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# PRIVACY, NECESSITY, AND THE CONSTITUTION

The object of this paper is to sharpen and strengthen a familiar but surprisingly muted argument about the existence of a constitutional right to privacy. The argument asserts that the protection of personal privacy is a necessary condition for the protection of certain other rights (let us call them "obvious rights") whose constitutionality is not in doubt. It asserts that such necessary conditions must themselves be guaranteed as rights in order to protect the obvious ones. It concludes (deductively) that a constitutionally protected right to privacy exists.

An argument something like this was made in the classic privacy case, Griswold v. Connecticut , 381 US 479 (1965), and before that in Justice Harlan's dissent in Poe v. Ullman , 367 U.S. 497 (1961), 522-555. Harlan's argument was buried, however, in the furor over Justice Douglas' leading opinion in Griswold , which proffered the more provocative idea that the rights enumerated in the constitution, when taken together, produced a "penumbra" that protected a wide range of things that could be summed up under the label of privacy. Demolishing "penumbra theory" has since become a ritual. But that ritual is largely unrelated to Harlan's neglected necessity argument.

Harlan's claim is as seductively simple as Hart's claim about the natural right to liberty. [1] Hart proposed that if we grant the existence of contractual rights ("special" rights), then we are logically committed to accept the normative claims that necessarily underlie them -- for example, the non-contractual ("general") liberty-right to make contracts. Concerning privacy, Harlan

proposed that since there is a constitutional right to liberty, there is a constitutional right to the privacy that necessarily underlies liberty.[2]

This argument deserves more scrutiny than it has received, because it is virtually independent of competing theories of constitutional interpretation. That is, if it is sound, its conclusion will fall out of every defensible theory of constitutional interpretation, since all such theories accept the existence of some obvious rights and the importance of protecting the necessary conditions of those rights. Thus, if the argument is sound, continued controversy about the mere existence of a right to privacy will be misplaced. The genuinely disputable issues will concern only the scope, content, and stringency of the right. Privacy will be no more revealing as a test for a theory of constitutional interpretation than is freedom of speech.

There is obviously something wrong, here. An issue as vexed as this cannot be as simple as Harlan suggests. At least that is a prudent assumption. But the necessary condition argument, as I shall call it, deserves a closer look. It seems to be sound.

**Reprise of the Setting**

Though privacy is not mentioned in the constitution, it is commonplace to observe that various elements of the Bill of Rights deal with it implicitly. Freedom of speech and religion, for example, as well as immunities from self-incrimination and unreasonable search concern the extent to which we are free from government interference in our private lives. It is tempting to rephrase this by saying that such provisions deal with the extent to which our privacy is constitutionally protected; the extent of our right to privacy. But as Justice Black notes with some asperity, "[o]ne of the most effective ways of diluting or expanding a constitutionally guaranteed right is to substitute for the crucial word or words of a constitutional guarantee another word or words, more or less flexible and more or less restricted in meaning."[3] He has not been alone

in thinking that reading 'privacy' into the Bill of Rights is a temptation we should avoid.

The Supreme Court, over Black's vigorous dissent, ratified the existence of a constitutional right to privacy in Griswold v. Connecticut 381 US 479 (1965). As alluded to above, Justice Douglas, writing for the Court, found the right to privacy in what he called the emanation or penumbra of various explicit guarantees, specifically the First, Third, Fourth, and Fifth Amendments, as secured by the Ninth and Fourteenth.[4] His reasoning, which made terse and memorable use of a controversial principle of interpretation (see the "Emergence" principle below), has had an unfortunate effect on subsequent debate. In Griswold itself, for example, it virtually submerged the promising line of argument mentioned but not developed in the concurring opinions of Justices Goldberg, Harlan, and White. They found the right to privacy to be "implicit" in the liberty guaranteed by various amendments.[5] Douglas gave this a glance himself in his discussion of freedom of association.[6]

Subsequent scholarly discussion has been quite critical of "penumbra theory."[7] Moreover, it has tended to polarize the debate about the existence of a constitutional right to privacy, framing it in terms of the split between judicial conservatives and activists, or between strict constructionists and their opponents.[8] Thus the debate about privacy is presented as a fundamental question of constitutional interpretation: How, if at all, may we justifiably hold that the constitution addresses matters that it does not explicitly mention?[9]

Rationale for the Necessary Condition Argument

The range of hermeneutical principles that might govern the answer to that question is familiar. At the extremes are two indefensible positions, useful only for marking the boundaries. One is the literalist doctrine that no interpretation at all is legitimate -- that the things "in" the constitution are all and only the things explicit in its text, as originally understood by the framers.[10] At the other extreme is the Humpty-Dumptyish[11] doctrine that every

reading of the constitution is wholly unconstrained by the text, and that the constitution contains whatever its interpreters say it contains.[12] The boundaries defined by those extremes are very wide indeed, and the logical possibilities for theories of constitutional interpretation are legion.

In practice, however, such theories appear to be variants or combinations of a rather small number of closely linked interpretive principles. They are arranged here in a sort of ascending order, from least to most inclusive:

Intention -- the notion that the meaning of the text is to be found wholly in the explicit or implicit intentions of its authors.

Implication -- the notion that, in addition to what may be derived from authorial intentions, the meaning of the text is given by what is logically implied by those intentions, whether the authors were aware of the implications or not.

Emergence -- the notion that, in addition to the meaning given by intention and implication, new meanings may emerge or emanate from the text when various passages are combined in novel ways, or are read against novel sets of social conditions; the text's meaning, therefore, is not merely in its authors' intentions and the strict logical implications thereof, but also in its emergent properties.[13]

Evolution -- the notion that the meaning of the text is to be found in current constitutional practice, guided by intention, implication, and emergence principles. Thus, just as etymology is often relevant but never decisive for questions about the current meaning of words, so too the meaning of the constitution is not wholly determined by its origins, implications and emergent properties, but rather by its historically developed use.[14]

Construction -- the notion that each act of interpretation is a creative act of constitution-making; thus the meaning of the text is the meaning its interpreters construct, using intention, implication, emergent properties

and current practice as guides.[15]

This way of presenting the principles oversimplifies the logical possibilities for their interrelationships. It suggests an invariably concentric arrangement in which each successive principle "includes" all the previous ones. That is misleading, for it is logically possible to apply the evolution or construction principles in ways that effectively ignore (original) intention and its implications. Moreover, the implication and emergence principles can plausibly be restated in purely formal terms, without restrictive reference to intention but instead with equal applicability to all the other principles. The situation is further complicated, of course, by the fact that intentionalist arguments need not be about original intent. They can be based on a constructivist conception of who the authors of the constitution are. All these variations and more are logically possible.

As a description of actual constitutional practice, however, the ordered arrangement of these principles presented here seems roughly accurate. In practice, everyone seems to take account of what can be known about original intent, if only as a baseline against which to apply other principles. In practice, each successive principle represents a point at which some theorists say "This far, but no farther." In practice, use of any given principle on the list seems to involve some use (not necessarily determinate use) of all the previous ones. That much is enough to create an opening for a significant argument about privacy, based on the principle of implication. To wit:

The Necessary Condition Argument

(1) The protection of personal privacy is a necessary condition for the protection of rights explicitly mentioned in the constitution. For example, we cannot be free from unreasonable searches and seizures, as guaranteed by the Fourth Amendment, unless under some conditions we can exclude others from access to our personal belongings. We cannot have freedom of religion unless under some conditions we can prevent others from interrupting our worship or

prayer. We cannot have freedom of speech unless under some conditions we can speak selectively, to one audience rather than another. The ability to exclude others from intruding on our lives defines an area in which we can keep our affairs private; it defines an area of personal privacy. Having a relevant area of personal privacy is thus a necessary condition of the exercise of some of the rights explicitly mentioned in the constitution.

2) The same is true of the rights that are obviously or uncontroversially implicit in the constitution -- implicit in the sense that we cannot make sense of that document and its history unless we hold that those rights have been "in" the constitution from the beginning. Freedom of thought is an example. It is nowhere mentioned, but is obviously implicit in the concept of free speech. One can have freedom of thought without the ability to speak, but one cannot conceivably have freedom of speech (in any plausible construal of the First Amendment's guarantee of it) without a corresponding amount of freedom of thought. And some privacy is a necessary condition for it. We cannot have freedom of thought if we are required to make every thought public -- to make every thought into an act that has overt consequences for our lives and the lives of others.

The list of implicit rights (obvious or uncontroversial ones) that involve privacy as a necessary condition is long and striking.[16] It includes the liberty to love and care for others of one's choosing; to marry out of love; to have children; to educate one's children in unconventional ways (e.g., by teaching them an unusual foreign language). None of these are explicit in the constitution; nor is the liberty to read, or to enjoy art or music. But no one can plausibly hold that such liberties are unprotected by the constitution, and some privacy is a necessary condition for their exercise.

3) If the constitution is meant to be effective in protecting a certain liberty, such as freedom of thought, it must be understood as protecting the necessary conditions for the exercise of that liberty. What sort of liberty would the Fourth Amendment protect if it left open the possibility that we might be

required to live our lives entirely in full public view? What sort of liberty would the First Amendment protect if it left open the possibility that all our prayers had to be published in Newsweek , or that every time we set up a meeting with people we had to invite a police officer? It is clear that without the protection of the privacy necessary for the exercise of those liberties, the liberties are empty, and their constitutional guarantee is meaningless. On the assumption that no defensible theory of interpretation will understand them as meaningless, it follows that every theory of interpretation will understand the constitution as protecting the conditions necessary for their exercise.

4) Thus the constitution must be understood to protect, by implication, the privacy necessary for the exercise of all of our obviously or uncontroversially protected liberties. This is equivalent to saying that a constitutionally protected right to privacy exists.

What This Does and Does Not Prove

The necessary-condition argument is straightforward enough to give one pause. It seems sound. It is applicable to every plausible theory of interpretation. It is not a recent discovery. It is not arcane, complicated, or abstruse. Why has it not figured more prominently in the debate about the existence of the right to privacy? One suspects that its neglect reflects a judgment that it is somehow beside the point -- that the "real" issues at stake in the debate cannot be settled by it. How might that be so?

Too general . Perhaps the argument is irrelevant because it deals only with abstractions -- with a vague and indeterminate general right to privacy -- while courts must settle questions about specifics. Does the right to privacy include the right to use contraceptives? The necessary-condition argument will not answer that question, and since that is the question the justices had to answer in Griswold , it is understandable why they put aside arguments that are incapable of settling it.

Such an objection is unconvincing, however. An argument can be relevant to

privacy cases without being sufficient by itself to decide them. And the necessary-condition argument does directly address (and apparently decide) an issue very much in the foreground of the Griswold case, and the subsequent discussion of it. That issue is whether the constitution speaks to the issue of privacy at all, and thus whether Griswold and other cases brought under the heading of a right to privacy thereby present a justiciable issue. If there is no right to privacy in the constitution, then they do not. The necessary-condition argument, however, establishes that there are rights to privacy in the constitution. It is thus directly relevant to privacy cases.

Too specific . Perhaps the argument fails to establish a general, independent right to privacy. Perhaps it only establishes an unconnected set of "privacy bubbles" attached to separate rights, so that instead of a general right to privacy we have only separate rights to speech-privacy, thought-privacy, and so forth. Then discussing these as distinct from the rights to which they are attached would be misleading. Discussing them as indistinct from those rights would be pointless. Trying to use them to decide questions that fall between their separate spheres would be illegitimate. In short, unless there is a general, independent right to privacy underlying all the separate privacy bubbles, questions such as the one about contraceptive use that prompted Griswold will not be answerable on privacy grounds. Thus (the objection goes), since the necessary-condition argument does nothing to establish the existence of such a general, underlying right, it is largely irrelevant. [17]

On the contrary, the necessary-condition argument contributes significantly to the case for a general, underlying "right to be left alone" -- a right to privacy. Here some of Justice Harlan's arguments in Poe [18] and again in Griswold can be put to good use. The framers did not intend the rights named in the Bill of Rights to be an exhaustive list. The Ninth Amendment makes that clear. Since the necessary-condition argument establishes that privacy is a necessary background condition for some named rights, and also for some other implicit but obvious guarantees, it is plausible to suppose that a general

right to privacy might be implicit in the constitution. Moreover, given the general project behind the Bill of Rights, it is plausible to hold that the most fundamental of the general rights named in it is liberty. Privacy is intimately and quite generally connected to liberty, as a necessary condition for its exercise. If liberty is fundamental, the privacy necessary for its exercise will be equally fundamental -- not subordinated to or carved into separate pieces by other rights on a par with liberty. We thus have a very strong reason for concluding that the constitution protects a general right to privacy matching the generality of the right to liberty. Given the scope of the right to liberty, we can perhaps be forgiven if we say that its privacy-bubble constitutes an atmosphere. [19]

Too tenuous . All of this seems aimed at forcing users of the intention and implication principles to concede that the constitution must be construed to protect a general right to privacy. But perhaps even they need not concede this; perhaps they can take refuge in Holmes' dictum that "The life of the law has not been logic; it has been experience." [20] And in any case, can't people who use other interpretive principles simply ignore this argument?

For intentionalists or implicationists, evading the logic of the argument means abandoning the effort to make authorial intentions effective. Since we must assume the authors of the constitution meant it to be effective, abandoning the attempt to make it so (without at the same time abandoning the constitution itself) amounts to abandoning the effort to interpret it solely on the basis of authorial intention and/or implication. That means generating an interpretation based on emergence, evolution, or construction principles that denies the existence of a right to privacy. (Presumably, if intentionalists or implicationists wanted to affirm the right to privacy they would have no reason to go beyond their favored principles to do it.) But currently, interpretations based on the emergence, evolution, and construction principles now generally agree that there is a constitutional right to privacy. Moreover, twenty-five years after Griswold , it is hard to see how an interpretation based on those

principles could reach a different result. (Humpty Dumpty could, but that is in another land.)

So the options forced by the necessary-condition argument are these: (1) General acceptance of the existence of a constitutional right to privacy. That is, acceptance of the logic of the necessary-condition argument by intentionalists and implicationists, and no change in the general position of others. (2) Abandonment (or relevant limitation) of the use of intention and implication, and the construction of an interpretation of the Bill of Rights that denies the existence of a right to privacy. Since (2) doesn't seem possible, we are left with (1). If so, the necessary-condition argument works as advertised.

Peroration

Liberty has limits, and so does privacy. Freedom of religion does not include the right of consenting adults to practice ritual human sacrifice, no matter how privately they do it. And so there is no right to privacy invaded when the state steps in to prevent the ritual. Freedom of thought does not include the right to keep every thought private -- for example, when one is under oath and suitably immunized. And so there is no right to privacy invaded by the state's demand that one speak the truth in that case.

The limitations we place on liberty are made necessary, in part, by temporary, local circumstances as well as by general social conditions. The liberty of consenting adults to practice crossword puzzles in bed on Sunday morning is secure. But what about the liberty of consenting adults to practice tattooing in bed, if it turns out that contamination of the needles is very difficult to prevent and associated with the spread of AIDS? Would we then want to insist on licensing the tattooers and limiting their liberty in other ways -- until we found a way to make the practice as safe as doing crosswords? Such questions arise in particular social contexts, and have to be resolved, in part, in terms of them. And because circumstances change constantly, so too must the limits of liberty and privacy. This sort of adjustment to cases and

circumstance is a necessary part of the process of protecting the liberty and privacy guaranteed by the constitution. Both the legislature and the judiciary have important roles in this process.

Moreover, this process cannot be reduced to a mechanical one. Reasonable people disagree on the nature of our circumstances, and the limits of liberty and privacy those circumstances make necessary. So it is not surprising that the limits of constitutional rights to privacy change over time, and are often subject to dispute. What is interesting, then, is not whether there are rights to privacy in the constitution but rather what they are and what their limits must be given our present circumstances. For that, we must rely on the cases. It is simply not decidable a priori whether the liberty to love another person includes the liberty to make love to him, and therefore the privacy necessary to do it; whether the liberty to make love includes the liberty to do so without risking pregnancy; whether the liberty to risk pregnancy includes the liberty to terminate unwanted pregnancies. But the fact that these questions are not mechanically decidable does not mean that they are unanswerable, or that they must be answered arbitrarily or in terms of a higher law. They can be answered by careful philosophical argument about the law -- about the fundamental law, the constitution. I submit that that is what the Court does, and should do. And it is a good reason, incidentally, for being concerned about the kind of philosophical argument a potential Supreme Court justice is likely to make.

## NOTES

**FOOTNOTES**

1:

H.L.A. Hart, "Are There Any Natural Rights?" Philosophical Review .....

2:

In his confirmation hearings, Justice David Souter frequently invoked this argument, but it seemed, curiously, to be brushed aside, almost as if it were a familiar irrelevancy.

3:

Griswold v. Connecticut 381 U.S. 479 (1965) at 509.

4:

At 482-4.

5:

At 493 (Goldberg), 500 (Harlan), 502 (White). Such an argument had been made at greater length (in dissent) by Justice Harlan in Poe v. Ullman 367 U.S. 497 (1961), 522-555.

6:

At 483. "...while [this aspect of association] is not expressly included in the First Amendment its existence is necessary in making the express guarantees fully meaningful."

7:

cite...

8:

cite review articles

9:

For example, the word 'no' in the opening clause of the First Amendment: "Congress shall make no law..."

10:

Analogy to biblical hermeneutics and plenary verbal inspirationism. Unsophisticated or pop versions of original intent.

11:

"When I use a word," Humpty Dumpty said in a rather scornful tone, "it means just what I choose it to mean -- neither more nor less." Lewis Carroll, Through the Looking Glass , ch. 6.

12:

Note about "literary" hermeneutics, Stanley Fish, and "radical reader response" theory.

13:

It should be noted that this principle is much older and broader than the so-called "penumbra theory" put forward by Justice Douglas in Griswold v. Connecticut 381 U.S. 479 (1965), at 480-486. It includes a very commonplace (if obscure) view of how judges may find (rather than make) law in novel cases by extending the recognized meaning of a given passage. This is often described as finding something to be "implicit" in the text, but is of course not the claim that there was an implicit authorial intent on the matter. Nor is it the claim that the extension is logically necessary; that it is a matter of strict implication. Rather, the form of argument seems to be an inductive, weight-of-the-evidence one, like this: We now read passage X as guaranteeing R1. But the proposed R2 is only marginally distinguishable from R1, or provides useful support for R1, or is in the same general category as R1. Thus it would be hard to support or oppose one without the other. We do not want to oppose R1. Thus we ought to support them both.

14:

An example is the contention that an evolving sense of decency now renders capital punishment cruel and unusual punishment within the meaning of the Eighth Amendment. Furman v. Georgia (Marshall)

15:

This principle may be grounded either in political theory or in epistemology. The view that the constitution is as much a process as a text is an example of the former. See Paul Brest, ... Certain views about the nature of authorial intention -- e.g., that it is either inaccessible or indeterminate -- exemplify the latter. See Stanley Fish....

16:

Ref. to recital in Griswold

17:

Cite Judy Thomson.

18:

Poe v. Ullman 367 U.S. 497 (1961), 522-555.

19:

I am indebted to Charles Koch for the extension of the bubble metaphor.

20:

Oliver Wendell Holmes, Jr., The Common Law (1881) (Boston: Little Brown,

1963), p5.