection.[23] For example, in *Doe* v. *Commonwealth's Attorney,*[24] the Supreme Court summarily affirmed a Federal district court's dismissal of a challenge by a male homosexual to Virginia's sodomy law.[25] However, the precedential value of the Court's action in *Doe* is debatable because the Court did not hear oral argument and did not write an opinion setting forth its reasoning.[26]

Predictably, disagreement over the significance of the Court's action in *Doe* surfaced the next term of the Supreme Court in the case of *Carey* v. *Population Services International.*[27] Writing for the majority, Justice Brennan observed that the Court had not definitively answered the difficult question whether and to what extent the Constitution prohibits State statutes regulating private consensual sexual activity among adults.[28] In response, Justice Rehnquist wrote in dissent that the decision in *Doe* had definitively established the constitutional validity of State statutes prohibiting certain consensual sexual conduct.[29]

In the case of *Michael M.* v. *Superior Court of Sonoma County,*[30] Justice Rehnquist and Justice Brennan again expressed their disagreement as to the affect of precedent on governmental authority to prohibit consensual sexual behavior. In his plurality opinion, Justice Rehnquist seemed to assume that a State could validly make sexual intercourse among teenagers a criminal act.[31] In a dissenting opinion, Justice Brennan countered by observing that prior cases would not foreclose a privacy challenge to the State's power to criminalize consensual sexual activity.[32] Justice Brennan argued that minors enjoy a right of privacy in connection with decisions affecting procreation and that it is not settled that a State may rely on a pregnancy-prevention justification to make consensual sexual intercourse among minors a criminal act.[33]

The foregoing cases suggest that the exact contours of the constitutional right to privacy have not been clearly established.[34] The differing views expressed by Justices of the Supreme Court concerning the relationship between privacy and sexual activity increase the likelihood of future litigation on that issue.

The next section of this article will examine some cases decided in the lower Federal and State courts where employees have challenged the constitutionality of regulations affecting their sexual behavior. The first three cases will involve instances where privacy claims were rejected, and the remaining cases will represent decisions where privacy claims were sustained.

LOWER COURT DECISIONS

Privacy Claims Rejected

In *Fabio* v. *Civil Service Commission of the City of Philadelphia,*[35] the Supreme Court of Pennsylvania ruled that a Philadelphia police officer's constitutional right to privacy was not violated by his dismissal for sexual misconduct. The officer was discharged for "conduct unbecoming an officer" after it was demonstrated that he induced his wife to consent to an extramarital affair with a fellow police officer and then participated in an extramarital affair with his wife's 18-year-old sister. In rejecting the officer's claim of a privacy infringement, the court said that even if the officer's conduct was protected by the Constitution, the right to privacy is not an unqualified right, and at some point, the government's interest may become sufficiently compelling to sustain a regulation of that activity.[36] While noting that in Pennsylvania individuals have the right to engage in extramarital sexual activities free from the threat of criminal prosecution, the court held that the State has a wider latitude and different interests in regulating the activities of its employees than in the behavior patterns of the citizenry at large.[37]

Accordingly, the court concluded that even under the strictest standards of review, the government's interests were sufficiently compelling to overcome the officer's privacy claim.[38] In ruling that police officers can be held to a higher standard of conduct than other citizens, including other public employees, and that the officer's conduct had adversely affected his department, the court said:

> "The government must tread lightly when it investigates and regulates the private activities of its police officers. Public employers must be careful not to transform anachronistic notions of unacceptable social conduct into law. However, when an employee's private life is the center of rumors, when it adversely affects his fellow workers, when it corrupts his family members, and when it results in complaints to his employer, governmental intervention is warranted."[39]

In *Childers* v. *Dallas Police Department,*[40] a Federal district court ruled that Childers, an admitted homosexual, was not deprived of his right to privacy when the Dallas Police Department refused to hire him for a position in the property division of the department.[41] The court acknowledged that while the interests of the government frequently conflict with the constitutional interests of its employees, the government in certain instances has a right as an employer to control the conduct of its employees.[42]

Moreover, the court interpreted the Supreme Court's decision in *Doe* v. *Commonwealth's Attorney*[43] as implying that homosexual conduct does not enjoy special constitutional protection and concluded that the *Doe* decision was binding precedent.[44] The court added that even if homosexual conduct was in some respects protected by the Constitution, the Dallas Police Department would only be required to show that its decision was rationally related to legitimate governmental purposes.[45] Recognizing the special needs of law enforcement employment, the court said:

> "There are a myriad of grounds upon which the police department's actions and the regulations upon

". . . while the interests of the government frequently conflict with the constitutional interests of its employees, the government in certain instances has a right as an employer to control the conduct of its employees."

which those actions were based may be found appropriate for the full and efficient accomplishment of the police department's mission. The regulations serve to protect the integrity of the police department and to maintain discipline. There is legitimate concern about tension between known and active homosexuals and others who detest homosexuals. There are also legitimate doubts about a homosexual's ability to gain the trust and respect of the personnel with whom he works. Moreover, the police department could rationally conclude that tolerance of homosexual conduct might be construed as tacit approval, rendering the police department subject to approbation and causing interference with the effective performance of its function."[46]

While it does not involve a law enforcement employee, the decision in *Hollenbaugh* v. *Carnegie Free Library*[47] deserves brief mention. In that case, the Supreme Court refused to review a decision of a lower Federal court sustaining the discharge of two public library employees for living in an openly adulterous relationship.[48] In rejecting the privacy claim, the district court limited the protection afforded by the right to privacy to only those fundamental rights and personal intimacies associated with the home, the family, motherhood, procreation, and child rearing.[49] The court said there is no fundamental privacy right for two persons, one of whom is married, to live together in an openly adulterous relationship.[50]

Privacy Claims Sustained

In *Shuman* v. *City of Philadelphia,*[51] a Federal district court ruled in favor of an officer who had been dismissed pursuant to a policy of the Philadelphia Police Department. The officer, who was separated from his wife, had become romantically involved with an 18-year-old woman. Following a series of complaints from the woman's mother and an Internal Affairs Bureau surveillance, the officer was subjected to an official interview concerning his personal relationship with the woman. The officer refused to answer questions concerning his off-duty personal life despite being warned that a city ordinance provided that he could be dismissed for his refusal to cooperate. Subsequently, the officer was dismissed for his refusal to answer questions during an official departmental investigation.

The court noted that where there is a zone of privacy protecting activities of an employee, compelled disclosure in and of itself may be unconstitutional absent a strong countervailing State interest.[52] In this regard, the court said that the Supreme Court's decision in *Whalen* v. *Roe*[53] had recognized the existence of a legitimate strand of privacy involving an individual's interest in avoiding disclosure of personal matters.[54]

Moreover, the court found that private sexual conduct is within the "zone of privacy" and is protected from unwarranted governmental intrusion. The court said some matters fall within this zone not because they necessarily relate to the exercise of substantive rights, but because they are private and constitute areas of one's life where the government simply has no legitimate interest.[55]

The court noted, however, that an employee's privacy rights are not absolute and that if the sexual activities of a public employee were open and notorious, or if such activities took place in a small town, the public employer might very well have an interest in investigating such activities and possibly terminating the employee.[56] With respect to the facts in *Shuman*, the court ruled that the department had failed to meet its burden of demonstrating how the officer's private sexual activities impacted on his job as a police officer and said the officer could not be dismissed for his refusal to answer questions concerning his personal life.[57]

In *Smith* v. *Price,*[58] a panel of the U.S. Court of Appeals for the Fifth Circuit assumed without deciding that a police officer's adulterous relationship was included within the right to privacy.[59] The privacy issue was not directly decided because the court concluded that the officer's sexual conduct was not a motivating factor in his dismissal. The court determined that the department had other legitimate reasons for the termination, including the officer's visits to the woman's home while on duty without notifying the dispatcher and his failure to report the taking of his police gun and gunbelt.[60]

In *Major* v. *Hampton,*[61] a Federal district court ruled that an Internal Revenue Service agent was improperly dismissed even though his discharge was based on a finding that he had engaged in off-duty extramarital sexual activities.[62] While conceding that some types of off-duty sexual conduct might seriously jeopardize the ability of a particular employee, the court said the government does not have an unlimited license to inquire into the private lives of its employees.[63]

The court noted that the peculiar relationship of employer-employee permits the government, when it acts as employer, to require more of its employees than it may require of the general public.[64] However, the court said those governmental prerogatives are more limited in instances where an employee's fundamental rights are affected.[65] In those instances, a compelling as compared to a rational justification must be demonstrated to justify an infringement.[66]

The court then acknowledged the fact that the degree of protection afforded sexual activity by the right to privacy is not clearly defined, but concluded that the dismissal of the agent was not justified even under the less rigorous "rational basis" standard.[67] In that regard, the court observed that the agent's adulterous conduct occurred in the City of New Orleans, was circumspect, and had not brought any significant discredit to his employer. Focusing on the factors to be assessed, the court said:

> "To some degree the determination whether an employee's off-duty acts tend to discredit either the employee or his employer must depend upon the nature of the acts, the circumspection or notoriety with which they are performed, and the atmosphere of the community in which they take place."[68]

One final case merits some attention. While it does not involve the privacy claim of an employee, the recent decision in *People* v. *Onofre*[69] illustrates a significant expansion of the right to privacy doctrine. In that case, the Court of Appeals of New York held that the State consensual sodomy statute was violative of the constitutional right to privacy. In describing the constitutional right to privacy, the court said it is a right of independence in making certain kinds of important decisions, with a concomitant right to conduct oneself in accordance with those decisions, undeterred by governmental restraint.[70] Noting that the Supreme Court's decision in *Eisenstadt* distinguished between public and private morality, the court concluded that the State had failed to demonstrate how government interference with the practice of personal choice in matters of intimate sexual behavior out of view of the public and with no commercial component will serve to advance the course of public morality or do anything other than restrict individual conduct and impose a concept of private morality chosen by the State.[71] In summary, the court said:

> ". . . (T)here has been no showing of any threat, either to participants or the public in general, in consequence of the voluntary engagement by adults in private, discreet, sodomous conduct. Absent is the factor of commercialization with the attendant evils commonly attached to the retailing of sexual pleasures; absent the elements of force or of involvement of minors which might constitute compulsion of unwilling participants or of those too young to make an informed choice, and absent too intrusion on the sensibilities of members of the public, many of whom would be offended by being exposed to the intimacies of others. Personal feelings of distaste for the conduct sought to be proscribed . . . and even disapproval by a majority of the populace, if that disapproval were to be assumed, may not substitute for the required demonstration of a valid basis for intrusion by the State in an area of important personal decision protected under the right of privacy drawn from the United States Constitution-areas, the number and definition of which have steadily grown but, as the Supreme Court has observed, the outer limits of which it has not yet marked."[72]

DEVELOPING POLICY

It is important for law enforcement agencies to develop policy that is both understandable and fair to employees and effective in meeting agency needs. When that policy attempts to regulate an employee's off-duty sexual conduct, law enforcement managers should be particularly sensitive to the potential right of privacy claims highlighted by the cases discussed in this article.

". . . it is . . . important for law enforcement agencies to provide employees with notice of the factors that will be evaluated in deciding whether sexual conduct will result in disciplinary action."

Those cases reveal differing modes of analyses regarding whether private sexual activity is protected by the right to privacy and to what extent. While it is difficult to offer definitive predictions about how courts will resolve employee privacy claims in future litigation, there are nevertheless some principles emanating from the cases upon which there is general agreement. Set forth below are those areas of consensus which should be considered when a standards of conduct policy is being formulated.

1) While a law enforcement employee cannot be required to surrender his constitutional rights as a condition of employment, law enforcement employers can restrict to some extent the constitutional freedoms of their employees because of the peculiar needs associated with the employer-employee relationship. The degree of restriction permissible depends on the nature of the right affected. For example, if a fundamental right such as freedom of speech is infringed, the government would be required to show a compelling justification. Conversely, if the right is not fundamental, such as hair length, then only a rational reason is required to justify a departmental regulation. The distinction between compelling need and rational basis is significant in terms of the burden on the employer to provide justification for disciplinary action.

2) Use of catch-all provisions like "conduct prejudicial to good order" or "conduct unbecoming an officer" have been viewed as constitutionally fair and adequate notice as long as the specific basis for discipline is consistent with substantive constitutional standards.[73] Recognizing that it is not feasible to delineate all the types of conduct and circumstances that would constitute "conduct unbecoming an officer," it is nonetheless important for law enforcement agencies to provide employees with notice of the factors that will be evaluated in deciding whether sexual conduct will result in disciplinary action.

3) The courts are divided over the question of whether an employee's private consensual sexual conduct is entitled to protection as a fundamental constitutional right. Assuming *arguendo* that it is and that compelling reasons would be required before disciplinary action would be constitutionally appropriate, the following are legitimate questions for a law enforcement employer to consider:

A. Has the employee engaged in conduct which is subject to criminal punishment within the jurisdiction of the employing agency?
B. Was the employee's conduct private and discreet or open and notorious?
C. Has public confidence and respect for the law enforcement agency been substantially diminished?
D. Has the conduct damaged agency efficiency or morale?
E. Has the conduct impaired the ability of the employee to objectively and diligently complete work assignments or to handle classified information?

CONCLUSION

The right to privacy issues discussed in this article are complex and require some careful balancing of competing interests. It is reasonable to anticipate additional litigation as courts attempt to further develop and define the scope of protection afforded by the constitutional right to privacy. In view of the fact many governmental entities face the prospect of strict liability for policy that violates an employee's constitutional rights,[74] it is imperative that law enforcement agencies develop policy on a principled basis consistent with constitutional requirements. Furthermore, the assistance of competent legal advice in the development and implementation of such policy will reduce the probability of subsequent liability and also increase the confidence of law enforcement personnel in the legitimacy of a standards of conduct policy.

FBI

Footnotes

[1] For a discussion of the constitutional rights of law enforcement employees, *see* Daniel L. Schofield, "Public Employment and the U.S. Constitution—Recent Supreme Court Opinions," *FBI Law Enforcement Bulletin*, July & August 1978.

[2] 381 U.S. 479 (1965).

[3] *Id.* at 485–86. Justices Black and Stewart dissented, arguing that there is no constitutional right to privacy. *Id.* at 507.

[4] *Id.* at 498–99. Chief Justice Warren and Justice Brennan joined this opinion.

[5] 405 U.S. 438 (1972).

[6] *Id.* at 443. The Court found that the statute violated the rights of single persons under the Equal Protection Clause of the 14th amendment.

[7] *Id.* at 453.

[8] *Id.* at n. 10.

[9] 410 U.S. 113 (1973).

[10] *Id.* at 152–53.

[11] *Id.* at 153.

[12] *Id.* at 155.

[13] *Id.* at 164.

[14] A number of legal commentators have viewed *Griswold* as marking the advent of an era of constitutionally protected sexual freedom. *See* Grey, "Eros, Civilization and the Burger Court," 43 Law & Contemp. Prob. 83, 84 (1980).

[15] *See* "Developments in the Law—The Constitution and the Family," 93 Harv. L. Rev. 1156 (1980).

[16] 425 U.S. 238 (1976).

[17] *Id.* at 244. The Supreme Court has also refused to expand the scope of protection afforded by the right to privacy in the following three cases: *Whalen* v. *Roe*, 429 U.S. 589 (1977) (governmental storage of personal data in computers); *Paul* v. *Davis*, 424 U.S. 693 (1976) (injury to reputation); *Paris Adult Theater* v. *Slaton*, 413 U.S. 49 (1973) (viewing obscene films in a public theater).

[18] 413 U.S. 49 (1973).

[19] 394 U.S. 557 (1969).

[20] 413 U.S. 66, n. 13.

[21] *Id.*

[22] *Id.*

[23] For a comprehensive review of the differing views of legal commentators, *see* Katz, "Sexual Morality and the Constitution: *People* v. *Onofre*," 46 Albany L. Rev. 311 (1982) and Karst, "The Freedom of Intimate Association," 89 Yale L. J. 624 (1980).

[24] 425 U.S. 901 (1976).

[25] *Doe* v. *Commonwealth's Attorney*, 403 F. Supp. 1199 (E.D. Va. 1975). The Federal district court held in a 2 to 1 vote that the sodomy statute was constitutional, over contentions that it deprived adult males engaging in regular homosexual relations consensually and in private of their constitutional rights to privacy.

[26] One legal commentator has suggested that the absence of any real threat of prosecution of the *Doe* plaintiffs suggests that the Court's affirmance might have rested on a ripeness ground. *See* L. Tribe, American Constitutional Law 989 (1978). Justices Brennan, Marshall, and Stevens dissented from the summary disposition and urged that the case be set for oral argument.

[27] 431 U.S. 678 (1977). The Court declared unconstitutional a New York statute which regulated the distribution of nonmedical contraceptives.

[28] *Id.* at 694, n. 17. Justice Brennan was able in *Carey* to restate the holding of *Griswold* (in light of *Eisenstadt* and *Roe*) as follows: "*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." After noting that "intrusion into 'the sacred precincts of marital bedrooms' made (the law in *Griswold*) particularly 'repulsive,'" he added that "subsequent decisions have made clear that the constitutional protection of individual autonomy in matters of childbearing is not dependent on that element." *Id.* at 687.

[29] *Id.* at 718, n. 2.

[30] 450 U.S. 464 (1981).

[31] *Id.* at 472, n. 8.

[32] *Id.* at 491, no. 5.

[33] *Id.*

[34] One author has summarized these cases as follows: "Thus, the right to privacy has sprouted at least two branches: a broad protection of the home from governmental intrusion and a safeguarding of certain intimate relationships when confined to appropriate locations closely associated with the very nature of the relationship." *See* "Application of the Constitutional Privacy Right to Exclusions and Dismissals from Public Employment," 1973 Duke L. J. 1037, 1044–45 (1973).

[35] 414 A.2d 82 (1980).

[36] *Id.* at 89. There are a variety of instances where an officer's sexual activities may involve conduct which is clearly beyond the protection of the constitutional right to privacy. For example, an officer may engage in sexual activity while on duty in a public place or may use force or intimidation. For a comprehensive discussion of sexual misconduct cases not involving right to privacy claims, *see* "Sexual Misconduct or Irregularity as Amounting to Conduct Unbecoming an Officer, Justifying Officer's Demotion or Removal or Suspension from Duty," 9 ALR 4th 614 (1981).

[37] The court noted that Pennsylvania had eliminated the crime of adultery in 1972 and the civil cause of action of criminal conversation in 1976. 414 A.2d at 89.

[38] *Id.* at 90.

[39] *Id.*

[40] 513 F.Supp. 134 (N.D. Tex. 1981).

[41] The job in the property room entailed handling and recording all property and drugs coming into the custody of the police department, as well as occasionally going to the scene of a crime. *Id.* at 137.

[42] *Id.* at 139–40.

[43] 425 U.S. 901 (1976).

[44] 513 F.Supp. at 146.

[45] *Id.*

[46] *Id.* at 147–48.

[47] 436 F.Supp. 1328 (W.D. Pa. 1977), *aff'd mem.*, 576 F.2d 1374 (3d Cir. 1978), *cert. denied*, 439 U.S. 1052 (1978).

[48] Both Justices Brennan and Marshall objected to the denial of certiorari. Justice Marshall characterized the lower court's decision as an unwarranted intrusion into the privacy of public employees absent a showing of a substantial governmental interest. *Id.* at 1056. (Marshall dissenting).

[49] 436 F.Supp. at 1333.

[50] *Id.* at 1334. In the case of *Wilson* v. *Swing*, 436 F.Supp. 555 (M.D. N.C. 1978), a Federal district court concluded that adultery is not protected by the constitutional guarantee of privacy or association. The court said that a police officer who had engaged in an extramarital affair involving another police officer was validly disciplined because the action was rationally related to the department's interest in morale, discipline, effectiveness, and reputation in the community.

[51] 470 F.Supp. 449 (E.D. Pa. 1979).

[52] *Id.* at 458.

[53] 429 U.S. 589 (1977).

[54] 470 F.Supp. at 458.

[55] *Id.* at 458–59.

[56] *Id.* at 459.

[57] *Id.* at 461. The court noted that adultery had not been a crime in Pennsylvania since 1972. Moreover, the court concluded that the officer's activities were done privately, unobtrusively, and without publicity.

[58] 616 F.2d 1371 (5th Cir. 1980).

[59] *Id.* at 1375. In a concurring opinion, Judge Hill objected to the panel's assumption that the U.S. Constitution guarantees the right to commit adultery. *Id.* at 1380.

[60] 616 F.2d at 1375–76.

[61] 413 F.Supp. 66 (E.D. La. 1976).

[62] The facts revealed that the agent had rented an apartment in New Orleans, together with three other males, for the purpose of sexual relationships with consenting females during off-duty hours. *Id.* at 67.

[63] *Id.*

[64] *Id.* at 70.

[65] *Id.* at 69.

[66] *Id.*

[67] *Id.* at 70, n. 2.

[68] *Id.* at 70.

[69] 415 N.E.2d 936 (N.Y. Ct. App. 1980), *cert. denied*, 451 U.S. 987 (1981).

[70] *Id.* at 939.

[71] *Id.* at 941.

[72] *Id.* at 941–42. The *Onofre* decision has been characterized as a remarkable extension of the Federal right to privacy because the court read a right to choose one's means of sexual gratification into the Supreme Court's decisions on birth control, abortion, and obscenity. Moreover, the decision is noteworthy because it constitutes the first judicial victory for advocates of sexual freedom for homosexuals in a case in which homosexual acts were directly at issue. See *Katz*, "Sexual Morality and the Constitution: *People* v. *Onofre*," 46 Albany L. Rev. 311, 312–13 (1982).

[73] *Davis* v. *Williams*, 617 F.2d 1100 (5th Cir. 1980), *cert. denied*, 449 U.S. 937 (1980). The court noted that these phrases require a person to conform his conduct to an imprecise but comprehensible normative standard. *Id.* at 1103.

[74] *See* Daniel L. Schofield, "Law Enforcement and Governmental Liability—An Analysis of Recent Section 1983 Litigation," *FBI Law Enforcement Bulletin*, January 1981.

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