PRIVACY IN THE BURGER COURT: THE INFLUENCE OF MR. JUSTICE BLACK

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INTRODUCTION

In 1965 in *Griswold v. Connecticut*[1] the Supreme Court struck down Connecticut's law forbidding the practice of contraception and aiding or abetting contraception. The decision was the culmination of an extended effort by groups opposed to the Connecticut law, and it constituted a significant step in the assertion of individual rights in a highly personal area of choice. Following *Griswold* a number of decisions struck down other state statutes which proscribed contraception or the aiding of contraception.[2] At present it seems clear that practicing or promoting birth control is constitutionally beyond the reach of limitation.

The Supreme Court's decision in *Griswold* was not unanimous, though all of the Justices, including the dissenters,[3] intimated their disapproval of the law on social policy grounds. The Court's opinion by Mr. Justice Douglas based its conclusion squarely on a general right of privacy which he found to be "derived," as a "penumbra" or "emanation" from a number of the articles in the Bill of Rights, notably the first, third, fourth, fifth and ninth amendments.[4] Such a penumbra, Mr. Justice Douglas argued, applied to the States through the fourteenth amendment. In conclusion he wrote:

> We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a

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

2. *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438 (1972).

3. 381 U.S. at 507 (Black, J., dissenting), 527 (Stewart, J., dissenting).

4. *Id.* at 484. The term "penumbra" appears in Mr. Justice Holmes' dissent, referring to the fourth and fifth amendments, in the landmark wiretapping case of Olmstead v. United States, 277 U.S. 438, 469 (1928). Mr. Justice Holmes expressed uncertainty as to whether such a penumbra extended to exclude all federal wiretapping.

> harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.[5]

Mr. Justice Goldberg, concurring for himself, Mr. Chief Justice Warren and Mr. Justice Brennan, stressed the ninth amendment's protection of rights not explicitly enumerated in the preceding articles of the Bill of Rights.[6] Mr. Justice Harlan[7] and Mr. Justice White[8] concurred in the decision but on grounds limited to interpretation of the due process clause of the fourteenth amendment. But there were two earnest dissents. Mr. Justice Black, reiterating his familiar insistence on reading the Constitution literally, asserted that a general right of privacy could not be found there and that only specific protections, such as those of the fourth amendment, might be invoked against intrusions into the private affairs of individuals.[9] He charged the Justices of the majority with reading their personal social policy ideas into the due process clause, and with appealing to such conceptions as "natural justice" and "a sense of fairness and justice" which require the improper exercise of judicial discretion.[10] Mr. Justice Stewart, dissenting separately, echoed the thesis that a general right of privacy simply is not asserted in the Constitution or the Bill of Rights.[11]

The constitutional status of the right of privacy is the theme of the present discussion, which will begin by formulating the approach of Mr. Justice Black in a number of areas including the birth control issue, abortion (more explicitly in controversy now than while Mr. Justice Black was on the bench), political and religious expression, wiretapping, searches and seizures, and the protection of reputations and homes from unwelcome intrusion. Mr. Justice Black was clearly deeply sympathetic with the cause of individual freedom. But at the same time, he insisted upon the need to ground that cause in unequivocal demands in the Constitution. The discus-

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5. 381 U.S. at 486.
6. *Id.* (Goldberg, J., concurring).
7. *Id.* at 499 (Harlan, J., concurring).
8. *Id.* at 502 (White, J., concurring).
9. *Id.* at 507 (Black, J., dissenting).
10. *Id.* at 511 & n.4.
11. *Id.* at 527 (Stewart, J., dissenting).

sion here will be in the main sympathetic to the Black approach and will pursue the question of how far that approach has been, and should be, a basis for decision on present issues.

I. Mr. Justice Black and the Right of Privacy

Mr. Justice Black joined the Supreme Court after a notable career as a labor lawyer and New Deal Senator. From the first his judicial opinions were marked by a special concern for full protection of individuals against denial of rights by governmental authorities. Writing in *Chambers v. Florida*[12] he denounced the use of a confession extracted from a number of young Negroes accused of murder:

> The determination to preserve an accused's right to procedural due process sprang in large part from knowledge of the historical truth that the rights and liberties of people accused of crime could not be safely entrusted to secret inquisitorial processes. The testimony of centuries, in governments of varying kinds over populations of different races and beliefs, stood as proof that physical and mental torture and coercion had brought about the tragically unjust sacrifices of some who were the noblest and most useful of their generations. The rack, the thumbscrew, the wheel, solitary confinement, protracted questioning and cross questioning, and other ingenious forms of entrapment of the helpless or unpopular had left their wake of mutilated bodies and shattered minds along the way to the cross, the guillotine, the stake and the hangman's noose. And they who have suffered most from secret and dictatorial proceedings have almost always been the poor, the ignorant, the numerically weak, the friendless, and the powerless.[13]

Mr. Justice Black here sounded the note that was to characterize his opinions about both the first amendment and the due process clause. He did not argue simply from the assertion that individual rights are something prior to and limiting government's actions; rather he expressed his conception of the just and self-governing society in which individuals receive, and also embody, the status appropriate to free members of a self-governing society.

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12. 309 U.S. 227 (1940).
13. *Id.* at 237-38.

A similar concept was apparent in Mr. Justice Black's notable dissent in *Barenblatt v. United States*[14] where he protested the contempt sentence imposed on a witness who invoked the first amendment to justify his silence before the House Committee on Un-American Activities. In defending Barenblatt's refusal to answer questions about his own or others' beliefs related to the Communist Party, Mr. Justice Black affirmed the necessity of interpreting the first amendment as a charter of universal political participation. It was not Barenblatt's private right to silence but rather his right to choose when and how to contribute his beliefs to public discussion that justified his refusal to cooperate with the Committee. The public's right to hear Barenblatt was the true governing principle in the case and could not be balanced away by claims of alleged national security.[15]

Mr. Justice Black is probably best known for his commitment to unqualified first amendment protections for political and religious expression. He believed in taking the Constitution at face value, and he deplored the exercise of judicial discretion to dilute constitutional principle by considerations of alleged emergency or incompatibility with other clauses of the Constitution.[16] While he acknowledged that the Constitution was not eternally valid, he believed that it was, as written, a self-consistent and comprehensive charter of self-government.

This first amendment absolutism brought him into conflict not only with the more conservative members of the Court but also, particularly in the 1960's, with his fellow-libertarians. In a series of civil rights cases involving demonstrations near jails[17] and courthouses[18] and also in privately-owned restaurants[19] and shopping centers,[20] he expressed the view that first amendment guarantees did

14. 360 U.S. 109, 134 (1959) (Black, J., dissenting).

15. *Id.* at 141.

16. *See* Mr. Justice Black's dissenting opinions in Katz v. United States, 389 U.S. 347 (1967); Griswold v. Connecticut, 381 U.S. 479, 507 (1965); Dennis v. United States, 341 U.S. 494, 579 (1951).

17. Adderley v. Florida, 385 U.S. 39 (1966).

18. Cox v. Louisiana, 379 U.S. 536, 575 (1965) (Black, J., concurring in part and dissenting in part).

19. Bell v. Maryland, 378 U.S. 226, 318 (1964) (Black, J., dissenting).

20. Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 327 (1968) (Black, J., dissenting).

not automatically extend to expressions of opinion regardless of the time, place, and manner involved. Absolute protection extended, in Mr. Justice Black's view, to the content of genuine public discussion; however, private property owners, as well as public authorities, might properly appeal for restrictions on when, where, or how public discussion might be carried on. It is important to note that such restrictions were themselves to be conceived in general or public terms and not simply in the form of an appeal to a general right of individual privacy. As in his *Griswold* dissent, he insisted that claims against improper intrusion must be, so far as the Constitution was concerned, based upon some specific constitutional provision. This position was reflected in his opinions on wiretapping, the securing of evidence by forcible seizure such as blood tests and stomach pumping, immunity claimed from unwanted publicity, and immunity from disturbance of one's peace and quiet at home.

His views on wiretapping were set out in 1967 in *Katz v. United States*.[21] The Supreme Court, in an opinion by Mr. Justice Stewart, upset a conviction for illegal betting activity because evidence was taken from an electronic tap on a public telephone booth. The opinion declared that the tap "violated the privacy upon which he [Katz] justifiably relied while using the telephone booth."[22] In a strenuous and solitary dissent, Mr. Justice Black contended that the language of the fourth amendment applied only to tangible objects that might be "searched, seized, or both."[23] Though the Founders knew nothing about wiretapping, he wrote, they were well-acquainted with eavesdropping and could have forbidden that if they had thought it improper.[24] The dissent quoted the opinion of Mr. Chief Justice Taft in the landmark case of *Olmstead v. United States*[25] to the effect that "[t]he Amendment itself shows that the search is to be of material things."[26] In conclusion, Mr. Justice Black declared that:

> In interpreting the Bill of Rights, I willingly go as far as a liberal construction of the language takes me, but I simply

21. 389 U.S. 347, 364 (1967) (Black, J., dissenting).
22. *Id.* at 353.
23. *Id.* at 365 (Black, J., dissenting).
24. *Id.* at 366.
25. 277 U.S. 438 (1928).
26. 389 U.S. at 367-68.

> cannot in good conscience give a meaning to words which they have never before been thought to have and which they certainly do not have in common ordinary usage. I will not distort the words of the Amendment in order to "keep the Constitution up to date" or "to bring it into harmony with the times."
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> . . . .
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> The Fourth Amendment protects privacy only to the extent that it prohibits unreasonable searches and seizures of "persons, houses, papers, and effects." No general right is created by the Amendment so as to give this Court the unlimited power to hold unconstitutional everything which affects privacy. Certainly the Framers, well acquainted as they were with the excesses of governmental power, did not intend to grant this Court such omnipotent lawmaking authority as that.[27]

Mr. Justice Black's position had previously been expounded in cases involving the admissibility of evidence secured by procedures which were attacked as violating the fourth or the fifth amendments. In 1949 he had concurred in *Wolf v. Colorado*[28] which held that exclusion of improperly secured evidence was not mandatory on constitutional grounds, though states might exclude such evidence as they saw fit. But in 1961, in *Mapp v. Ohio,*[29] he joined in upsetting a conviction based on evidence secured forcibly and without a warrant, and in concurring he confessed to having changed his mind since *Wolf.* Although, he said, the fourth amendment alone does not support exclusion of evidence improperly secured, still the fourth amendment when taken together with the fifth amendment's provision against self-incrimination provided a constitutional basis for exclusion. For the seizure of confidential papers, like the extraction of swallowed substances by a stomach pump or the forcible taking of blood for a test of the blood's alcohol content, improperly compelled an individual to supply evidence against himself.[30] The argument was characteristic of Mr. Justice Black's insistence on proceeding from analysis of the constitutional language rather than appealing to "a sense of justice" or "certain decencies of civilized

27. *Id.* at 373-74
28. 338 U.S. 25, 39 (1949) (Black, J., concurring).
29. 367 U.S. 643 (1961).
30. *Id.* at 661-66 (Black, J., concurring).

conduct" as Mr. Justice Frankfurter had done in the stomach pump case.[31]

Mr. Justice Black dissented in the blood test case,[32] taking the position that an involuntary blood sample should not be accepted in evidence. Justices Douglas, Fortas and Chief Justice Warren also dissented from the majority opinion by Mr. Justice Brennan, which stressed the non-testimonial character of the test.[33] Mr. Justice Black, joined by Mr. Justice Douglas, wrote, in part:

> To reach the conclusion that compelling a person to give his blood to help the State convict him is not equivalent to compelling him to be a witness against himself strikes me as quite an extraordinary feat.
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> . . . .
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> . . . It is a strange hierarchy of values that allows the State to extract a human being's blood to convict him of a crime because of the blood's content but proscribes compelled production of his lifeless papers . . . . [B]lood, of course, is not oral testimony given by an accused but it can certainly "communicate" to a court and jury the fact of guilt.[34]

Thus the Brennan interpretation of self-incrimination was, Mr. Justice Black argued, unduly narrow. His argument did not, predictably, include the thesis separately advanced in dissent by Mr. Justice Douglas, that the blood test involved the same invasion of privacy which he had condemned in *Griswold*.[35]

Mr. Justice Black also declared his opposition to affirming a general right of privacy in connection with the freedom of the press to comment on individuals. *Time, Inc. v. Hill*[36] involved a suit brought against Time because of a story in *Life* magazine, printed by Time, about a notable episode in which a private family had been held captive for many hours by convicts. The story in *Life* described a new Broadway play in which the episode was dramatized, and in part the story identified the Hill family as that which

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31. Rochin v. California, 342 U.S. 165, 173 (1952).
32. Schmerber v. California, 384 U.S. 757, 773 (1965) (Black, J., dissenting).
33. *Id.* at 761-65.
34. *Id.* at 773-75.
35. *Id.* at 778 (Douglas, J., dissenting).
36. 385 U.S. 374 (1967).

had been held captive. Hill, who after the episode had done what he could to escape further publicity, sued Time for violation of New York's so-called Privacy Law.[37] On appeal, the Supreme Court, speaking through Mr. Justice Brennan, denied the applicability of the law in cases where private persons had—even involuntarily—become newsworthy.[38] The opinion did indeed qualify the press freedom by insisting that the reporting must not be with "actual malice—knowledge that the statements are false or in reckless disregard of the truth."[39] Mr. Justice Black, with Douglas, concurred in the judgment, though claiming that the actual malice qualification was incompatible with press freedom.[40] On the matter of privacy, Mr. Justice Black wrote:

> If judges have . . . by their own fiat today created a right of privacy equal to or superior to the right of a free press that the Constitution created, then tomorrow and the next day and the next, judges can create more rights that balance away other cherished Bill of Rights freedoms . . . . Life's conduct here was at most a mere understandable and incidental error of fact in reporting a newsworthy event. One does not have to be a prophet to foresee that judgments like the one we here reverse can frighten and punish the press so much that publishers will cease trying to report news in a lively and readable fashion as long as there is—and there always will be—doubt as to the complete accuracy of the newsworthy facts.[41] [footnote omitted.]

While Mr. Justice Douglas concurred in holding the Hills' adventure a matter in the public domain, Mr. Justice Fortas, for himself and Mr. Chief Justice Warren and Mr. Justice Clark,[42] bitterly assailed the decision as involving an irresponsible and injurious invasion of the privacy of a quiet family.

In Mr. Justice Black's constitutional theory, there is, then, no general right of privacy; rather (as Rousseau suggested) there are only such specific privacies as the public or its press chooses to leave

37. N.Y. Civ. Rights Law §§ 50-51 (McKinney 1976).
38. 385 U.S. at 388-90.
39. *Id.* at 387.
40. *Id.* at 398-401.
41. *Id.* at 400-01.
42. *Id.* at 411 (Fortas, J., dissenting).

unnoticed or uninvaded. In other words, it is unsound to think in terms of a persistent confrontation between public demands and private privilege; as the *Barenblatt* dissent argued, the issue is between conflicting conceptions of the public requirements. Individuals are indeed protected by such principles as free expression of ideas, or free movement, free exploitation of their own personal powers or property; they must be assured due process of law and the equal protection of the laws. But there is no wholesale right of privacy from which these are derived. This is not to say that Mr. Justice Black affirmed, in his opinions, a philosophic theory of society which he imposed upon his interpretation of the Constitution.[43] There is no doubt that he was personally committed to individual freedom and to the kind of political and social order in which such freedom might flourish. But his creed as a member of the Supreme Court was the Constitution, which established self-government as the basic political agreement of Americans and which could not be reconciled with rule by any select group of individuals—even a Supreme Court endowed with the wisdom of "Platonic Guardians."[44]

Such privacies as the Constitution might properly be held to protect must, in Black's view, be found to be essential elements in privileges affirmed in the actual language. Thus the first amendment was to be interpreted as protecting the right of silence, as well as of speech, since the one is counterpart of the other in free participation in the political process. The freedom to maintain a private collection of allegedly pornographic materials in one's home[45] is to be assured as an integral element in a person developing his own perspective as he participates in forming public opinion; for sex is, after all, a topic of major interest to the American public. By the same token, all Americans, including public officials, must be able to enjoy the quiet and recreation which their public activity requires; and this imposes limits on the propriety of their homes being ringed by shouting demonstrators, however urgent their cause.[46]

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43. *See* Conclusion *infra*.

44. Griswold v. Connecticut, 381 U.S. 479, 526-27 (1965) (Black, J., dissenting) (quoting HAND, THE BILL OF RIGHTS 73 (1958)).

45. Stanley v. Georgia, 394 U.S. 557 (1969).

46. *See* Gregory v. Chicago, 394 U.S. 111, 125-26 (1969) (Black, J., concurring).

Though Mr. Justice Black hardly formulated the matter comprehensively, one might suggest that the essential individual privileges to be protected are all those requisite to enable an individual to participate to the full in responsible and independent self-government.

Mr. Justice Black's privacy theory may be clarified by contrasting it with those of his colleagues on the Court. The noted dissent by Mr. Justice Brandeis in *Olmstead* had condemned wiretapping as threatening "the right to be let alone—the most comprehensive of rights."[47] One may suppose that Mr. Justice Black would respond that, while he liked his privacy as much as the next man, what he found in the Constitution was only the freedom from "unreasonable" intrusions. And, more substantially, the right to be let alone is after all only negative; what is ultimately important is what one does with one's powers when he is not "invaded" by others or by government. The heart of that privacy which is treasured is the activity which expresses one's own beliefs and tastes in the context of one's relations with other people. This is why, presumably, that what is constitutionally significant about privacy may be expressed in terms of liberty—either the unqualified liberty to participate in the democratic process or the qualified liberty to conduct one's business within the due process of law.

In the *Griswold* case Mr. Justice Black rejected both the Douglas and Goldberg arguments. He found unpersuasive the thesis that a general right of privacy may be considered an emanation or penumbra from a number of the clauses in the Bill of Rights: to say this is to confess that it cannot be securely derived from any one of them. He contended that the ninth amendment could not be construed as implying a general reserved right of privacy; a proper reading of the ninth amendment only advises us that there may be rights other than those explicit in the first eight amendments.[48] His view may be expressed thus: Properly read, the ninth amendment declared that what we have done, we have done, no more, and no less. The judicial function was to determine and declare the Framers' intentions and neither to enlarge nor diminish them.

47. 277 U.S. at 478 (Brandeis, J., dissenting).

48. Griswold v. Connecticut, 381 U.S. 479, 519-20 (1965) (Black, J., dissenting).

While Mr. Justice Black came into sharp conflict with his colleagues on such issues as those in *Griswold* and *Katz*, the precise formulation of the disagreement is elusive. The absolute protections of the first amendment, as noted above, required for Mr. Justice Black a liberal interpretation so that, for example, silence as well as speech is protected and legislation is proscribed which has a chilling effect on political association or activity. But such an interpretation was not to indulge in recourse to speculative entities such as penumbras or emanations; silence is not a cloudy accompaniment of speech but an essential condition if speech is to be free. A similar insistence on precision marked Mr. Justice Black's interpretation of the fourteenth amendment's protection from deprivation of "life, liberty, or property, without due process of law."[49]

Due process, with its companion condition equal protection of the laws, was to be taken procedurally and not so as to import the judge's substantive conceptions of justice.[50] It was not sufficient to identify marriage as "older than the Constitution" and therefore immune from regulation; it was clear that marriage can be regulated in many ways provided the appropriate procedures of regulation are followed. The public can make marriage as much, or as little, a public affair as it chooses. This does not mean that it can proscribe interracial marriage, for such a ban offends equal protection.[51] Nor can it limit unduly the power of parents to bring up their children as they choose, for that is a part of the liberty protected by the fifth and fourteenth amendments;[52] but the Court has in many ways restricted that liberty in the interests of the children or of the public welfare.[53]

In concluding this summary view of Mr. Justice Black's views on privacy, note should be taken of the opinion he wrote in *United States v. Vuitch*[54] during his last year on the bench. The opinion upheld the District of Columbia statute limiting permissible abortions to those determined by a physician to be necessary to preserve

49. U.S. CONST. amend. XIV.
50. H. BLACK, A CONSTITUTIONAL FAITH 23-42 (1968).
51. Loving v. Virginia, 388 U.S. 1 (1966).
52. Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925).
53. Prince v. Massachusetts, 321 U.S. 158 (1944).
54. 402 U.S. 62 (1971).

the life or health of the prospective mother. Apart from accepting the case as within the Court's jurisdiction, Mr. Justice Black rejected the claim that the phrase "life or health" was improperly vague; for health, he argued, could and should be construed to include mental as well as physical health.[55] He noted in conclusion that he was not arguing from the privacy grounds invoked in the *Griswold* decision; and he expressed in a footnote the belief that Mr. Justice Douglas was unnecessarily fearful that jury prejudice against abortion could exploit the language of the statute.[56] In dissent, Mr. Justice Douglas contended that in practice the statute would leave the physician's decision as to life or health to be reviewed by the jury, and that many considerations such as the interest in family planning might be relevant.[57] He suggested that interpretation of life or health would prove as subject to abuse as that which Mr. Justice Black had condemned in cases involving obscenity.[58] And accordingly he offered as a model which would escape such vagueness the New York 1970 law providing that abortions might legally be performed if the physician believed them necessary to save the mother's life *or* if they occurred within the first twenty-four weeks of pregnancy.[59]

The *Vuitch* case is of interest in a study of Mr. Justice Black as exhibiting his commitment to deciding such issues on procedural due process grounds, such as vagueness, wherever possible. There is an intimation that abortion in some circumstances is acceptable, for specification of the mental health criterion assigns a significant role to the attitude of the mother-to-be. But once more there is explicit rejection of the right of privacy.

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55. *Id.* at 72-73.

56. *Id.* at 72 n.7.

57. *Id.* at 74-76 (Douglas, J., dissenting in part).

58. *Id.* at 79-80.

59. *Id.* at 80 n.4. Mr. Justice Stewart stated that the District of Columbia statute must be interpreted so as to preserve the physician's immunity from review of his professional decision by a jury. *Id.* at 96-97 (Stewart, J., dissenting in part). On the jurisdictional issue Justices Blackmun, Brennan, Marshall and Harlan dissented.

II. The Burger Court

A. *Privacy and Birth Control*

In *Eisenstadt v. Baird,*[60] decided in the year after Mr. Justice Black left the Court, a majority of six, over the Chief Justice's dissent, upset the conviction of a birth control advocate for giving to an unmarried woman at the end of a public lecture a package of contraceptive foam. The Massachusetts law involved in *Eisenstadt* forbade selling, lending, or giving away contraceptives, except as authorized by registered physicians and administered by registered pharmacists filling prescriptions for married persons. Mr. Justice Brennan, for Justices Douglas, Marshall and Stewart, declared that the legislation could not reasonably be viewed as a deterrent to premarital sex nor as protecting health.[61] Noting that the Court of Appeals had condemned the law as conflicting with "fundamental human rights," the opinion did not commit itself to agreement or disagreement with that approach, but instead invoked the principle of equal protection:

> [W]hatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike.
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> . . . It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.[62]

Mr. Justice Brennan, while expressly basing his opinion on equal protection, thus in effect affirmed the privacy thesis respecting the use as well as the exchange of contraceptives.

Mr. Justice Douglas, while concurring in the Brennan opinion, argued that the particular facts of the case—the giving away of the

60. 405 U.S. 438 (1972).
61. *Id.* at 447-52.
62. *Id.* at 453.

contraceptive sample at the end of the lecture—called for a decision against the law on first amendment grounds.[63] He distinguished the public presentation involved from huckstering or peddling;[64] Baird's lecture was protected by the demand, articulated by Mr. Justice Murphy in *Thornhill v. Alabama,*[65] for discussion embracing "issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period."[66]

The other members of the Court did not concur in the Brennan formulation. Mr. Justice White, while concurring in the result, wrote for himself and Mr. Justice Blackmun that the *Griswold* decision had held that forbidding, using, or giving advice about contraceptives unduly invaded a zone of privacy protected by the Bill of Rights.[67] Given recognition of this right, Baird could be punished only on the basis of a specific demonstration of the dangers in the sample given away. Furthermore, the State had not produced evidence as to whether or not the recipient was married. Such grounds were sufficient to reverse the judgment against Baird, and so Mr. Justice White found "no reason for reaching the novel constitutional question whether a State may restrict or forbid the distribution of contraceptives to the unmarried."[68]

In dissent, Mr. Chief Justice Burger took issue with the argument that a health consideration was not involved. The law was on a par, he thought, with earlier statutes forbidding quacks and medicine men to address the public and supply free samples of "some unproven remedy."[69] Of the *Griswold* decision, the Chief Justice wrote:

> I do not challenge *Griswold v. Connecticut*, . . . despite its tenuous moorings to the text of the Constitution, but I cannot view it as controlling authority for this case. The Court was there confronted with a statute flatly prohibiting the use of contraceptives, not one regulating their distribution. I simply

63. *Id.* at 457-60 (Douglas, J., concurring).
64. *Id.* at 455.
65. 310 U.S. 88 (1940).
66. 405 U.S. at 457 (quoting *Thornhill,* 310 U.S. at 102).
67. *Id.* at 461 (White, J., concurring).
68. *Id.* at 465.
69. *Id.* at 472 (Burger, C.J., dissenting).

> cannot believe that the limitation on the class of lawful distributors has significantly impaired the right to use contraceptives in Massachusetts. By relying on *Griswold* in the present context, the Court has passed beyond the penumbras of the specific guarantees into the uncircumscribed area of personal predilections.[70]

The concluding sentence sounds the persistent concern voiced by Mr. Justice Black about the abuse of the due process clause, and Mr. Justice Black presumably would have approved the skeptical reference to the constitutional "moorings" of *Griswold.* How far Mr. Justice Black would have accepted the Brennan argument seems uncertain, as Mr. Justice Black deplored "substantive equal protection" arguments as well as those from "substantive due process."[71] On the other hand, it seems that he would have supported Mr. Justice Douglas' appeal to the first amendment.

The *Eisenstadt* decision, when taken with *Griswold,* effectively declares that laws outlawing the use or exchange of contraceptives are unconstitutional.[72] Mr. Justice Black, while personally sympathetic with this outcome, would deplore the constitutional appeal to privacy. He would cite the Court's inability to achieve a majority opinion formulating a general privacy right. And he would urge focusing on the procedural or first amendment considerations as these might be involved. Privacy in general seemed to him a judicial construct, not to be found in the Constitution. If contraception was to be constitutionally protected, that must be done by amending the Constitution or in state legislation; judges were not to be the guardians of public morality.

B. *Abortion and Privacy*

The Burger Court has not followed Mr. Justice Black's *Griswold* lead in the abortion cases of 1973 and 1976, but the Court's opinions have shown some deference to that lead. As noted above,

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70. *Id.* at 472.

71. *See* note 50 *supra* at 30-31; *c.f.* Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

72. The Supreme Court on January 10, 1977, heard argument on New York State's law forbidding sale of contraceptives to minors. Carey v. Population Services Int'l, 398 F. Supp. 321 (S.D.N.Y. 1975), *cert. granted,* 426 U.S. 918 (1976) (No. 75-443, 1975 Term) (argument before Supreme Court printed in 45 U.S.L.W. 3481-83, Jan. 18, 1977).

Mr. Justice Black did deliver the opinion involving the regulation of abortion in the District of Columbia: he upheld the provision, as not impermissibly vague, that abortions were legitimate when approved by a physician for the sake of the mother's life or health.[73] The opinion appeared tacitly to accept the propriety of abortion under appropriate conditions, but it did not enter into discussion of the grounds for a right to have an abortion.

In the major abortion decision of 1973, *Roe v. Wade*,[74] the Court, speaking through Mr. Justice Blackmun, affirmed the due process argument for a privacy right to abortion. The opinion recalled the ninth amendment argument developed by Mr. Justice Goldberg in *Griswold* and also the penumbra argument advanced by Mr. Justice Douglas.[75] But the opinion expressed preference for deriving the right to abortion from the liberty protected by the due process clause of the fourteenth amendment. Mr. Justice Douglas, concurring, set forth in some detail the various zones of privacy which he thought constitutionally protected.[76] In a concurring opinion, Mr. Justice Stewart declared that the Court was thereby reaffirming the substantive due process approach; for himself, Mr. Justice Stewart expressed a willingness to go along with this approach.[77] On the other hand, Justices Rehnquist and White in dissent protested this return to "judicial legislation."[78]

Mr. Justice Blackmun's broad appeal to the liberty of the due process clause may be contrasted with both Mr. Justice Douglas' delineation of the various types of privacy, on the one hand, and the austerity affirmed by the dissenters. Mr. Justice Blackmun asserted that the right of privacy inherent in the fourteenth amendment is "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[79] Such a right could not be considered absolute and must be limited by the state interest in the mother's life or health and in the life of the child: this interest validated the

73. United States v. Vuitch, 402 U.S. 62 (1971).
74. 410 U.S. 113 (1973).
75. *Id.* at 129.
76. *Id.* at 209-15.
77. *Id.* at 167-68 (Stewart, J., concurring).
78. *Id.* at 174 (Rehnquist, J., dissenting), 222 (White, J., dissenting).
79. *Id.* at 153.

regulations governing abortion after the first trimester. The decision to have an abortion thus involved a fundamental right which could be abridged only for the sake of a compelling state interest. In concurring, Mr. Justice Douglas reiterated his *Griswold* argument for a general right of privacy, which he analyzed as consisting of (1) the unqualified right to autonomous control over the development of one's intellect, interests and personality, (2) the freedom of choice in the basic decision of marriage, divorce, procreation, contraception, and the education of children, and (3) the freedom to care for one's health and person, freedom from bodily restraint or compulsion, freedom to walk, stroll, or loaf.[80] The privacy in (1) he claimed to be peripheral to the first amendment; the qualified privacy in (2) and (3) were referred to previous Court decisions but without express reference to their "constitutional moorings." In a significant footnote, he insisted that he was not reintroducing substantive due process but was asserting rights "in the periphery" of rights such as those in the first amendment.[81] This blunts considerably the edge of his disagreement with Mr. Justice Black in *Griswold,* though the same footnote disclaimed appeal to Mr. Justice Black's *Adamson v. California* thesis[82] identifying the fourteenth amendment liberties with those of the Bill of Rights. In sum, Mr. Justice Douglas seemed to narrow, but not close, the gap between his position and that of his fellow-libertarian.

Mr. Justice White, dissenting in *Roe v. Wade,* declared that the Court "fashions . . . a new constitutional right for pregnant mothers and with scarcely any reason or authority for its action."[83] He did not criticize either Mr. Justice Blackmun or Mr. Justice Douglas in detail but asserted that a prospective mother's mere convenience had now been given precedence in decisions involving life and death. Mr. Justice Rehnquist in his dissent dismissed the appeal to privacy as being largely irrelevant because, in his view, privacy should be interpreted principally in relation to the fourth amendment.[84] History did not support, he said, the assertion that the

80. *Id.* at 211-15 (Douglas, J., dissenting).
81. *Id.* at 212 n.4.
82. 332 U.S. 46, 68-92 (1947) (Black, J., dissenting).
83. 410 U.S. at 221-22 (White, J., dissenting).
84. *Id.* at 172 (Rehnquist, J., dissenting).

liberty protected by the fourteenth amendment included the right to terminate an unwanted pregnancy.

The decisions handed down in 1976 throw additional light on the present Court's attitude toward the privacy asserted to be associated with abortion. In *Planned Parenthood v. Danforth*[85] the Court, speaking again through Mr. Justice Blackmun, ruled that neither spousal consent in the case of a married woman nor parental consent in the case of an unmarried minor could be required by law.[86] The Court cited both the stress of marital privacy in *Griswold* and the *Eisenstadt* description of marriage as an association of two independent individuals, "each with a separate intellectual and emotional makeup."[87] The opinion did not concede indifference to either the importance of marriage or the family in our society, but it contended that the law is not a constitutionally valid basis for imposing a spousal or parental ban on an abortion which may be permissible in terms of the stage of pregnancy and the advice of a qualified physician. If husband and wife disagree on the desirability of an abortion, the unity of the marriage may be presumed to be dissolved, and the wife, as the party more involved, may properly make the crucial decision. In respect to parental consent, the Court argued that "[a]ny independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant."[88] While a narrower statute might be valid, the general requirement of parental consent is over-broad. The Chief Justice, and Justices Rehnquist and White concurring in part and dissenting in part, asserted that a prospective father's interest might fairly be thought by Missouri to be equal in importance to that of the mother.[89] They also dissented, joined in a separate statement by Mr. Justice Stevens,[90] from the majority's view that the parental requirement might not be valid as a basis for assuring the rationality of the abortion decision.[91]

85. 428 U.S. 52 (1976).
86. *Id.* at 70-71 nn. 10 & 11.
87. *Id.* at n.11 (quoting Eisenstadt v. Baird, 405 U.S. at 453).
88. *Id.* at 75.
89. *Id.* at 92.
90. *Id.* at 101 (Stevens, J., concurring in part and dissenting in part).
91. *Id.* at 92-93.

The doctor-patient relationship in abortion cases received explicit attention from Mr. Justice Blackmun in *Singleton v. Wulff*.[92] In affirming the standing of doctors to challenge exclusion from Medicaid of non-medically indicated abortions, he observed that the standing need not be derived from the doctor's right to pursue his profession but could rather be grounded in the right of the patient.[93] Women's assertion of their own rights might be hindered by obstacles such as undesirable publicity or "imminent mootness."[94] Mr. Justice Stevens declined to join in the argument relating to the women's rights but concurred with respect to the doctor's own rights and consequent standing.[95] Mr. Justice Powell, for Justices Stewart and Rehnquist and the Chief Justice, took the same stand in a separate statement, pointing out that the publicity obstacle could be overcome by anonymity, for example by the use of pseudonyms in *Roe v. Wade;* and that mootness was not in fact always significant.[96] Finally, Mr. Justice Powell argued that the Medicaid exclusion did not per se affect the confidential relation between doctor and patient.[97] Deploring unnecessary and inflexible assertions of third-party rights, his dissent concluded that "today's holding will be difficult to cabin."[98] Once again, it seems reasonable to believe that Mr. Justice Black would have found this variety of views hard to reconcile with the assertion of a clear-cut and constitutionally grounded right to privacy under which people's affairs could be so conceived as to be intelligibly related to their confidential relationships with other persons.

Has the Court in its abortion decisions rejected Mr. Justice Black's austere proscription of judicial constitution-making? Have its members imported conceptions of privacy and of family relationships in ways which only legislative assemblies should follow? Have they intruded into the domains proper to the States and local communities?

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92. 428 U.S. 106 (1976).
93. *Id.* at 114-18.
94. *Id.* at 117.
95. *Id.* at 121 (Stevens, J., concurring in part).
96. *Id.* at 122 (Powell, J., concurring in part and dissenting in part).
97. *Id.* at 127-28.
98. *Id.* at 130 n.7.

We may answer the last question first. The debate, explicated between Justices Black and Harlan in the *Adamson* case of 1947, continues. Mr. Justice Black's position, while respected, still is a minority view: that is, the Court has not accepted his belief that the fourteenth amendment incorporated all the Bill of Rights so as to apply them to the States.[99] As a corollary, the Court may refrain from ruling on state actions where it would intervene if federal legislation were involved. While the Court has shown a marked reluctance in certain types of cases to grant Bill of Rights relief, it has been generally active in the privacy cases considered here. In the complex discussions concerning standing of doctors and their actual or prospective patients, the Court normally has taken the position of according access to judicial review.

On issues of substance the Court has not deferred to Mr. Justice Black's injunction to abjure appeals to privacy. It is true that in *Roe v. Wade* both Blackmun and Douglas moved back in the direction of specific constitutional provisions. But both appeared to rest their assertions of the right to decide to have an abortion ultimately on an implication from the liberty clause of the fourteenth amendment. It seems reasonable to suppose that Mr. Justice Black would find that Blackmun and Douglas were expanding improperly on the Founders' conception of the Constitution's proper reach. Birth, marriage, and the family were, for the Founders, matters for local communities or at most for the States to control; and if the federal government now should take cognizance of these, then the Constitution should be amended. If it is objected that amending is difficult and slow, the answer is that such is proper for changes of these dimensions.

It is perhaps not out of order to suggest one line of argument on abortion with which Mr. Justice Black might have been sympathetic. This is the argument from equal protection—that women, and their unwanted offspring, suffer disproportionately if abortion is not available. As noted above, Mr. Justice Black was as critical of substantive equal protection as he was of substantive due process. But his objection to the former was that it affirmed equality, or denounced inequality, on the basis of criteria extrinsic to the issue.

99. Adamson v. California, 332 U.S. at 68 (Black, J., dissenting).

He was prepared to accept the constitutionality of a poll tax against the claim that it denied equal protection on the grounds of its relevance to collecting taxes or generating interest in voting. He might have accepted shielding limited abortion from state restraints on the ground that forbidding abortion in fact condemns the prospective mother and child to undesired circumstances from which the father is generally free. Whether Mr. Justice Black would approve such an argument is not certain, but his passion for equal treatment of all persons was well established.

C. *Searches, Seizures, and Self-Incrimination*

As noted above, Mr. Justice Black declined in *Katz v. United States* to regard wiretapping as invading privacy protected by the fourth amendment. On the other hand, in *Mapp v. Ohio* he concurred in the decision condemning the use in a criminal trial of evidence seized in a search judged to be in violation of the fourth amendment. The members of the Burger Court have, in this field as in that of birth control and abortion, generally disagreed with Mr. Justice Black's position, though for varying reasons. Respect for privacy as a constitutional principle has been recurrently expressed in the Court's decisions. On the other hand, there has been a narrowing of fifth amendment protections which seems inconsistent with the stand taken by Mr. Justice Black in such cases as *Chambers, Adamson,* and *Miranda v. Arizona.*[100]

Discussion here will center on *Andresen v. Maryland,*[101] decided in June 1976, and cases leading up to it. A majority of seven, speaking through Mr. Justice Blackmun, upheld the admissibility as evidence of papers and records seized pursuant to a search warrant from offices of an attorney charged with false pretenses in promoting the sale of real estate. The fact that the papers belonged to the attorney and were incriminating did not mean, the Court held, that their seizure involved compulsory self-incrimination. Mr. Justice Blackmun declared that:

> We recognize, of course, that the Fifth Amendment protects privacy to some extent. However, "the Court has never

100. 384 U.S. 436 (1966).
101. 427 U.S. 463 (1976).

> suggested that every invasion of privacy violates the privilege." . . . Indeed, we recently held that unless incriminating testimony is "compelled," any invasion of privacy is outside the scope of the Fifth Amendment's protection, . . . Here . . . petitioner was not compelled to testify in any manner.[102] [citations omitted].

Mr. Justice Brennan dissented earnestly, holding that self-incrimination was forced on the accused and that the search warrant was impermissibly broad;[103] on the second point he was joined by Mr. Justice Marshall.[104] Brennan wrote:

> [T]he Fifth Amendment protects an individual citizen against the compelled production of testimonial matter that might tend to incriminate him, provided it is matter that comes within the zone of privacy recognized by the Amendment to secure to the individual "a private inner sanctum of individual feeling and thought."[105] [citation omitted].

Here the papers seized contained statements made by the petitioner, and to seize them under search warrant is to compel him quite as directly as to make him utter the statements orally. Business records are within "that private zone comprising the mere physical extentions of an individual's thoughts and knowledge."[106] Whether such papers are seized under a warrant or a subpoena, the "intrusion occurs under the lawful process of the State."[107] The fact that a search may be reasonable does not in itself deprive the evidence seized of its incriminating potential.

Mr. Justice Black presumably would have registered dissatisfaction with both the opinion and the dissent in so far as they conceded the relevance of the appeal to privacy. But it seems reasonable that on the merits of the decision he would have sided with the dissent. For the heart of the Blackmun opinion was that the petitioner was not compelled to do anything;[108] he simply stood by

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102. *Id.* at 477.
103. *Id.* at 492-93.
104. *Id.* at 493 (Marshall, J., dissenting).
105. *Id.* at 485 (Brennan, J., dissenting).
106. *Id.* at 486.
107. *Id.* at 487.
108. *Id.* at 472.

in the offices while the files were searched. Given the facts that the papers were both personal records and were incriminating, it seems hard to resist the Brennan case for compulsory self-incrimination. While Mr. Justice Black rejected the metaphor of a general zone of privacy into which other persons might not enter, he did affirm as the heart of the fifth amendment privilege, the liberty of not cooperating in incriminating oneself. The issue is thus not one of privacy but rather of selfhood—that is, of what can fairly be said to constitute such extensions of oneself as are genuinely one's own. And here Mr. Justice Black's position seems to have been firmly established in his dissent in the blood sample case and in his enthusiastic endorsement of the historic *Boyd v. United States* decision.[109] One's person, house, papers, and effects are one's own in the sense which is relevant when the issue is whether compulsion is involved.

The Court had shown a similar division earlier in 1976 in *Fisher v. United States.*[110] The opinion by Mr. Justice White for six members of the Court, denied the protection of the fifth amendment privilege to lawyers who refused to obey a summons to yield their clients' tax papers to the Internal Revenue Service.[111] Mr. Justice White set the rule for Mr. Justice Blackmun's *Andresen* opinion, declaring that the privilege could not be invoked because the accused clients were not themselves compelled to testify by the summons served on the lawyers.[112] Citing arguments advanced on behalf of personal privacy, Mr. Justice White argued that the fourth amendment does not afford privacy when there is reasonable suspicion of incriminating evidence[113] and that the fifth amendment does not protect privacy claims beyond non-self-incrimination. He noted that the *Boyd* decision "was understood to declare that the seizure, under warrant or otherwise, of any purely evidentiary materials violated the Fourth Amendment and that the Fifth Amendment rendered these seized materials inadmissible."[114] But he insisted that papers were privileged only when there was direct compulsion to make a testimonial communication. It was on this ground that

109. 116 U.S. 616 (1886).
110. 425 U.S. 391 (1976).
111. *Id.* at 396.
112. *Id.* at 409.
113. *Id.* at 400-01.
114. *Id.* at 407.

he joined in the Court's approval of compulsory blood-sampling in *Schmerber* over Black's dissent. The White opinion, in sum, insisted on keeping the fourth and fifth amendments arguments in *Boyd* as close as possible to conditions of literally physical compulsion of self-incrimination. Superficially, such insistence might appear in keeping with Mr. Justice Black's principles of constitutional literalness, but in fact they appear out of line with his endorsement, in *Mapp,* of a liberal reading of the fourth and fifth amendments. The Court had declared in *Boyd,* Black said, that it was "unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself . . . .[115] [C]onstitutional provisions for the security of person and property should be liberally construed."[116]

There were no dissenters in *Fisher,* but both Mr. Justice Brennan and Mr. Justice Marshall wrote independent opinions concurring only in the result. In an extended criticism of Mr. Justice White's reasoning, Mr. Justice Brennan argued that the opinion denigrated the entire course of privacy theory from *Boyd* to *Griswold.*[117] Conceding that in the instant case the papers were not personal, as they had been shared with an accountant and concerned business affairs, Mr. Justice Brennan faulted the opinion for failing to acknowledge the personal and therefore privileged status of such papers as the business records of a sole proprietor, cancelled checks and tax records, and also personal letters and diaries. The thrust of the White opinion, Mr. Justice Brennan claimed, was to imply that such papers might not be privileged.[118] Mr. Justice Marshall, in his concurring opinion, suggested that Mr. Justice Brennan might be unduly pessimistic about the opinion, in view of Mr. Justice White's emphasis on the importance of an accused person's privilege with respect to actually identifying the incriminating evidence.[119]

It might, once again, appear that by virtue of the contrasting

115. 367 U.S. at 662 (Black, J., concurring) (quoting *Boyd,* 116 U.S. at 633).
116. *Id.* at 663 (quoting 116 U.S. at 635).
117. 425 U.S. at 414-15 (Brennan, J., concurring).
118. *Id.*
119. *Id.* at 433-34 (Marshall, J., concurring in judgment).

views expressed by Justices White and Brennan on privacy, the disagreement between them aligns the former more nearly with the position of Mr. Justice Black. Certainly it was the main concern of Mr. Justice Brennan to point out that Mr. Justice White was paying only lip service to the importance of privacy in the context of the fifth amendment. White saw protection of privacy as a by-product of the privilege rather than the factor determining the privilege's scope. Probably in these terms Mr. Justice Black, as much as Mr. Justice White, would have been charged by Mr. Justice Brennan with putting the cart before the horse. Yet if the reference to privacy is omitted, it appears that Mr. Justice Black would have agreed more nearly with Mr. Justice Brennan about the continuing vitality of the *Boyd* decision. His enthusiasm for that decision, expressed in *Mapp,* was not consistent with White's belief that the protections in *Boyd* had been "washed away" in later decisions.[120] Rather than reading the fifth amendment protection literally, as in White's restriction of the privilege to "oral testimony,"[121] Black's view is expressed in his conclusion in *Mapp* that "the two Amendments upon which the *Boyd* doctrine rests are of vital importance in our constitutional scheme of liberty and that both are entitled to a liberal rather than a niggardly interpretation."[122]

D. *Privacy and the Press*

The Burger Court as a whole has been unsympathetic with Mr. Justice Black's insistence that first amendment protections of the press must not be limited by considerations of privacy or actual malice. A recent decision in a libel suit, brought against *Time* magazine[123] by a party in a notorious divorce suit, refused to identify as a matter of public interest a seventeen-month trial involving the heir to the Firestone Company. Mary Firestone, the Court ruled, was not a public figure, nor was the divorce proceeding a matter of the kind of public interest which would justify applying a standard of actual malice on the press in reporting it.

As previously noted, Mr. Justice Black had virtually affirmed

120. *Id.* at 409.
121. *Id.* at 409-11.
122. 367 U.S. at 666 (Douglas, J., concurring).
123. Time, Inc. v. Firestone, 424 U.S. 448 (1976).

in *Time v. Hill* that what the press identifies as newsworthy *is* of public interest and therefore not to be reserved from first amendment protections of the press.[124] As was evident in *Griswold,* Mr. Justice Black liked his privacy as much as the next man, and he would affirm the immunity of opinions from compulsory legal disclosure to official investigations. But by the same token, he regarded press freedom with respect to public issues as essential to the free formation of public opinion. Of the present members of the Court, it seems that Mr. Justice Black would agree fully only with Mr. Justice Brennan on this point, inasmuch as Mr. Justice Marshall expressed willingness, in *Firestone*[125] and also in the earlier cases of *Gertz v. Robert Welch, Inc.*[126] and *Rosenbloom v. Metromedia,*[127] to reserve from protected press discussion the activities of persons who were neither public officials nor public figures, even if their activities were such as to bring them into public notice. To Mr. Justice Brennan's declaration that "we are all 'public' men to some degree,"[128] Mr. Justice Black presumably said *Amen.* Yet it must further be noted that Mr. Justice Brennan still limited protection to such publications as are not actually malicious, whereas for Mr. Justice Black, the criterion of actual malice seemed as intellectually and practically unmanageable as obscenity or, for that matter, privacy.

Critics of Mr. Justice Black's self-denying conceptions of the Supreme Court's judicial role no doubt view his theory as committed to abstaining from any effort to support restrictions on malicious gossip and snooping, just as, in the sections considered above, he refused to give constitutional status to claims of individuals to protection from wiretapping or from penalties for exercising their freedom of choice with respect to birth control and abortion. In the case of gossip and prying into private affairs, it seems clear that Mr. Justice Black depended upon a basic faith in the good sense and good taste of Americans. However, there is no reason to regard him as sentimentally optimistic. He believed that his experience con-

124. 385 U.S. 374, 398 (1967) (Black, J., concurring).
125. 424 U.S. at 484 (Marshall, J., dissenting).
126. 418 U.S. 323 (1974).
127. 403 U.S. 29, 78 (Marshall, J., dissenting).
128. *Id.* at 48.

firmed the thesis that the remedy for ignorance is knowledge, for spite is indifference or humor, for narrowness is continued exposure to the widest variety of opposing views. The development of responsible public opinion requires the widest possible investigation and reporting of the facts of our common economic, social, and cultural experience.

So broad an assertion is bound to provoke any independent-minded American to adduce phenomena of many kinds which cannot by any reasonable criteria be regarded as of public interest. And the existence of the private sphere, distinct from the public, is entirely consistent with the Black denial of inherent privacy as a zone forbidden to the press. For his position, as it was formulated in *Time v. Hill,* and as presumably he would have stated it in *Firestone,* was that when the press, or unorganized individuals, brings someone else's lives into public view, those lives are at least in principle public. They are public in the basic sense that they constitute materials which provide a basis on which the public can reflect and form an opinion on a particular public policy. Should, for example, the facts of a celebrated divorce case be considered by the public at large? Reflection on these facts may be merely prurient, or invidious; but it also may bear upon public policies regarding marriage and divorce and provision for the children of such shipwrecked unions.

Furthermore, as suggested above, Mr. Justice Black was not unwilling to assert the claims of privacy with respect to particular constitutional protections. The privacy of the home, taken in a qualified sense and related to the performance of a citizen's general public office, was strikingly expressed in his opinion in *Gregory v. City of Chicago,* invalidating the arrest of comedian Dick Gregory for his part in a demonstration against Mayor Daley of Chicago.[129] Concurring with Mr. Justice Douglas, Mr. Justice Black wrote:

> Were the authority of government so trifling as to permit anyone with a complaint to have the vast power to do anything he pleased, wherever he pleased, and whenever he pleased, our customs and our habits of conduct, social, political, economic, ethical, and religious, would all be wiped out, and become no

129. 394 U.S. 111, 113 (1969) (Black, J., concurring).

> more than relics of a gone but not forgotten past. Churches would be compelled to welcome into their buildings invaders who came but to scoff and jeer; streets and highways and public buildings would cease to be available for the purposes for which they were constructed and dedicated whenever demonstrators and picketers wanted to use them for their own purposes. And perhaps worse than all other changes, homes, the sacred retreat to which families repair for their privacy and their daily way of living, would have to have their doors thrown open to all who desired to convert the occupants to new views, new morals, and a new way of life. Men and women who hold public office would be compelled, simply because they did hold public office, to lose the comforts and privacy of an unpicketed home.[130]

Mr. Justice Black's position here is not simply that "a man's home is his castle, into which not even the king can enter,"[131] it is rather that when first amendment protections are considered in the context of actions performed, in addition to ideas expressed, there must be reasonable considerations of such competing demands as the need for quiet and recreation. No man or woman can be an adequate official or citizen without a room of one's own in which to rest and reflect; and the normal demands of public discussion may be met without indefinite exposure of the home to public view. Of course, emergencies such as natural or civic disasters may still transform the most private homes into public facilities: it may be necessary to admit the king if the royal palace has burned down.

CONCLUSION

The lectures which Mr. Justice Black delivered at Columbia in 1968 under the title *A Constitutional Faith* summarize the heritage which he bequeathed to the Burger Court.[132] The faith he formulated was not just about the Constitution, it was *in* the Constitution as the precisely articulated instruction for Americans and especially

130. *Id.* at 125.

131. *C.f.* Frank v. Maryland, 359 U.S. 360, 378-79 (1959)(Douglas, J., dissenting); Rowan v. United States Post Office, 397 U.S. 728 (1970).

132. The James S. Carpentier Lectures, Columbia University School of Law (Mar. 1968), *printed in* H. BLACK, A CONSTITUTIONAL FAITH (1968).

their judges. The tone of the lectures was recurrently polemical as he responded to the criticisms of his colleagues and others. He maintained his contention, long disputed by most of his brethren, that the Court had erred in not accepting the incorporation of all the Bill of Rights into the due process clause of the fourteenth amendment. That error was, he thought, logically associated with the Warren Court's sympathetic attitude toward privacy claims, and the error was being carried forward by the Burger Court as well. As has been noted, however, the Burger Court is hardly of one mind with respect to privacy, and one who shares the general constitutional theory of Mr. Justice Black may hope that in time that theory will prove the soundest basis for resolving the differences.

A. *The Role of the Courts in Our Constitutional System*

Mr. Justice Black believed in an activist Court which would be quick to intervene when violations of the Constitution, especially the Bill of Rights, were at issue. He believed in hearing and adjudicating cases in which governments at any level were charged with improperly asserting their power. But such judicial activity was not to issue from an independent set of moral or political intuitions. Mr. Justice Black's protests against compelling witnesses to testify as to their political beliefs or their own guilt and his insistence on the unqualified freedom of political and religious thought was based upon his reading of the constitutional text and the intentions, ascertained by historical study, of the Framers. This did not preclude a liberal reading of the text but it did delimit peremptorily the reach of principles that might be brought to bear. The faith of a judge was to the Constitution as it was, not to his own ideas of what it should be.

It is a truism that the Burger Court has drawn back from the Warren Court's activism, and this would—in respect to the Bill of Rights—disappoint Mr. Justice Black deeply. On the privacy issue, however, the Court probably has intervened more than he would have thought proper. The introduction of privacy was, in effect, of the same order as that freedom of contract invoked by conservative judges in the early years of this century. Certainly with respect to birth control, abortion, and wiretapping cases he did not find the constitutional violations which disturbed the other members of the Court. Nor did he approve restrictions of press freedom in the name

of privacy. His persisting challenge is to show that one is authentically reading the Constitution, not adding to it.

B. *Due Process of Law*

The second lecture of *A Constitutional Faith* reaffirmed his concern that the Court not import into its decisions its own social or economic doctrines. In a governmental system committed to limiting power, he believed, the only way to limit the power of judges is to see that they restrict their judgments to what is clearly in the Constitution. This did not mean that he was sure a judge could always perceive the Constitution's meaning with full clarity, or that a given judgment might not need to be reconsidered. Mr. Justice Black's concurring opinion in *Mapp* reported his conclusion that his opinion in *Wolf,* dealing with the admissibility of unreasonably seized evidence, had been mistaken. A like revision had occurred respecting the compulsory flag salute in public schools. But he was sure that judges should not, either in the name of some higher law, or of keeping up with the times, revise the Constitution as they saw fit.

With respect to privacy, he claimed that his fellow Justices were creating a right in terms of which to restrict federal or state governments. He insisted that the Court, instead of building up a structure of such limitations in terms of a conception such as ordered liberty, should adhere to the clear intentions of the fourteenth amendment—that is, that the Bill of Rights delineated the privileges of persons against state regulations. It was on this ground that he believed the stomach pump and compulsory blood sampling might be condemned as forms of compulsory self-incrimination. On this ground, likewise, he denied that a general right of privacy could be identified as the basis on which wiretapping might be outlawed, or the rights of contraception and abortion affirmed.

No member of the Burger Court has accepted fully the Black position on the general right of privacy. The present Justices differ among themselves, but all have appeared ready, to a point, to accept the *Griswold* assertion of privacy as a fundamental right. The Douglas account of the various regions of privacy probably is not now supported by any of the Justices, though its temper is congenial to Justices Brennan and Marshall. It is presumably no accident that the rather cautious statements by Mr. Justice Blackmun have con-

stituted the Court's official opinion in the abortion cases. Actually, the Justices closest to Mr. Justice Black's privacy views in both abortion and self-incrimination cases have been the Chief Justice and Justices Rehnquist and White. And yet, with deference, it seems possible to argue that what the privacy advocates, especially Mr. Justice Brennan, argue may be closer to Mr. Justice Black's conclusions than the conservative views. Though Justices Brennan and Black disagreed on whether a general right of privacy provided a basis from which particular privacies might be derived, still in his reading of such provisions as the first, fourth, and fifth amendments, Mr. Justice Black affirmed a latitude of freedom from restraint which was close to that affirmed by Mr. Justice Brennan.

The affinity between the views of Mr. Justice Black and those of Douglas and Brennan had been noted by Mr. Justice Harlan in his concurring opinion in *Griswold*:[133] the opinions of both Douglas and Goldberg, he said, seemed to "evince an approach to this case very much like that taken by my brothers Black and Stewart in dissent, namely: that the Due Process Clause of the Fourteenth Amendment does not touch this Connecticut statute unless the enactment is found to violate some right assured by the letter or penumbra of the Bill of Rights."[134] In Harlan's view, "The Due Process Clause of the Fourteenth Amendment stands, . . . on its own bottom."[135] Though Mr. Justice Black believed that the penumbra conception of marital privacy was unpersuasive, still it did constitute an attempt to avoid judicially constructing a wholly independent reading of the "ordered liberty"[136] which Mr. Justice Harlan declared inherent in the due process clause.

While marital privacy was not, for Mr. Justice Black, to be affirmed as a penumbra of one or more of the Bill of Rights, still the first amendment protects marriage counseling and advocacy of contraception. The marriage chamber normally is immune from searches and seizures under the fourth amendment; still, it cannot be said to provide a sanctuary into which police might never be authorized to pursue a suspected criminal. The right to bring up and

133. 381 U.S. at 499 (Harlan, J., concurring in judgment).
134. *Id.*
135. *Id.* at 500.
136. *Id.* (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

educate children cannot be claimed to issue from privacy, for the propriety of education requirements and other legislative controls hedge parental authority in many ways. The privacy claims with respect to one spouse testifying at law about the other must be taken as a rule of procedure rather than a constitutional requirement. It is not intended to assert that Mr. Justice Black would have phrased his position on these issues as has been done here, but he surely was willing to accord liberal reading to the provisions of the Bill of Rights.

The same liberality might have been expected with respect to self-incrimination. It seems possible to hold that in *Andresen* and *Fisher* Mr. Justice Black, like Justices Brennan and Marshall, would have taken the expansive view of what constitutes self-incrimination. Papers written for the sake of record or personal communication, or as expressions of one's business dealings or one's own plan of living are to be considered extensions of oneself and so privileged. Mr. Justice Black was responsive to the police need to be able to search persons or properties where there was probable cause of violence.[137] But where documents were an expression of personality, it seems that the privilege against self-incrimination should prevail.

The wiretapping issue is perhaps most perplexing to Mr. Justice Black's liberal admirers. With deference, it may be suggested that without any appeal to privacy such surveillance might, consistently with Black's principles, be regarded as a form of compulsory self-incrimination. The telephone is normally conceived as secure, and to adduce as evidence in trial proceedings what a person has said in the belief others would not hear is not simply dirty business but a violation of the fifth amendment. There may be occasions when wiretapping is reasonable, though public opinion appears to be narrowing the range of permissible occasions since the Nixon tapes have come into public view. Yet a strong case can be made for supporting the Court's decision in *Katz* without invoking a general right of privacy. In addition, wiretapping authorization always faces the problem of an over-broad authorization. Furthermore, telephone conversations seem generally an ingredient in that general process of conversation which falls under the shield of the first amendment.

137. *See* Terry v. Ohio, 392 U.S. 1, 31 (1968) (Harlan, J., concurring).

C. *The First Amendment*

Mr. Justice Black would surely have been especially disappointed by the decision in *Time v. Firestone* which affirmed the privacy principle to limit press freedom. The Rehnquist opinion asserted that, first, such a divorce proceeding was to be distinguished from political controversies in which the public has an imperative need for free discussion and, second, the parties in the proceeding could claim privacy protection because they did not "thrust themselves" into public view. For Mr. Justice Black, it seems persuasive to rejoin that political controversies cannot be separated in this way from general public discussion, for the latter is what provides the setting and the formulation of political questions; and again, when public information is at stake, the question is not about the willing exposure of the individuals but about the public significance of the event.

Press comment on public affairs always has the potential for hurt feelings, lowering reputations and diminishing the people's confidence in government. Such comment may be ill-willed, prejudiced and inaccurate to the point of deliberate falsehood. It was such "actual malice" that seemed to Mr. Justice Brennan and a fortiori to the new members of the Court, to justify restricting press freedom. But such qualifications themselves reflect what was for Mr. Justice Black a mistakenly personal and private view of the individual's relation to public opinion. If you begin with the view that private interests must be set against public enlightenment, he would say, then you will end up imposing restrictions on the press. But you can avoid that if you will bear in mind that the press exerts influence only through the minds of its readers. The freedom of the press implies confidence in people's ability to distinguish between the false and the true, the malicious and the benevolent. The press is not to be limited either by the executive or the judicial branch. In Jeffersonian fashion, Mr. Justice Black drew the line at the point where expressions of opinion crossed the line into actions. As in *Gregory v. City of Chicago,* the privacy of individual homes might be invoked when physical demonstrations so surrounded a residence as to make recreation and reflective activity impossible.

Mr. Justice Black left us a heritage of constitutional commitment which no judge, himself included, could maintain perfectly. To his liberal friends he offered the warning that their present en-

thusiasm for the cause of privacy should not be permitted to infuse their reading of the Constitution with their own moral convictions. To the conservatives, especially those concerned with the alleged latitude accorded to defendants in criminal proceedings, he urged adherence to the fourth and fifth amendments taken in their most generous reading. He was bound to disappoint enthusiasts of both sides. But he bade us to remember that the Constitution is not all of our national life, and the Supreme Court is not all of our government. His deepest faith was in the Constitution as providing the means by which the people determine the way they are to live.