Journal of Criminal Law and Criminology

Volume 68
Issue 1 *March*

Article 4

Spring 1977

Recent Trends in the Criminal Law

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Recommended Citation
Recent Trends in the Criminal Law, 68 J. Crim. L. & Criminology 70 (1977)

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THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY
Vol. 68, No. 1
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Printed in U.S.A.

RECENT TRENDS IN THE CRIMINAL LAW

BLANKET SEARCH CONDITIONS

In *Morrissey v. Brewer*,[1] the United States Supreme Court recognized that parole is a form of "conditional liberty"[2] giving rise to certain procedural safeguards before a parolee's[3] liberty may be revoked. One year later, in *Gagnon v. Scarpelli*,[4] the Court applied the same rationale to probationers[5] facing revocation. Recently, courts have focused upon the substance of such conditions and questioned to what extent they may restrict the probationer's liberty. One condition which is frequently attached to probation requires the probationer to surrender his fourth amendment[6] right against unreasonable searches and seizures. Courts have divided as to whether such a condition may be sustained.

In its broadest form, the condition is a "blanket" search condition, often requiring the probationer to "[s]ubmit his person, place of residence and vehicle to search and seizure at any time of the day or night, with or without a search warrant, whenever requested to do so by the Probation Officer or any law enforcement officer."[7] The validity of the blanket search condition depends upon the constitutional status accorded the probationer. The court divines the location of the probationer on a continuum of enjoyment of fourth amendment rights, from the prisoner (minimum) to the free person (maximum). If the court accords the probationer fourth amendment rights, the next step is to determine the role of the exclusionary rule[8] in the revocation hearing.

There is a substantial split in authority among jurisdictions that have dealt with the relationship of the fourth amendment to the probationer.[9] Both analyses begin with the basic

[1] 408 U.S. 471 (1972).

[2] The parolee gains his freedom subject to certain conditions such as the requirement that he not associate with convicted felons. *Id.* at 478.

[3] A parolee is a convict who is released from a penal institution to serve the remainder of his sentence under the supervision of a parole officer. *See, e.g.*, TEX. CODE CRIM. PROC. ANN. art. 42.12 § 2(c) (Vernon 1966).

[4] 411 U.S. 778 (1973).

[5] A probationer is a person convicted of a crime who is released into the community under the supervision of a probation officer in lieu of incarceration. *E.g.*, TEX. CODE CRIM. PROC. ANN. art. 42.12 § 2(b) (Vernon 1966).

There does not seem to be any significant difference between the constitutional status of probationers and parolees. In United States v. Consuelo-Gonzalez, 521 F.2d 259 (9th Cir. 1975), the Ninth Circuit concluded that the reasons for justifying warrantless searches by parole officers of their parolees are equally applicable in the probation setting. Both parole and probation officers have "a special and unique interest in invading the privacy of . . . [parolees or probationers] under their supervision." *Id.* at 265-66. In Gagnon v. Scarpelli, 411 U.S. 778 (1973), the Supreme Court suggested this similarity, stating that "revocation of probation . . . is constitutionally indistinguishable from the revocation of parole." *Id.* at 782 n.3.

[6] The right of people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, describing the place to be searched, and the persons or things to be seized. U.S. CONST. amend. IV.

[7] Tamez v. State, 534 S.W.2d 686, 690 (Tex. Crim. App. 1976); People v. Mason, 5 Cal. 3d 759, 762, 488 P.2d 630, 631, 97 Cal. Rptr. 302, 303 (1971), *cert. denied*, 405 U.S. 1016 (1972).

[8] Under this rule, evidence obtained in violation of the fourth amendment cannot be used in a criminal proceeding against the victim of the unreasonable search and seizure. Mapp v. Ohio, 367 U.S. 643 (1961); Weeks v. United States, 232 U.S. 383 (1914). The judicially-created remedy was not designed to compensate for the unlawful invasion of one's privacy, but to deter future unlawful police conduct. As stated by the Supreme Court in Elkins v. United States, 364 U.S. 206, 217 (1960), "[t]he rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." The rule has never been interpreted to proscribe the use of all illegally-seized evidence in all proceedings or against all persons. *See, e.g.*, Oregon v. Hass, 420 U.S. 714 (1975); United States v. Calandra, 414 U.S. 338 (1974) (exclusionary rule not applicable to grand jury proceedings); Brown v. United States, 411 U.S. 223 (1973) (only victim of unlawful search has standing to invoke exclusionary rule); Harris v. New York, 401 U.S. 222 (1971) (evidence obtained in violation of *Miranda* not admissible in prosecutor's case in chief but admissible for impeachment purposes); United States v. Schipani, 435 F.2d 26 (2d Cir. 1970), *cert. denied*, 401 U.S. 983 (1971) (exclusionary rule not applicable to sentencing proceedings).

[9] Recent cases upholding a blanket search condition include Himmage v. State, 88 Nev. 296, 496 P.2d 763 (1972); State v. Schlosser, 202 N.W.2d 136 (N.D.

premise that a condition must have a reasonable relationship to promoting the probationer's rehabilitation while affording a measure of protection to society. The issue dividing the courts is the extent to which a probationer's freedoms must be curtailed to achieve this dual purpose. The traditional view is that legitimate government demands—the goals of the probation system—validate the imposition of any type of search condition. The new approach is that while search conditions are necessary, a blanket search condition is not.

People v. Mason[10] illustrates the traditional view upholding blanket search and seizure conditions. After tracing a burglary suspect's car to the defendant, the police discovered that he was on probation and subject to a blanket search condition. On the strength of this condition, the officers searched the defendant's home and discovered items of contraband. The Supreme Court of California, en banc, reversed the lower court's order suppressing this evidence. The key point in the holding is that "persons conditionally released to society . . . may have a reduced expectation of privacy, thereby rendering certain intrusions by governmental authorities 'reasonable' which otherwise would be invalid under traditional constitutional [fourth amendment] concepts, at least to the extent such intrusions are necessitated by legitimate governmental demands."[11] Hence, the rehabilitative and protective goals of the probation system are considered legitimate governmental demands which are important enough to override the probationer's fourth amendment rights.

The new approach to blanket search condition validity is most thoroughly analyzed in *United States v. Consuelo-Gonzalez.*[12] There, police received a tip that the defendant was dealing in heroin. They learned that she was currently on probation from an earlier heroin smuggling conviction and was subject to a blanket search condition. Accordingly, the officers searched the defendant's apartment and uncovered 11.7 grams of heroin, providing the basis for a new conviction. The Ninth Circuit, en banc, reversed this conviction, holding the condition invalid. The court reasoned that certain governmental intrusions—searches by probation officers—are not only compatible with rehabilitation, but are essential if the probationer is a prior narcotics offender. However, the blanket search condition goes too far. It would permit intimidating and harassing searches which could not possibly be "necessitated by legitimate governmental demands." The probationer's fourth amendment rights are therefore preserved, at least in part, by the Ninth Circuit's approach.

Those courts which have determined that the probationer enjoys fourth amendment rights are then confronted with a second analytical step. What protection is to be afforded these rights? The focal point of this issue is the role of the exclusionary rule[13] in a probation revocation hearing.[14] By definition, the probationer's fourth amendment rights are afforded exclusionary rule protection in a new criminal proceeding[15], but that same protection is seldom extended to the probation revocation hearing.[16] The widely accepted argument against extension of the rule is articulated in *United States v.*

1972); People v. Mason, 5 Cal. 3d 759, 488 P.2d 630, 97 Cal. Rptr. 302 (1971), *cert. denied,* 405 U.S. 1016 (1972); State v. Mitchell, 22 N.C. App. 663, 207 S.E.2d 263 (1974); People v. Santos, 298 N.Y.S.2d 526, 31 App. Div. 2d 508 (1969), *cert. denied,* 397 U.S. 969 (1970).

Cases holding a form of the blanket search condition invalid are United States v. Consuelo-Gonzalez, 521 F.2d 259 (9th Cir. 1975); Latta v. Fitzharris, 521 F.2d 246 (9th Cir.), *cert. denied,* 423 U.S. 897 (1975); United States *ex rel.* Coleman v. Smith, 395 F. Supp. 1155 (W.D.N.Y. 1975); People v. Peterson, 62 Mich. App. 258, 233 N.W.2d 250 (1975). In some of these cases a distinction is drawn between searches by law enforcement officers and those by correctional authorities. Only the police officer may not search without probable cause; *e.g.*, Latta v. Fitzharris, 521 F.2d 246 (9th Cir.), *cert. denied,* 423 U.S. 897 (1975). For a discussion of an appropriate standard for searches by correctional officers, see Note, *Fourth Amendment Limitations of Probation and Parole Supervision,* 1976 DUKE L.J. 71.

[10] 5 Cal. 3d 759, 488 P.2d 630, 97 Cal. Rptr. 302 (1971), *cert. denied,* 405 U.S. 1016 (1972).

[11] *Id.* at 764–65, 488 P.2d at 633, 97 Cal. Rptr. at 305.

[12] 521 F.2d 259 (9th Cir. 1975).

[13] *Supra,* note 8.

[14] For an excellent analysis of the role of the exclusionary rule in a probation revocation hearing, see Cole, *The Exclusionary Rule in Probation and Parole Revocation Proceedings: Some Observations on Deterrence and the "Imperative of Judicial Integrity,"* 52 CHI.-KENT L. REV. 21 (1975).

[15] *Supra,* note 8.

[16] *See, e.g.,* United States v. Winsett, 518 F.2d 51 (9th Cir. 1975) (probation); United States *ex rel.* Sperling v. Fitzpatrick, 426 F.2d 1161 (2d Cir. 1970) (parole). *See also* United States v. Vandemark, 522 F.2d 1019, 1020–21 (9th Cir. 1975) (supporting cases compiled in opinion).

Winsett.[17] In *Winsett,* the defendant was on probation following a narcotics conviction subject to a condition that he not leave his judicial district. United States Border Patrol agents, unaware of his probationary status, stopped the defendant at a checkpoint outside his judicial district and discoverd 100 pounds of marijuana. Since, the search was illegal,[18] the evidence was inadmissible to establish a new conviction for unlawful possession. The federal probation office then sought to revoke probation, since the defendant was seen outside his judicial district in violation of the condition. The Ninth Circuit held that the exclusionary rule, although properly invoked to suppress evidence in a criminal proceeding, is not applicable to a subsequent revocation proceeding.

The *Winsett* holding is based upon a two-step analysis. First, it must be determined whether extension of the exclusionary rule to probation revocation hearings would deter future unlawful police conduct. Second, any potential deterrent benefits must be balanced against the potential injury to the function of the revocation hearing in which the illegally obtained evidence is to be used.[19] The court reasoned that extension of the rule may deter police misconduct in that illegal searches consciously directed at probationers might in some instances be discouraged.[20] This potential benefit must be balanced against the potential harm to the probation system, i.e. that known violations of conditions will go uncorrected. Since the conditions are designed to further the goals of probation, their violation may indicate that the probationer is incapable of rehabilitation.[21] The Ninth Circuit concluded that this balancing process precludes extension of the exclusionary rule.

In *Tamez v. State,*[22] the Texas Court of Criminal Appeals[23] reviewed whether a blanket search condition could render otherwise illegal evidence admissible in a probation revocation hearing. The defendant had been placed on probation subject to a blanket search condition after he had pleaded nolo contendere to possession of marijuana. At a stationary checkpoint approximately twenty-five miles north of the Mexican border, a United States Border Patrol agent searched the defendant without consent and without probable cause. Since the search was invalid as a border search,[24] the handgun

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[17] 518 F.2d 51 (9th Cir. 1975).

[18] *Id.* at 52. The border search was illegal based on Almeida-Sanchez v. United States, 413 U.S. 266 (1973) and United States v. Bowen, 500 F.2d 960 (9th Cir.) (en banc), *aff'd*, 422 U.S. 916 (1975).

[19] 518 F.2d at 54.

[20] *Id.* at 54–55. *Winsett's* holding is confined to the situation where, at the time of the illegal arrest and search, the police had neither knowledge nor reason to believe that the suspect was a probationer. Comparing *Winsett* to its decision in Verdugo v. United States, 402 F.2d 599, 612 (9th Cir. 1968), *cert. denied*, 397 U.S. 925 (1970), the Ninth Circuit noted:

> [T]his court applied the exclusionary rule to sentencing proceedings where the police were familiar with past narcotic violators and current suspects and had a personal stake in seeing not only that a violator was convicted, but also that he receive a lengthy sentence. The court reasoned that in the absence of the exclusionary rule an officer would have an incentive, given the proper circumstances, to lawfully obtain only so much evidence as is necessary to assure conviction of the defendant of a single offense, and then proceed to unlawfully obtain evidence of additional offenses which would ensure a long sentence. Similarly, when the police at the moment of search know that a suspect is a probationer, they may have a significant incentive to carry out an illegal search even though knowing that evidence would be inadmissible in any criminal proceeding. The police have nothing to risk: If the motion to suppress in the criminal proceedings were denied, the defendant would stand convicted of a new crime; and if the motion were granted, the defendant would still find himself behind bars due to revocation of probation. Thus, in such circumstances, extension of the exclusionary rule to the probation revocation proceeding may be necessary to effectuate Fourth Amendment safeguards.

Id. at 54 n.5.

[21] Because violation of probation conditions may indicate that the probationer is not ready or is incapable of rehabilitation by integration into society, it is extremely important that *all reliable* evidence shedding light on the probationer's conduct be available during probation revocation proceedings.

518 F.2d at 55 (emphasis in original). The emphasis on *reliable* evidence should be noted. Thus, nothing should preclude the exclusion of unreliable evidence in probation revocation hearings. In Coleman v. State, 505 S.W.2d 878 (Tex. Crim. App. 1974), an eyewitness identification of the probationer was suppressed at a revocation hearing because it was too suggestive.

[22] 534 S.W.2d 686 (Tex. Crim. App. 1976).

[23] In a Texas criminal case, the Court of Criminal Appeals is the highest state court of appeals.

[24] The court concluded that searches conducted at traffic checkpoints removed from the border are invalid as border searches, citing Almeida-Sanchez v.

found in the defendant's possession would be inadmissible in any criminal proceeding. However, the handgun was admitted at a hearing in which the defendant's probation was revoked. The court of criminal appeals reversed the order revoking probation[25] and adopted the rationale of *Consuelo-Gonzalez*. A blanket search condition cannot render admissible otherwise illegal evidence. The condition is too broad, since it would permit "an intimidating and harassing search to serve law enforcement ends totally unrelated to either his prior conviction or his rehabilitation. . . ."[26] To be reasonable, a condition must contribute significantly both to probationer rehabilitation and to societal protection.

The significance of *Tamez* derives from the unique circumstances of the jurisdiction. Texas is a juridiction which does not follow the *Winsett* approach to the exclusionary rule.[27] It is settled in Texas that a probationer's fourth amendment rights are afforded exclusionary rule protection in a probation revocation hearing.[28] In *Tamez*, the Texas Court of Criminal Appeals confronted the determination of a probationer's constitutional status in a posture significantly different than that of other courts. As in other jurisdictions testing the validity of a blanket search and seizure condition, the dichotomy was clear: either the traditional *Mason* or the new *Consuelo-Gonzalez* approach would be used. Unlike other jurisdictions, if the *Tamez* court chose to adopt the *Consuelo-Gonzalez* approach, the second analytical step was made as well. Texas could not extend greater fourth amendment rights to probationers by invalidating the blanket search condition as unnecessarily broad without also protecting those rights in the revocation hearing. Yet, despite both its unique circumstances and the refusal of other courts to

United States, 413 U.S. 266 (1973) (the fourth amendment prohibits the use of roving patrols to search vehicles at points removed from the border); United States v. Peltier, 422 U.S. 531 (1975) (*Almeida-Sanchez* is not applied retroactively); United States v. Brignoni-Ponce, 422 U.S. 873 (1975) (except at the border, agents may stop vehicles only if they are aware of specific facts which reasonably warrant suspicion); United States v. Ortiz, 422 U.S. 891 (1975) (*Almeida-Sanchez* extended to traffic checkpoints removed from the border); United States v. Martinez, 526 F.2d 954 (5th Cir. 1976) (*Brignoni-Ponce* and *Ortiz* given retrospective effect).

[25] The court decided that the hearing judge had abused his discretion in revoking the defendant's probation. It held that the allegations of a probation violation should be fully and clearly set forth in the motion to revoke probation so that the probationer may prepare his defense. The defendant was subject to a probationary condition requiring that he "(a) Commit no offense against the laws of this State or any other State or of the United States." 534 S.W.2d at 688. In its motion to revoke probation, the state alleged that the defendant "did receive and possess firearms, to wit: a pistol and a shotgun in violation of the Penal Laws of the United States and in violation of condition 'a' of the Judgment placing him on probation." *Id.* The court held that the defendant had no notice of which federal gun law he had supposedly violated. *Id.* at 689.

[26] 534 S.W.2d at 692.

[27] The only other jurisdiction not following *Winsett* is Oklahoma, Michaud v. State, 505 P.2d 1399 (Okla. Crim. 1973). In *Michaud*, the defendant pleaded guilty to the possession of marijuana and was placed on probation. At a hearing revoking the defendant's probation, the trial judge denied a motion to suppress evidence seized pursuant to a search warrant issued without probable cause. The Oklahoma Court of Criminal Appeals reversed the revocation order holding that "revocation may only be had upon competent evidence" and that "[e]vidence obtained through an unlawful search and seizure [is] . . . 'incompetent evidence'. . . . The distinction between a criminal trial and a revocation hearing does not abrogate the Fourth Amendment." *Id.* at 1402–03 (citations omitted).

[28] Rushing v. State, 500 S.W.2d 667 (Tex. Crim. App. 1973) (fruits of a search of a probationer without probable cause not admissible in a revocation hearing); Hegdal v. State, 488 S.W.2d 782 (Tex. Crim. App. 1972) (fruits of a search conducted under a warrant which contained probable cause were admissible in a revocation hearing).

It is unclear, however, whether a probation revocation hearing is a "criminal proceeding" in Texas, thereby mandating use of the exclusionary rule. In 1971 the Texas Supreme Court held that a criminal prosecution includes a proceeding in which probation is revoked. Fariss v. Tipps, 463 S.W.2d 176 (Tex. 1971). Prior to this decision, the court of criminal appeals had consistently held that such a hearing was not a trial in the constitutional sense. Campbell v. State, 456 S.W.2d 918 (Tex. Crim. App. 1970); Hulsey v. State, 447 S.W.2d 165 (Tex. Crim. App. 1969); Cooper v. State, 447 S.W.2d 179 (Tex. Crim. App. 1969); Tate v. State, 365 S.W.2d 789 (Tex. Crim. App. 1963). *Fariss* seems to have had little effect. The Court of criminal appeals continues to treat such proceedings as being outside the meaning of the Texas Constitution and has in fact stated that, "a hearing on a motion to revoke is not a trial in the constitutional sense," Hill v. State, 480 S.W.2d 200 (Tex. Crim. App. 1971), *cert. denied*, 409 U.S. 1078 (1972), and that it "is not a criminal trial," Stembridge v. State, 477 S.W.2d 615 (Tex. Crim. App. 1972). *See* Comment, *A Survey of Recent Law Concerning Revocation of Probation in Texas*, 15 S. TEX. L.J. 92, 99–100 (1974).

extend the exclusionary rule, the Texas court chose to adopt the *Consuelo-Gonzalez* approach.

The controversy over the constitutional status of the probationer has generated two approaches to the validity of blanket search conditions. The choice presented to courts depends upon the level of governmental intrusion considered necessary to achieve the dual goals of the probation system. Until *Tamez v. State,* no court had been willing both to recognize the probationer's right to be free from a blanket search condition and to protect that right in the revocation hearing. Now, in the Texas continuum from the prisoner to the free person, the probationer has acquired almost the full range of fourth amendment rights available to the latter.

Abortion Recordkeeping and Right of Privacy

The constitutional right of privacy includes a qualified right to an abortion. In *Roe v. Wade,*[29] the Supeme Court held that the constitutionally-protected right of privacy is "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[30] A related issue of privacy is raised when a state requires collection of personal information from those who obtain abortions. Although in the past the Supreme Court has indicated a willingness to uphold governmental data collection,[31] the information collected was not as "personal" as abortion information.

Recently, in *Planned Parenthood of Central Missouri v. Danforth,*[32] the Court upheld a statutory provision which required that a patient's name be included in the health facility file recording her abortion, where the sole use to be made of the collected data was statistical.[33] In finding the abortion recordkeeping system in *Danforth* constitutionally permissible, the Court cautioned that there are limits: abortion recordkeeping must be reasonably directed to protecting maternal health, must not be abused, must respect the confidentiality and privacy of the patient, and must not have a legally significant impact or consequence on the abortion decision.[34]

Eight months before *Danforth,* the New York Court of Appeals, in *Schulman v. New York City Health and Hospital Corp.*,[35] directly confronted the question whether the requirement of mandatory filing of a certificate when an abortion is performed violates a woman's right to abort and her right to privacy in the use of her name.[36] The court, in a four to three decision, approved a city recordkeeping provision which required that an abortion patient's name and address be entered on a termination of pregnancy certificate sent to a centralized computer. The patient's personal abortion information was then included in records serving both sta-

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[29] 410 U.S. 113 (1973).

[30] *Id.* at 153.

[31] *See* Laird v. Tatum, 408 U.S. 1 (1972), where the Court held that the existence of an army intelligence data bank did not violate first amendment rights because the plaintiffs were not able to show that they sustained an injury or that they were in immediate danger of sustaining direct injury. *See also* California Bankers Ass'n v. Schultz, 416 U.S. 21 (1974), where the Court held that required maintenance of records by the banks for certain transactions did not constitute a seizure, and claims of constitutional violations were premature because the government had not requested disclosure of the information.

[32] 428 U.S. 52 (1976).

[33] The Court considered infringements on the right to abort and struck down the statutory requirement of spousal consent as "inconsistent with the standards enunciated in *Roe v. Wade*," 96 S.Ct. at 2842, and also struck down the parental consent provision. The Court did not specifically address a right to privacy concerning use of one's name.

[34] 428 U.S. at 80–81.

[35] 38 N.Y.2d 234, 342 N.E.2d 501, 379 N.Y.S.2d 702 (1975). A doctor who performed an abortion at the patient's request did not file the required certificate. The doctor and patient instituted court proceedings to ascertain the constitutionality of the name requirement.

[36] It is unclear if there is a right to privacy concerning the use of one's name for personal data. In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), the Supreme Court held that the right of privacy does not include protection against dissemination of a person's name when it was obtained from judicial records kept in connection with a public prosecution and which are open to public inspection, even if the publication was embarrassing or otherwise painful to the individual. *Id.* at 491. In *Jaffess v. Secretary, Dep't of Health, Education and Welfare,* 393 F. Supp. 626 (1975), the court rejected a contention that Jaffess' right of privacy was violated by disclosure of his name and social security benefits to the Veteran's Administration: "the present thrust of the decisional law does not include within its compass the right of an individual to prevent disclosure by one governmental agency to another of matters obtained in the course of the transmitting agency's regular functions." *Id.* at 629. The court went on to emphasize, however, that it did not "suggest that a constitutional right of privacy might not be found to exist and appropriate relief granted in instances where the government is possessed of highly personal and confidential information which has been given under compulsion of law and with an expectation of privacy. . . ." *Id.* at 630.

tistical and counseling purposes. The *Schulman* majority found that the requirement did not interfere with the decision to abort[37] and that the right of privacy did not extend to situations where the government gathers information for legitimate purposes.[38] However, a comparison of the nature and purpose of recordkeeping in *Danforth* with the uses of data permitted in *Schulman* indicates that the recordkeeping method approved in *Schulman* exceeds the limitations suggested in *Danforth*.

In *Roe v. Wade*,[39] the Supreme Court held that the right of privacy includes a woman's decision whether or not to terminate her pregnancy. The right to an abortion is qualified, however, for it must be balanced against important state interests. The state has a significant interest in protecting a woman's health after the first trimester of pregnancy, and concern for the potential life of the fetus becomes a legitimate state interest after viability (at approximately the third trimester). The state may therefore subject abortions performed after these stages to reasonable regulation.[40]

Roe v. Wade forbids imposing restrictions or regulations on first trimester abortions,[41] and raises the question whether any records may be maintained for abortions performed during this period. The answer which *Danforth* provides is that such records may be maintained if they conform to certain guidelines. The records at issue in *Danforth* were maintained to provide a source of pertinent information to assist in preserving maternal health and life.[42] The data were to be collated statistically, and they remained confidential. The records, stored in the permanent files of the health facility where the abortion was performed, were to be destroyed after seven years. "[W]hile perhaps approaching permissible limits, [recordkeeping] of this kind [is] not constitutionally offensive"[43] in itself, said the *Danforth* Court:

> The added requirements for confidentiality, with the sole exception for public health officers, and for retention for seven years, a period not unreasonable in length, assist and persuade us in our determination of the constitutional limits.[44]

Although the Court in *Danforth* did not specifically address the question whether governmental collection of abortion data similar to the type upheld in *Schulman* is constitutionally permissible, *Danforth* implies that *Schulman*-type recordkeeping is an unwarranted intrusion by the government into private life. New York City's provision required that all abortions be reported to the Health Department. The records were not subject to subpoena, but could be inspected by the Health Commissioner and other "authorized personnel."[45] A centralized computer was used to cull statistical data and to provide information for public health counseling, which led to wide dissemination of abortion information.[46] No procedures had been

[37] 38 N.Y.2d at 240, 342 N.E.2d at 504, 379 N.Y.S.2d at 706.

[38] *Id.* at 243, 342 N.E.2d at 506, 379 N.Y.S.2d at 709.

[39] 410 U.S. 113 (1973).

[40] *Id.* at 160.

[41] *See*, Word v. Poelker, 495 F.2d 1349, 1351 (8th Cir. 1974) where the court held that the city could not establish sweeping regulations for "abortion clinics" even though the city did not proscribe abortions, because failure to exclude first trimester abortions made the regulations overbroad and unreasonably infringed on fundamental right. *See also*, Friendship Medical Center, Ltd. v. Chicago Bd. of Health, 505 F.2d 1141 (7th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975) where the court held that the city could not require certain equipment for the abortion procedure which was not required for similar surgical procedures, because first trimester abortions must be free from state interference and must be treated as other medical procedures of similar complexity.

[42] 428 U.S. at 80. *See* House Comm. Substitute House Bill No. 1211, §10(1), 77th Gen. Assembly of Mo., 2d Sess. (June 14, 1974).

[43] 428 U.S. at 81.

[44] *Id.*

[45] NEW YORK CITY HEALTH CODE, § 204.07 (as amended 1973), NEW YORK CITY AD. CODE, ch. 22, tit. A, § 567.

[46] 38 N.Y.2d at 238, 342 N.E.2d at 503, 379 N.Y.S.2d at 704. Two public health experts submitted affidavits showing public health objectives of the termination of pregnancy certificates:

1. Allowing follow-up where complications ensue.
2. Enabling the Department of Health to determine whether orthodox procedures were followed.
3. Enabling the department to determine whether further investigation or regulation is required.
4. Facilitating the collection of public health data as yet nonexistent on the possible adverse effects of an abortion or of multiple abortions on the same woman.
5. Ensuring the efficient compilation of this data and to allow the department to retrieve a particular patient's record from an abortion service where the patients are identified only by name and address.
6. Offering public health counseling on adequate family planning measures as alternative

established by statute or by Health Department regulation to discontinue culling and storing abortion information after the need for the information ceased.[47]

Although *Danforth* upheld the keeping of abortion records, the methods used in that case and the degree of access to the information were significantly different from *Schulman's* computerized abortion registry. *Danforth* abortion records were maintained, along with other hospital records, in the permanent health facility files. *Schulman* abortion records, on the other hand, were stored not only where the abortion was performed but also in a centralized computer registry exclusively concerned with abortions. The maintenance of localized, confidential records is a "far cry from the massive, open-ended compilation of names created by New York's regulation and is obviously a more palatable approach."[48] Furthermore, "there is an enormous difference between the knowledge that one's name exists, together with the names of all patients, not just abortion patients, merely in a hospital record somewhere in an immense metropolis, and the knowledge that the local political body has compiled a special file of all those who have sought this particular treatment."[49] The reasonable seven-year period for which records were maintained helped persuade the *Danforth* Court that the recordkeeping scheme before it was constitutional.[50] The unrestricted retention of records in *Schulman,* however, extends the potential for abuse.[51]

The type of recordkeeping in *Danforth* is not as readily susceptible to breaches in confidentiality and privacy as is computerized recordkeeping. Even where the information is to be kept confidential, computerization necessarily results in broader access. Because of the number of employees required to handle and process the data before and during compilation of a patient's computerized file, the information is not well protected: "The problem is how to prevent 'authorized' access for 'unauthorized' purposes, since most leakage of data from personal data systems . . . appears to result from improper actions of employees either bribed to obtain information, or supplying it to outsiders."[52] Furthermore, "the impersonal data system, and faceless users of the information it contains tend to be accountable only in the formal sense of the word. In practice they are for the most part immune to whatever sanctions the individual can invoke."[53] The impersonality and unaccountability of computerized data systems is perceived by the public, and may lead to widespread fears that computer use adversely affects personal privacy.[54] Such fears may have an impact on a woman's abortion decision and this, according to *Danforth,* is a constitutionally impermissible consequence of recordkeeping.

Differences between the purposes served by *Danforth* and *Schulman* abortion records also lead to significant variation in the dissemination of the personal abortion data. In *Danforth,* the statutory language explicitly provides that abortion records "shall be confidential and shall be used only for statistical purposes."[55] *Schulman* purposes go beyond mere statistical compilation, as the stated objectives of the regulation include the provision of counseling services to those identified in the certificates. The city's interests in counseling and advisory services are not sufficiently compelling to warrant inclusion of the patient's name and address on the termination of pregnancy certificate.

Judge Wachtler, dissenting in *Schulman,* found that the "only valid objective presented" by the city was the compilation of public health data, and the city was unable to demonstrate

means of birth control to repeated abortions.

7. Ensuring that women who test positive for venereal disease, sickle cell anemia, and RH negative factor which affect the health of any future children receive proper health counseling and treatment.

Id.

[47] *Id.* at 244, 342 N.E.2d at 507, 379 N.Y.S. 2d at 710.

[48] *Id.* at 247, 342 N.E.2d at 509, 379 N.Y.S.2d at 713 (Wachtler, J., dissenting) (referring to the three-judge district court decision in *Danforth*, 392 F. Supp. 1362 (E.D.Mo. 1975).

[49] *Id.* at 254, 342 N.E.2d at 513, 379 N.Y.S.2d at 718–719 (Fuchsberg, J., dissenting).

[50] 428 U.S. at 81.

[51] *Id.*

[52] U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE REPORT OF THE SECRETARY'S ADVISORY COMMITTEE ON AUTOMATED PERSONAL DATA SYSTEMS, RECORDS, COMPUTERS AND THE RIGHTS OF CITIZENS 19 (1973).

[53] *Id.* at 30.

[54] "In more than one opinion survey, worries and anxieties about computers and personal privacy show up in the replies of about one third of those interviewed." *Id.* at 29.

[55] 428 U.S. at 79. House Comm. Substitute House Bill No. 1211, § 10(3), 77th Gen. Assembly of Mo., 2d Sess. (June 14, 1974).

why the patient's name and address were necessary when a system of coded numbers could serve the same purpose.[56] Studies have shown that a serious problem of computer bank privacy violations results "to the extent that information stored in data banks bears a personal label."[57]

Judge Fuchsberg, also dissenting in *Schulman,* considered the follow-up of unrelated diseases and contraceptive counseling to be serious violations of a woman's privacy:[58] an invasion of constitutionally-protected privacy "in order to facilitate the achievement of health goals which were *unrelated* to abortion is so clearly prohibited by the Supreme Court decisions as to require no further comment here."[59] Judge Fuchsberg was offended by the implication of the statute that it was appropriate for the city to "seek out certain categories of abortion patients and advise them, paternalistically, of the best contraceptive methods to follow."[60]

Although the extent to which an individual's right of privacy protects her against collection and dissemination of abortion information has not been clearly delineated, the *Danforth* opinion provides guidelines for the states in the collection and use of such data. Methods and purposes of keeping abortion records must be reasonably directed to the protection of maternal health and life. The power to keep abortion records must not be abused, and the patient's confidentiality and privacy must be properly respected. Finally, abortion recordkeeping should not have a legally significant impact on a woman's decision whether to have an abortion. The computerized method approved in *Schulman* does not appear to meet the *Danforth* requirements, and it remains to be seen whether any computerized system would do so.

Sexual Privacy

The act of sodomy[61] is still a criminal offense in a majority of states.[62] Most state statutes simply prohibit this particular type of sexual conduct, making no distinction between married or unmarried, homosexual or heterosexual participants and public or private acts.[63] Ever since the United States Supreme Court's 1965 decision in *Griswold v. Connecticut,*[64] however, the constitutionality of these statutes has been in doubt. *Griswold,* which had its roots in previous decisions that limited state intrusion into child rearing,[65] procreation,[66] and marriage,[67] struck

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[56] 38 N.Y.2d at 247, 342 N.E.2d at 509, 379 N.Y.S.2d at 712 (Wachtler, J., dissenting).

[57] R. Miller, Data Banks and Privacy, Computers and the Law: An Introductory Handbook 157 (2d ed. 1969).

[58] 38 N.Y.2d at 252, 342 N.E.2d at 512, 379 N.Y.S.2d at 717 (Fuchsberg, J., dissenting).

[59] *Id.* at 252. 342 N.E.2d at 512, 379 N.Y.S.2d at 717 (Fuchsberg, J., dissenting).

[60] *Id.*

[61] "[S]odomy: carnal copulation with a member of the same sex or with an animal or unnatural carnal copulation with a member of the opposite sex; the penetration of the male organ into the mouth or anus of another." Webster's Third New International Dictionary of The English Language 2165 (1966).

[62] In varying degrees deviate sexuality has been regarded with intense aversion in nearly all times and civilizations, and subject to condemnation by religious interdict or severe secular punishment. Depending on the environment and education of the analyst, deviate sexuality may be attributed to spiritual illness (sin), to improper early psychic influences, or to a congenital and hereditary defect. ALI Model Penal Code § 207.5 Comment (Tent. Draft No. 4, 1955).

Biblical condemnation of sodomy may be found in *Leviticus* 18:22–23, *Leviticus* 20:13, and *Deuteronomy* 23:17. American statutes prohibiting sodomy were modeled after the English common law and statutory regulation of such acts.

At first there was some doubt as to whether this offense was classified as a felony or a misdemeanor. However, it soon came to be considered so repulsive that the obtainment of property under threat of accusation of sodomy constituted robbery. Comment, *The Bedroom Should Not Be Within the Province of the Law,* 4 Cal. W. L. Rev. 115, 115–16 (1968).

As of 1975, forty-three states and the District of Columbia had sodomy statutes. For a compilation of statutes, see Note, *The Constitutionality of Laws Forbidding Private Homosexual Conduct,* 72 Mich. L. Rev. 1613, nn.1 & 2 (1976).

[63] *E.g.,* N.J. Stat. Ann. § 2A:143–1 (West 1969): "Sodomy, or the infamous crime against nature, committed with man or beast, is a high misdemeanor, and shall be punished by a fine of not more than $5,000, or by imprisonment for not more than 20 years, or both."

[64] 381 U.S. 479 (1965).

[65] Meyer v. Nebraska, 262 U.S. 390 (1923) (state law prohibiting the teaching of foreign languages to private school students before the completion of eighth grade held violative of the due process clause of the fourteenth admentment).

[66] Skinner v. Oklahoma, 316 U.S. 535 (1942) (state law providing for sterilization of persons convicted of two or more "felonies involving moral turpitude" held violative of the equal protection clause of the fourteenth amendment).

[67] Loving v. Virginia, 388 U.S. 1 (1967) (state anti-

down Connecticut's statutes[68] prohibiting the use of contraceptives on the theory that they violated the constitutional right to privacy.[69] However, the Court in *Griswold* did not make clear the precise nature or scope of this right to privacy. Subsequent cases[70] have extended the right beyond the marital relationship, which was the focus of the *Griswold* decision, but it is still unclear whether the right is a narrow one, relating only to decisions concerning procreation, or whether it is a broader right to *sexual* privacy, thus protecting most sexual behavior, including sodomy, from state interference and regulation. There is considerable divergence of opinion among lower courts on this issue.

In *Lovisi v. Slayton*,[71] the United States Court of Appeals for the Fourth Circuit refused to issue a writ of habeas corpus to husband and wife petitioners convicted of committing sodomy on each other in their own bedroom in the presence of a third party.[72] The Fourth Circuit recognized the existence of the right to privacy and the fact that the Lovisis, a married couple engaging in sexual intimacies within their home, were protected from state intrusion by this right.[73] However, the court limited the right to privacy to "circumstances in which it may reasonably be expected."[74] Apparently defining privacy in terms of physical seclusion,[75] the court determined that the Lovisis had waived their right to privacy because of the presence of the third party:

> Once a married couple admits strangers as onlookers, federal protection of privacy dissolves. . . . The presence of the onlooker, Dunn, in the Lovisis' bedroom dissolved the reasonable expectation of privacy shared by the Lovisis when alone.[76]

Thus, the Fourth Circuit has limited the right to privacy, even among married persons, to those situations in which there is a "reasonable expectation of privacy." This limit, however, is not derived from privacy cases but rather from fourth amendment decisions such as *Katz v. United States*,[77] cited, *inter alia*, by the *Lovisi* court. *Katz* involved a conviction for violating a federal statute prohibiting the transmission of wagering information across state lines.[78] The government's evidence was obtained by attaching an electronic bugging device to the outside of the telephone booth from which the defendant made his calls. In reversing the conviction, the United States Supreme Court stated that:

> [T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.[79]

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miscegenation statutes held violative of the equal protection and due process clauses of the fourteenth amendment).

[68] CONN. GEN. STAT. ANN. §§ 53-32, 54-196 (1958)

[69] The Court found the right to privacy in the "penumbra" of the Bill of Rights, emanating from the first, third, fourth, fifth, and ninth amendments of the United States Constitution. 381 U.S. at 484.

[70] See notes 102-08 *infra* and accompanying text.

[71] 539 F.2d 349 (4th Cir. 1976), *petition for cert. filed*, 44 U.S.L.W. 2542 (U.S. Aug. 9, 1976) (No. 76-184).

[72] Petitioners Aldo and Margaret Lovisi were convicted in the state court for sodomy with each other in violation of VA. CODE ANN. § 18.1-212 (1950) (current version at VA. CODE ANN. § 18.2-361 (1975)), which provides:

> Crimes against nature.—If a person shall carnally know in any manner any brute animal, or carnally know any male or female person by the anus or by or with the mouth, or voluntarily submit to such carnal knowledge, he or she shall be guilty of a felony and shall be confined in the penitentiary not less than one year nor more than three years.

The prosecution was initiated after one of the Lovisis' two daughters brought a photograph to school which allegedly portrayed her and an adult male completely unclothed. The picture was destroyed by a teacher, but ultimately led to the execution of a search warrant and a search of the Lovisis' home. The search produced hundreds of erotic pictures, including photographs of the acts for which the Lovisis were convicted. The Lovisis had placed advertisements in a magazine, *Swinger's Life*. After answering one of the advertisements, Earl Romeo Dunn met with the Lovisis three times. The last meeting took place in the Lovisis' home in Virginia Beach, Virginia. This prosecution was brought for acts performed by the Lovisis *on each other* and not for the involvement of Dunn. In a separate proceeding, Margaret Lovisi was convicted of sodomy with Dunn. *See* Lovisi v. Slayton, 363 F. Supp. 620, 621 (E.D.Va. 1973). Dunn's participation in the affair resulted in deportation to his native Jamaica. 539 F.2d at 350 n.2.

[73] 539 F.2d at 351.

[74] *Id.*

[75] "[T]he marital intimacies shared by the Lovisis when alone and in their own bedroom are within their protected right of privacy." *Id.* at 351.

[76] *Id.* at 351-52.

[77] 389 U.S. 347 (1967).

[78] 18 U.S.C. § 1084 (1966).

[79] 389 U.S. at 351-52 (citations omitted).

Thus, even if derived soley from the fourth amendment, the Lovisis' right to privacy may arguably have been preserved despite the presence of Dunn because the act took place in the bedroom of their home—a strong indication that the Lovisis sought "to preserve as private" their sexual conduct. Furthermore, the right to privacy has roots deeper than the fourth amendment's guarantee against unreasonable searches and seizures. As the Supreme Court stated in *Griswold,* the right emanates from the first, third, fourth, fifth and ninth amendments of the Constitution.[80]

The same statute at issue in *Lovisi* was also upheld in a different context in *Doe v. Commonwealth's Attorney for Richmond.*[81] Here, the district court denied male homosexual petitioners' request for injunctive relief to restrain enforcement of the statute. The petitioners claimed that enforcement would deny their rights to due process, freedom of expression and privacy, and contravene their constitutional guarantee against cruel and unusual punishment. The court, however, found the statute to be an exercise of a legitimate state interest. According to the court, the constitutional right to privacy inheres only in the context of the marital, home and family relationship.[82] Thus, it does not prevent the state from punishing those who engage in homosexual acts.

Although the opinion does not clearly specify what the state's legitimate interests[83] are in regulating such conduct, it relied heavily on Mr. Justice Harlan's dissent in *Poe v. Ullman,*[84] to the effect that "the State's rightful concern for its people's moral welfare" would allow it to punish "adultery, homosexuality, fornication and incest . . . however privately practiced."[85] Concern for the moral welfare of its citizens has been a traditional area of state interest. The *Doe* court, however, appears to rest its conclusion that the state can continue to regulate in this area on the fact that it always has. It reasoned that:

> Although a questionable law is not removed from question by the lapse of any prescriptive period, the longevity of the Virginia statute does testify to the State's interest and its legitimacy. . . . In sum, we believe that the sodomy statute, so long in force in Virginia, has a rational basis of State interest demonstrably legitimate and mirrored in the cited decisional law of the Supreme Court.[86]

In light of several recent cases restricting state power to enforce sodomy statutes, the longevity argument loses strength. Furthermore, the Supreme Court has not written a recent opinion dealing with homosexual conduct. Consequently, it is uncertain whether the constitutional right to privacy affects the states' traditional regulation of atypical sexual behavior.

A number of state courts[87] have also dismissed the argument that every adult individual has the right to perform any private, consensual sexual act. One illustrative decision is *State v. Bateman,*[88] in which the Supreme Court of Arizona upheld the constitutionality of Arizona's sodomy and lewd and lascivious acts statutes. The court acknowledged the right to privacy derived from *Griswold* and its progeny, but upheld the constitutionality of the challenged

[80] 381 U.S. at 484.

[81] 403 F. Supp. 1199 (E.D.Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976). The Supreme Court's affirmance was cited by the Fourth Circuit in an addendum to its *Lovisi* decision, 539 F.2d at 352. The court maintained that *Doe* reinforced its decision in *Lovisi*. However, its reliance on *Doe* is seemingly unwarranted. Not only are the facts of the two cases strikingly different—*Doe* involved nonmarital, homosexual behavior, whereas *Lovisi* concerned marital, heterosexual behavior—but the Supreme Court simply affirmed without comment, thus making it impossible to determine the basis of its reasoning.

[82] 403 F. Supp. at 1200.

[83] One commentator, in discussing California's oral copulation statute, CAL. PENAL CODE § 288(a) (West 1972), lists the following presumably universal interests advanced by the state of California in support of its statute:

> [T]he protection of the young from sexual assault, the protection of public decency, and the prevention of the spread of venereal disease, which, if achieved by the statute, would tend to promote public health, safety, morals and welfare.

Comment, *Oral Copulation: A Constitutional Curtain Must be Drawn*, 11 SAN DIEGO L. REV. 523 (1974). One may also hypothesize a state interest in promoting procreative activity: sodomitic acts do not result in offspring.

[84] 367 U.S. 497 (1961), a case in which the majority had refused to adjudicate a constitutional challenge to Connecticut's contraception statute.

[85] 367 U.S. at 552 (Harlan, J., dissenting).

[86] 403 F. Supp. at 1202-03.

[87] *See, e.g.*, State v. Elliott, 89 N.M. 305, 551 P.2d 1352 (1976); Hughes v. State, 14 Md. App. 497, 287 A.2d 299, *cert. denied*, 409 U.S. 1025 (1972).

[88] 113 Ariz. 107, 547 P.2d 6 (1976).

statutes, distinguishing regulation of sexual conduct from sexual misconduct:

> The United States Supreme Court is the ultimate authority interpreting the United States Constitution. . . . While it has been said in *Griswold* and *Eisenstadt* that the state cannot interfere with the private sexual behavior of two adults, in neither of those opinions did it determine that the State could not regulate sexual misconduct.[89]

Support for the Arizona court's distinction between regulation of sexual conduct and sexual misconduct can be found in Mr. Justice Goldberg's concurring opinion in *Griswold*: "[I]t should be said of the Court's holding today that it in no way interferes with a state's proper regulation of sexual promiscuity or misconduct."[90] Justice Goldberg, however, provided no basis for his statement. Nothing in the Court's language in *Griswold* or in subsequent decisions specifically deals with this distinction. And, certainly, nothing in the opinions makes it clear that the states' interest in regulating private sexual "misconduct" between consenting adults overrides the individual right to be free of state interference.

In striking contrast to the decisions of the Fourth Circuit and the Supreme Court of Arizona, which upheld state regulation of sexual conduct, the Seventh Circuit has interpreted the Supreme Court's privacy decisions to limit severely a state's power to regulate sexual activity. In *Cotner v. Henry*,[91] the Seventh Circuit reversed the defendant's conviction for sodomy with his wife because the affidavit in the case contained no allegation of the use of force.[92] The court determined that, in the absence of an overriding state interest, the constitutionality of the Indiana sodomy statute[93] could be maintained only if construed "as being inapplicable to married persons or as outlawing such physical relations between married couples only when accompanied by force."[94] According to the court, "[t]he import of the *Griswold* decision is that private, consensual marital relations are protected from regulation by the state through the use of a criminal penalty."[95]

Massachusetts and New Jersey courts have taken a similar approach and narrowly construed their sodomy statutes.[96] The United States District Court for the Northern District of Texas has gone even farther and declared the state sodomy statute[97] to be unconstitu-

[89] 547 P.2d at 9 (citations omitted). In Eisenstadt v. Baird, 405 U.S. 438 (1972), the Supreme Court invalidated Massachusetts' contraception statute which limited the distribution of all contraceptive materials to married persons and stated that the right to privacy relates to the individual and not merely the married couple.

[90] 381 U.S. 479, 498–99 (Goldberg, J., concurring).

[91] 394 F.2d 873 (7th Cir.), *cert. denied*, 393 U.S. 847 (1968).

[92] *Id.* at 876.

[93] IND. CODE ANN. § 35-1-89-1 (Burns 1975).

[94] 394 F.2d at 875–76.

[95] *Id.* at 875.

> The American Law Institute Model Penal Code adopts the view that consensual private sexual conduct between adults should not ordinarily be subject to criminal sanction. Illinois, as well as many other states, has adopted this approach. . . .

Id. at 875 n.3.

[96] Commonwealth v. Balthazar, 318 N.E.2d 478 (Mass. 1974) (statute inapplicable to private, consensual conduct of adults); Lear v. State, 62 N.J. 388, 301 A.2d 748 (1973) (deviate sexual conduct of married couples not within scope of statute). This approach conforms, at least in part, to the recommendations of the American Law Institute.

[97] VERNON'S ANN. PENAL CODE, art. 524 (repealed):

> Sodomy. Whoever has carnal copulation with a beast, or in an opening of the body, except sexual parts, with another human being, or whoever shall use his mouth on the sexual parts of another human being for the purpose of having carnal copulation or who shall voluntarily permit the use of his own sexual parts in a lewd or lascivious manner by any minor, shall be guilty of sodomy. . . .

The new Texas statutes distinguish between homosexual and heterosexual conduct for some types of deviate sexual conduct:

> § 21.04. Sexual Abuse
>
> (a) A person commits an offense if, without the other person's consent and with intent to arouse or gratify the sexual desire of any person, the actor:
>
> (1) engages in deviate sexual intercourse with the other person, not his spouse, whether the other person is of the same or opposite sex; or
>
> (2) compels the other person to engage in sexual intercourse or deviate sexual intercourse with a third person, whether the other person is of the same sex as or opposite sex from the third person.
>
> (b) The intercourse is without the other person's consent under one or more of the following circumstances:
>
> (1) the actor compels the other person to submit or participate by force that overcomes such earnest resistance as might be reasonably expected under the circumstances;
>
> (2) the actor compels the other person to submit or participate by any threat, communicated by actions, words, or deeds, that would

tional. In *Buchanan v. Batchelor*,[98] the court held the statute to be void on its face for unconstitutional overbreadth because it failed to distinguish between married and unmarried persons, private and public acts, and homosexual and heterosexual conduct.[99] Noting that the marital relationship is not mentioned in the Constitution, the court stated that it has nevertheless been held to be included in the first amendment.[100] While conceding the state's legitimate interest in regulating "sexual promiscuity or misconduct," the court said that:

> Sodomy is not an act which has the approval of the majority of the people. In fact such conduct is probably offensive to the vast majority, but such opinion is not sufficient reason for the State to encroach upon the liberty of married persons in their private conduct.[101]

As these cases demonstrate, the law is far from settled on the question of whether the right to privacy extends to private, adult acts of sodomy. Because recognition of the right is relatively recent and because state regulation of sexual conduct is a well established tradition, which many states may be unwilling to give up, it is certain that additional guidance from the Supreme Court will be necessary to resolve the question.

Inexplicably, however, the Supreme Court has refused to provide such guidance. In March, 1976, it affirmed without comment the district court's decision in *Doe*,[102] refusing to hold the Virginia sodomy statute unconstitutional as applied to adult homosexuals. This summary affirmance is an enigma. The district court specifically limited the right to privacy in sexual conduct to the marital relationship. Yet the Supreme Court, in *Eisenstadt v. Baird*,[103] four years earlier, explicitly announced a right to individual privacy:

> It is true that in *Griswold* the right of privacy inhered in the marital relationship. Yet the married 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. . . .[104]

In *Roe v. Wade*,[105] holding the Texas abortion statutes[106] violative of the due process clause of

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prevent resistance by a person of ordinary resolution, under the same or similar circumstances, because of a reasonable fear of harm;

(3) the other person has not consented and the actor knows the other person is unconscious or physically unable to resist;

(4) the actor knows that as a result of mental disease or defect the other person is at the time of the deviate sexual intercourse incapable either of appraising the nature of the act or of resisting it;

(5) the other person has not consented and the actor knows the other person is unaware that deviate sexual intercourse is occurring;

(6) the actor knows that the other person submits or participates because of the erroneous belief that he is the other person's spouse; or

(7) the actor has intentionally impaired the other person's power to appraise or control the other person's conduct by administering any substance without the other person's knowledge.

§ 21.05. Aggravated Sexual Abuse

(a) A person commits an offense if he commits sexual abuse as defined in Section 21.04 of this code or sexual abuse of a child as defined in Section 21.10 of this code and he:

(1) causes serious bodily injury or attempts to cause death to the victim or another in the course of the same criminal episode; or

(2) compels submission to the sexual abuse by threat of death, serious bodily injury, or kidnapping to be imminently inflicted on anyone.

(b) An offense under this section is a felony of the first degree.

§ 21.06. Homosexual Conduct

(a) A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex.

(b) An offense under this section is a Class C misdemeanor.

TEX. PENAL CODE ANN. tit. 5, §§ 21.04–.06 426, (Vernon 1974 & Supp. 1976–77).

[98] 308 F. Supp. 729 (N.D.Tex. 1970), *vacated*, 401 U.S. 989 (1971). This case was remanded for reconsideration in light of Younger v. Harris, 401 U.S. 37 (1971), which held that only under special circumstances will federal injunctive relief be granted to a petitioner "when a prosecution involving the challenged statute is pending in state court at the time the federal suit is initiated." 401 U.S. at 41 n.2.

[99] 308 F. Supp. at 736.

[100] *Id.* at 732. *See* Griswold v. Connecticut, 381 U.S. 479, 483–85 (1965).

[101] 308 F. Supp. at 733. For critical analyses of the *Buchanan* decision, see Note, 50 NEB. L. REV. 567 (1971); Note, 49 TEX. L. REV. 400 (1971).

[102] 403 F. Supp. 1199 (E.D.Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976).

[103] 405 U.S. 438 (1972).

[104] *Id.* at 453.

[105] 410 U.S. 113 (1973).

[106] TEX. REV. CODE. STAT. ANN. arts. 4512.1–.4, 4512.6 (Vernon 1976).

the fourteenth amendment, the Court also implicity found an individual right to privacy: the plaintiff, denied an abortion under Texas law, was single. The Supreme Court did not limit her right to privacy on the basis of marital status: "This right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[107]

Of course, neither *Eisenstadt* nor *Roe* dealt with atypical sexual behavior which the courts of Virginia and Arizona have focused on. Yet in *Stanley v. Georgia,*[108] a case dealing with arguably anti-social conduct, possession of pornography, the Court limited the power of the state to intrude into the *home,* regardless of the marital status or the sexual proclivities of the defendant: "Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home."[109]

Since all of these decisions seem to indicate that adult individuals have a broad constitutional right to sexual privacy, at least within the confines of the home, it is somewhat surprising that the Supreme Court permitted the *Doe* decision to stand. The effect of that decision will be to create even more variation in lower court interpretations of the right to privacy.[110] Perhaps the Court is taking a "hands off" approach in order to give states time to conform their statutes to Supreme Court cases and current scholarly thinking on the subject of sodomy as a legitimate area of state regulation.[111] However, as noted earlier, this approach leads to inconsistent state and federal interpretations of the right to privacy which, in turn, has the constitutionally intolerable result of varying individual constitutional rights in different jurisdictions.[112]

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[107] 410 U.S. at 153 (emphasis in original).

[108] 394 U.S. 557 (1969).

[109] *Id.* at 565.

[110] Such confusion is exemplified by the *Lovisi* court's mistaken reliance on the Supreme Court's affirmance of *Doe*.

[111] The American Law Institute stated, as early as 1955:

> Our proposal to exclude from the criminal law all sexual practices not involving force, adult corruption of minors, or public offense is based on the following grounds. No harm to the secular interests of the community is involved in atypical sex practice in private between consenting adult sex partners. The area of private morals is the distinctive concern of spiritual authorities . . . . As in the case of illicit heterosexual relations, existing law is substantially unenforced, and there is no real prospect of real enforcement except against cases of violence, corruption of minors, and public solicitation. Statutes that go beyond that permit capricious selection of a very few cases for prosecution and serve primarily the interest of blackmailers. Existence of the criminal threat probably deters some people from seeking psychiatric or other assistance for their emotional problems; certainly conviction and imprisonment are not conducive to cures. Further, there is the fundamental question of the protection to which every individual is entitled against state interference in his personal affairs when he is not hurting others. Lastly, the practicalities of police administration must be considered. Funds and personnel for police work are limited, and it would appear to be poor policy to use them to any extent in this area when large numbers of atrocious crimes remain unsolved.

ALI MODEL PENAL CODE § 207.5, Comment (Tent. Draft No.4, 1955). *See also*, Note, *The Constitutionality of Laws Forbidding Private Homosexual Conduct*, 72 MICH. L. REV. 1613 (1976).

Illinois has adopted the approach of the American Law Institute and has completely removed the crime of sodomy from the statute books. In its place, Illinois has substituted a definition of deviate sexual conduct and an offense of deviate sexual assault. The former is a definition for use in conjunction with lesser offenses, and the latter is a form of battery. " 'Deviate sexual conduct,' for the purpose of this Article, means any act of sexual gratification involving the sex organs of one person and the mouth or anus of another." ILL. REV. STAT. ch. 38, § 11-2 (1976).

> Deviate Sexual Assault.
>
> (a) Any person of the age of 14 years and upwards who, by force or threat of force, compels any other person to perform or submit to any act of deviate sexual conduct commits deviate sexual assault.
>
> (b) Penalty. A person convicted of deviate sexual assault shall be imprisoned in the penitentiary from 4 to 14 years.

ILL. REV. STAT. ch. 38, § 11-3 (1976).

[112] A grant of certiorari to the Fourth Circuit's *Lovisi* decision would be a good opportunity finally to clarify the right to privacy concerning sodomy, at least with respect to married persons.