CHAPTER THIRTEEN

Privacy

The makers of our Constitution . . . conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.

—Justice Louis D. Brandeis (1928)

The word *privacy* appears not once in the Constitution, yet some aspects of privacy or individual autonomy were recognized by the framers of the Constitution as fundamental—as essential elements of liberty. Today protection of certain privacy interests is integral to American constitutional law. Privacy is also an idea with few apparent limits. Paul Freund once called it a "greedy legal concept." What is privacy? How do questions of privacy involve the Constitution? How are judges supposed to decide what privacy encompasses?

DIMENSIONS OF PRIVACY

Privacy denotes different things. For some it is a broad right "to be let alone." So put, *privacy* is almost synonymous with freedom. Accordingly, individuals should be allowed to make decisions about their lives without undue interference from others. Carried to an extreme, however, privacy would make organized society impossible. Every day, laws impinge on the liberty of individuals in numerous ways. Being in society means that people are by no means "let alone" to go their own direction entirely in their own way.

More narrowly conceived, privacy may mean physical separation from others. People enter their homes, close the door, and pull the shades for the express purpose of keeping themselves, their activities, and their belongings hidden from
public view. Such ordinary actions make it plain that people intend to shield the interior from the prying eyes of neighbors, as well as those of government.

Protecting one's reputation from defamatory comment is another dimension of privacy. As Chapter Eleven explained, courts must reconcile the privacy interest, recognized by the law of libel, with a competing interest—a free press—recognized by the First Amendment. A third and related dimension is control over information about oneself. Medical records, academic transcripts, bank and credit card statements, and tax returns all contain information that the persons about whom the information is compiled may not intend to become public. **Informational privacy** fosters a dual concern: accuracy and access. Are the data correct, and who is allowed to see and use them? These are questions made more urgent in the age of computers and the Internet.

Privacy may also denote security from intrusion on the intimacies of life, a dimension that is the focus of this chapter. Certain decisions regarding companionship, marriage, and child rearing may not be entirely free of government restrictions, but they should preserve a core of freedom from outside restraint. This suggests a zone of autonomy, which the government may not penetrate without justification.

**PRIVATE LAW AND PUBLIC LAW BEGINNINGS**

Not all dimensions of privacy involve the Constitution. Some are regulated by statute alone. From the beginning, American law has offered redress from physical trespass and intrusion, and libel actions have allowed damages when one's reputation has been besmirched. (Both are examples of **private law** at work: legal rules governing relations among individuals. **Public law** involves regulations overseeing the operations of government as well as relations between individuals and their governments. Constitutional law, for example, is a field of public law.) "At common law," Chief Justice Rehnquist said, "even the touching of one person by another without consent and without legal justification was a battery." As the Supreme Court declared in *Union Pacific R. Co. v. Botsford* (1891), "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."

Threats to privacy or autonomy are the focus of several provisions of the Constitution. By banning religious tests for public office, Article VI protects the sanctity of personal religious beliefs, and the First Amendment guards rights of individual expression, religious and otherwise. The Third Amendment virtually proscribes the quartering of troops in homes. The Fourth Amendment proclaims "the right of the people to be secure in their persons, houses, papers and effects" and prohibits "unreasonable searches and seizures." The Fifth Amendment protects the integrity of the individual by curtailing the state's power to force people to be witnesses against themselves in criminal proceedings. The Fifth and the Fourteenth remove government's power to take away a person's "life, liberty, or property without due process of law." Spiritual and bodily integrity are important as well in the ban on "cruel and unusual punishments" in the Eighth Amendment. In its own way, each of these provisions addresses some dimension of personality or autonomy.

Yet it was not until after 1890 that "privacy" began to take on life as a subject of its own. In that year Boston attorneys Samuel Warren and Louis Brandeis
published a seminal article called "The Right to Privacy." Their immediate concern was nondefamatory but nonetheless offensive gossip in the newspapers. Although existing law provided redress for libel and slander, Warren and Brandeis believed that persons should be able to sue for damages when certain kinds of unwanted, unpleasant information appeared in the press. Their goal was law to guard "an inviolate personality," to enforce "the right of the individual to be left alone." The article was partly successful in stemming some of the abuses that troubled its authors. But its more lasting impact lay in stimulating thinking about the concept of privacy generally.

Privacy was at least a peripheral concern in several decisions by the U.S. Supreme Court before 1965. In *Meyer v. Nebraska* (1923), eight justices overturned a state statute that both prohibited the teaching of subjects in any language other than English and forbade the teaching of foreign languages to any pupil who had not passed the eighth grade. According to Justice McReynolds, liberty "denotes not merely freedom from bodily restraint but also the right of any individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children . . . and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." Similarly, *Pierce v. Society of Sisters* (1925) invalidated an Oregon law forbidding parents from sending their children to private schools. The "liberty" of the Fourteenth Amendment was construed to include the right of the parents to direct the upbringing of their children.

In *Skinner v. Oklahoma* (1942), the Court struck down a compulsory sterilization scheme mandated by Oklahoma for certain classes of habitual criminals. Although the decision rested mainly on equal protection grounds (see the following chapter p. 626), Justice Douglas's majority opinion suggested a broader basis: "the Oklahoma legislation . . . involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race." The foreign language and private school decisions had arguably been related to the First Amendment, although the Court construed them in traditional terms of "calling" and property. Yet in *Skinner* the right infringed was tied neither to the First Amendment nor to any other express constitutional provision, for that matter. Barely half a decade after discrediting judicial creation of substantive rights in the wake of President Roosevelt's Court-packing plan (see Chapter Six), the justices created another.

Justice Douglas was persistent. When a divided Court in *Public Utilities Commission v. Pollack* (1952) refused to recognize a right not to be disturbed by piped in music in public conveyances, his dissent reflected Brandeis's influence: "Liberty in the constitutional sense must mean more than freedom from unlawful governmental restraint; it must include privacy as well, if it is to be a repository of freedom. The right to be left alone is indeed the beginning of all freedom."

The 1961 decision in *Mapp v. Ohio* (see Chapter Ten), in which the Court applied the exclusionary rule to the states as a way of putting "teeth" into the Fourth Amendment, was also proclaimed in the context of protecting privacy. Without the suppression of illegally acquired evidence, said Justice Clark, "the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court's high regard as a freedom 'implicit in the concept of ordered liberty.'" The same term witnessed an unsuccessful challenge in *Poe v. Ullman* to Connecticut's law banning the use of birth control devices. Dissenting,
Justice Harlan drew an analogy between the Connecticut law and the protections of the Fourth Amendment.

Certainly the safeguarding of the home does not follow merely from the sanctity of property rights. The home derives its preeminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right. . . . Of this whole "private realm of family life" it is difficult to imagine what is more private or more intimate than a husband and wife's marital relations. . . . [T]he intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected. It is one thing when the State exerts its power either to forbid extra-marital sexuality altogether, or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy. . . .

Thus, by 1961, thinking about privacy had evolved well beyond Warren and Brandeis's article of 1890. The rudiments of a new constitutional right were at hand.

INVIGORATING A RIGHT OF PRIVACY

The Connecticut anticontraceptive statute came before the Court again in 1965 in *Griswold v. Connecticut*. "Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception," declared the act, "shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned." The law had been on the books since 1879, but this was apparently only the second time anyone had been charged. Arrested and convicted were the state director of Planned Parenthood and a medical professor at Yale. Both had given instruction and advice to married persons.

Though it violated no express provision in the Constitution, the ban foundered on the right of privacy implicit in the Constitution. For the majority, Justice Douglas announced that no fewer than eight amendments (he named the First, Third, Fourth, Fifth, Sixth, Eighth, Ninth, and Fourteenth) "have penumbras, formed by emanations from those guarantees that give them life and substance." In other words, the specific guarantees in the Constitution implied others, equally important though unenumerated. By impinging on "an intimate relation of husband and wife the statute violated "a right of privacy older than the Bill of Rights. ..." (An astronomical term, *penumbra* is the partial shadow surrounding a complete shadow in an eclipse.)

If privacy is a penumbral right, how far does it extend? Two years later in *Loving v. Virginia*, the Court struck down Virginia's law banning interracial marriages. Relying mainly on the equal protection clause, Chief Justice Warren also drew authority from the constitutionally protected "freedom to marry"—"one of the vital personal rights essential to the orderly pursuit of happiness by free men." Then a 1968 decision, *Stanley v. Georgia*, invalidated a state law forbidding private possession of obscene material. Combining privacy as well as First Amendment interests, Justice Marshall reasoned, "Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's home."
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Griswold formed the basis of Eisenstadt v. Baird, a 1972 challenge to a Massachusetts statute that confined distribution of contraceptive devices to married people. According to Justice Brennan:

If under Griswold the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. . . . 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.

ABORTION

Abortion laws also affected the decision to bear a child. If a state could not proscribe birth control devices, could it nonetheless ban most abortions?

NATIONALIZING A RIGHT TO ABORTION. The landmark 7-2 decision in Roe v. Wade (1973) provided an answer to that question. Stoking the flames of a political conflagration, Justice Blackmun's majority opinion acknowledged abortion as an aspect of the constitutionally protected right of privacy. "(W)hether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or. . . in the Ninth Amendment's reservation of rights to the people, [it] is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." Yet the right to abortion was not absolute. According to Blackmun,

[A] state may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision. The privacy right involved, therefore, cannot be . . . absolute. . .. These interests are separate and distinct. Each grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes "compelling."

Roe called into question the abortion laws of nearly every state. In 1973, 21 states had highly restrictive laws similar to the one from Texas invalidated in Roe that permitted only those abortions necessary to preserve the woman's life. Typically, these laws dated from the nineteenth century. An additional 25 states also allowed some forms of therapeutic abortions: when continuation of the pregnancy would seriously impair the woman's health, when the fetus would probably be born with a grave and irremediable mental or physical defect, or when the pregnancy resulted from incest or rape. (These less restrictive statutes embodied some or all of the recommendations of the American Law Institute's Model Penal Code of 1962.) The remaining four states (Alaska, Hawaii, New York, and Washington) had repealed all criminal penalties for both elective and therapeutic abortions performed early in the pregnancy. Under Roe, no outright ban in any state would be allowed before the twenty-fifth week of pregnancy. Even then, a need to protect a woman's life or health would always supersede a ban on later-term abortions. Furthermore, by finding a protection for abortion in the Constitution, the Court nationalized the abortion debate. No longer would a state's abortion laws be the product of clashing interests within its own legislature. After 1973, much of the battle between those who believed Roe was right and those who believed it was
wrong shifted to Congress, presidential campaigns, and the courts. Moreover, Roe reinvigorated debate over the proper role of the Supreme Court as expositor of the Constitution.

**Testing the Limits of Roe.** Those who opposed the new abortion right began almost at once to press for regulations limiting the availability of abortion and discouraging its use. Planned Parenthood of Central Missouri v. Danforth (1976) knocked down the parts of a statute (1) requiring a married woman to obtain consent of her spouse in most instances before undergoing an abortion, (2) requiring parental consent for an abortion if an unmarried woman was under 18 years of age, (3) banning abortion by saline amniocentesis, and (4) criminalizing a physician's failure to preserve the life and health of a fetus, whatever the stage of pregnancy.

*Bellotti v. Baird* (1979) invalidated a Massachusetts parental consent requirement for minors seeking an abortion. The decision was based on the lack of an adequate alternative or "bypass" procedure under which an abortion could be performed without parental consent. The Court's position was essentially a compromise: Neither parents nor minor would necessarily have the final word. Under *Bellotti*, a bypass must meet four criteria. First, the minor must, be allowed to demonstrate to a third party (such as a judge) that she possesses the maturity to make the decision. Second, even if she is unable to demonstrate maturity, the minor must be allowed to show that the abortion would be in her best interest. Third, the minor's anonymity must be protected. Fourth, the bypass must be conducted speedily. Additionally, as the Court later suggested in *Ayotte v. Planned Parenthood* (2006), judges may enjoin application of that part of a notification statute that lacks an emergency health exception, without necessarily invalidating the entire law. Indeed, as of 2007, 44 states have notification statutes of some sort, with 38 of them containing exceptions for medical emergencies.

Litigation also centered on government's discretion to fund some abortions but not others. *Maker v. Roe* (1977) upheld Connecticut's policy of granting Medicaid support for therapeutic abortions but not for elective ones. Against the state's argument that it could constitutionally discourage abortions in this fashion because of its rational interest in promoting childbirth, opponents charged that paying for childbirth but not for elective abortions burdened the exercise of a constitutional right, financially forcing poor women to carry a pregnancy full term.

The Court extended the Maher reasoning to Congress in *Harris v. McRae* (1980). The *Hyde Amendment* (so named because of its sponsor, Representative Henry Hyde of Illinois) went a step beyond Connecticut's restriction and barred federal Medicaid funds from being spent even on some medically necessary abortions. Only abortions necessary to save the life of the mother qualified. A majority of five concluded that a state was not required to pay for those Medicaid abortions for which federal reimbursement under the Hyde Amendment was unavailable. Neither was the Hyde Amendment itself unconstitutional. It placed no government obstacle, concluded the majority, in the way of an abortion. A poor woman was no worse off than if no Medicaid funds were available for any medical needs.

*Thomiburgh v. American College of Obstetricians and Gynecologists* (1986) marked the last time that the Court struck down a comprehensive scheme of abortion regulations. At stake was a Pennsylvania statute governing consent, information, record keeping, determination of viability, care of the fetus, and the need for a second physician in postviability abortions. None of the challenged provisions survived.

**Impact of a Changing Court.** The 7-2 majority for Roe in 1973 had shrunk to 5—4 by 1986. Retiring immediately after *Thomiburgh*, Chief Justice Burger
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had already let it be known that he thought *Roe* was wrongly decided. The division on the bench in 1987 therefore made Justice Powell's retirement and the designation of a successor all the more critical. More than anything else, the widely held conviction that Judge Robert Bork would undermine the 1973 abortion decision led to his rejection by the Senate when President Reagan nominated him to take Powell's seat. (Bork's confirmation battle is reviewed in the Introduction.) Pro-choice and pro-life activists alike awaited the views of Justice Anthony Kennedy.

His views became partly known in *Webster v. Reproductive Health Services* (1989). In dispute was a Missouri statute, which (1) declared in its preamble that life begins at conception, (2) prohibited abortions performed in public facilities or by public employees, (3) prohibited public funding of abortion counseling, and (4) required viability testing prior to an abortion in a pregnancy of 20 weeks or more. Kennedy and four other justices voted to uphold the act. According to Chief Justice Rehnquist's opinion of the Court, the preamble merely expressed a point of view, and the restrictions on use of funds were valid under the Court's own prior decisions. The viability testing provision (the primary focus of both the majority and dissenting opinions) was constitutional because it "permissibly furthers the State's interest in protecting human life." Yet there were not five votes to overturn *Roe v. Wade* outright. Writing separately, Justice Scalia would have made that move. In his view the Constitution protected no right to abortion. Chief Justice Rehnquist and Justice White, both dissenters in *Roe*, might have been expected to agree. Justice O'Connor, however, was not prepared to go that far, preferring instead to accept the statute as not "impos[ing] an undue burden on a woman's abortion decision" (emphasis added).

Nonetheless, *Roe* did not survive unscathed. In addition to upholding a statute which the *Thornburgh* majority of 1986 surely would have struck down, the Court went out of its way to lay aside *Roe's* trimester analysis which had rested on a balancing of the woman's decision to abort, the state's interest in her health, and the state's interest in prenatal life. Moreover, recall that *Roe* had declared the abortion right to be "fundamental," meaning that limits on the right would be approved only for "compelling" reasons. After *Webster*, at least in the view of Rehnquist, White, Kennedy, and Scalia, limits on abortion were now in the category with restrictions on many other forms of behavior and would be constitutional as long as they were "reasonable." For O'Connor, regulations were permissible unless they imposed an "undue burden" on the woman. As a result, the abortion right, practically speaking, occupied a lower category in the ranking of constitutionally protected liberties.

**The Remnants of *Roe***. The retirements of Brennan in 1990 and Marshall in 1991 meant that the views of replacement Justices Souter and Thomas would be decisive. With the number of *Roe's* stalwart defenders reduced to two, both pro-life and pro-choice camps awaited the outcome of *Planned Parenthood v. Casey* (1992). Under review was a Pennsylvania law that imposed several conditions for obtaining an abortion, including informed consent, a 24-hour waiting period, parental consent for minors, spousal consent, and record-keeping requirements for medical personnel. The decision surprised both sides in the abortion controversy. It was neither the complete victory pro-life groups had sought nor the broad defeat pro-choice forces had feared. While the Court upheld all elements of the statute except the spousal consent provision, the fifth vote to overturn *Roe v. Wade* again failed to materialize. Confessing "reservations" about the correctness of *Roe* in 1973, Justices Souter, Kennedy, and O'Connor nonetheless reaffirmed what they termed "the central holding" of *Roe*, that abortion involved a constitutionally
protected liberty that states were forbidden to burden unduly. Coupled with Roe's avowed champions Blackmun and Stevens, the alignment left Roe's avowed adversaries (White, Rehnquist, Scalia, and Thomas) in the minority.

*Stenberg v. Carhart* (2000) raised a different issue. As had 30 other states, Nebraska banned a specific late-term medical procedure which it called "partial birth" abortion. But five justices held that "the woman's right to choose" overrode the state's interests in protecting the unborn and "the partially-born," preserving the integrity of the medical profession, and "erecting a barrier to infanticide." Nebraska's law fell for two reasons. First, its wording was vague and thus imposed an undue burden by effectively prohibiting legal abortions as well. Second, the statute lacked the health exception as mandated by Roe and Casey.

In 2003, President Bush signed into law the first national ban on the same late-term abortion procedure that Nebraska had attempted to prohibit. Like Nebraska's, the **Partial Birth Abortion Ban Act** contains no exception for a woman's health. In sustaining the statute, *Gonzales v. Carhart* (2007) became the Court's first decision upholding the prohibition of a specific abortion procedure, as well as its first approval of an abortion regulation with no health exception. Led by Stenberg dissenter Kennedy, a majority of five deemed the law sufficiently specific and, more importantly, deferred to Congress finding that the procedure was never medically-necessary. Accordingly, absence of a health exception did not impose an undue burden on a woman's right to terminate her pregnancy. With Justice Alito voting to uphold a law that Justice O'Connor probably would have found invalid, *Carhart* was another reminder that presidential elections have constitutional consequences.

Combined, *Casey* and *Carhart* point to several conclusions about the constitutional status of abortion. First, abortion no longer has status as a fundamental right but has intermediate constitutional protection. Second, and as a consequence of the first, total or near-total bans on previability abortions are almost certainly unconstitutional. Third, the Court will accept restrictions on abortions that would have been quickly rejected two decades ago. However, just how numerous and how burdensome such restrictions may be, beyond the terms of the 2003 statute, still remains to be seen. Finally, more than at any time since 1973, a woman's freedom to terminate a pregnancy now depends largely on what state legislatures, Congress, and the president allow. The Court may now tolerate more regulations, but it does not require them.

**A DEVELOPING CONCEPT**

As the previous sections demonstrate, a right once acknowledged invites application to new situations. The joint opinion in *Casey* recognized as much: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." And as the Court has addressed personal autonomy in other contexts, the justices have tended to ground it more on the substantive "liberty" that derives from the due process clause, rather than, strictly speaking, on a right of privacy itself.

**FAMILIES.** At least since *Euclid v. Ambler Realty Co.* (1926), the Court has recognized the broad powers of states and localities in establishing zoning and other land use regulations. In 1974, against a claim based on privacy and other grounds, seven justices upheld a zoning ordinance in the Village of Belle Terre, New York, near the Stony Brook campus of the State University. Prohibited was occupancy of
a dwelling by more than two unrelated persons as a "family." Permitted was occupancy by any number of persons related by blood, marriage, or adoption. The Court was willing to accept the community's judgment that in "families" larger than two, relationship rather than numbers chiefly determined the quality of life in a neighborhood (Belle Terre v. Boraas).

Such deference to local authorities was not dispositive three years later in Moore v. East Cleveland. Confronting the Court was an ordinance limiting occupancy of a dwelling unit to members of a family, where a "family" included only some categories of related persons. Specifically, Inez Moore lived with her two grandsons who were cousins, a category not within East Cleveland's definition of "family." In the city's eyes, one of the grandsons was an illegal occupant. In the eyes of five justices, the city's zoning rule impermissibly trod on a constitutional right. "Our decisions establish that the Constitution protects the sanctity of the family . . . ;," wrote Justice Powell, and "prevents East Cleveland from standardizing its children—and its adults—by forcing all to live in certain narrowly defined family patterns."

As noted, Meyer v. Nebraska and Pierce v. Society of Sisters in the 1920s protected the right of parents to make decisions regarding the rearing of their children. Reaffirming that principle, Troxel v. Granville (2000) struck down a "breathtakingly broad" Washington State statute that permitted a court—subject only to the judge's determination of the child's best interests—to disregard and overturn any decision by a fit custodial parent concerning visitation, where a third party (a grandparent in this instance) affected by the decision filed a visitation petition. For Justice O'Connor's plurality opinion, "the liberty interest at issue in this case—the liberty of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court."

**THE RIGHT TO DIE.** Another aspect of autonomy concerns the refusal of medical treatment and, more recently, the choice of the manner and timing of one's death. Each is made more complex because medical technology can now sustain life well past the point where natural forces would have once brought death. The complexity is only heightened when a patient is comatose.

The seminal decision is In re Quintan (1976), in which the New Jersey Supreme Court held that the father of Karen Quinlan could approve the removal of the respirator from his daughter, who had suffered severe brain damage in an accident. In the state court's view, Karen Quinlan's right of privacy under the U.S. Constitution included the right to terminate treatment. The court dismissed her previous statements on the subject because they were both casual and equivocal. Instead, it allowed her family (subject to approval by an ethics committee) to make the decision for her. The "only practical way to prevent destruction of the right is to permit the guardian and family of Karen to render their best judgment ... as to whether she would exercise it in these circumstances."

The general liberty of the Fourteenth Amendment formed the basis of the U.S. Supreme Court's first consideration of the question. In Cruzan v. Director (1990), the Missouri Supreme Court had turned back the efforts of the parents of Nancy Cruzan to terminate artificial nutrition and hydration for their daughter, who was living in a vegetative condition following an automobile accident. Without nutrition and hydration, Nancy Cruzan would of course die. In the state court's view, because Nancy Cruzan had not complied with Missouri's "living will" statutes and because there was no "clear and convincing, inherently reliable evidence" of the patient's wishes not to continue life under such circumstances, treatment would continue. In other words, short of persuasive evidence that the patient would reject treatment if
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she could, the presumption was that she would choose treatment. (Living wills set the terms for the withdrawal or withholding of life-sustaining treatment for patients with incurable conditions when the patients are incapable of making decisions regarding their medical treatment.)

On appeal, five justices of the U.S. Supreme Court found the state's standard constitutionally acceptable. According to Chief Justice Rehnquist, a state may require "clear and convincing evidence" (as opposed to the less demanding standard of "preponderance of the evidence") of an incompetent patient's wishes to refuse medical treatment. For the four dissenting justices who regarded the liberty interest at stake as "fundamental," Missouri's requirement of heightened proof was unconstitutionally intrusive into the patient's right to refuse treatment. Cruzan was partly responsible for passage of the Patient Self-Determination Act in 1991. Under this federal law, hospital employees must ask all patients if they want to plan for their death by making a living will or by designating a health care proxy, to make decisions should they become incapacitated. (In December 1990 Nancy Cruzan died in a Missouri hospital 12 days after a feeding tube was removed under a court order requested by her parents. Following the U.S. Supreme Court's decision, the trial court concluded that the record revealed "clear and convincing evidence" of her wishes not to sustain her life artificially under the circumstances.)

As is sometimes true with a "first step" in constitutional law, Cruzan raised as many questions as it answered. Read narrowly, the decision at most acknowledged the right of a conscious and competent person to refuse medical treatment. The Court divided, after all, on the standard of proof that the state could require with respect to the wishes of a comatose patient. Read broadly, the right to refuse medical treatment was an aspect of something far more encompassing: the right to determine the timing of one's own death.

Not surprisingly, terminally ill patients and their doctors challenged laws banning assisted suicide. The courtroom debate thus shifted from the circumstances under which government could require the administration of life-sustaining nutrition and hydration (i.e., forcing a person to remain alive) to the state's authority to deny the administration of life-ending medication (i.e., forbidding the active intervention of one person in ending another's life). In Compassion in Dying v. Washington, the Ninth Circuit Court of Appeals ruled in 1995 that Washington State's ban on assisted suicide, at least with respect to physicians and terminally ill patients, violated the liberty protected by the due process clause of the Fourteenth Amendment. While falling short of a "fundamental" liberty, the Ninth Circuit deemed the liberty interest nonetheless "significant," overriding the state's interest in preserving life. In Quill v. Vacco (1996) the Second Circuit decreed the same fate for a similar statute in New York but did so on different grounds. That court saw no valid difference between competent persons who refuse treatment (thus ending their lives) and competent persons who seek treatment to end their lives. Thus, the state lacked legitimate reasons, as required by the equal protection clause of the Fourteenth Amendment, for treating similarly circumstanced or situated people differently.

In Washington v. Glucksberg and Vacco v. Quill (1997), the Supreme Court reversed both appeals courts. Denying the existence of any constitutional right to commit suicide or to seek the assistance of another in doing so, the High Court preferred to leave the difficult moral and social choices in this area to state legislatures and state courts. Nonetheless, concurring opinions indicated that as many as five justices would reject any state's attempt to block access to pain-relieving medication where its administration would hasten a patient's death.
SEXUAL ORIENTATION. A person's sexual orientation and practice also involve a
dimension of autonomy, an issue the Supreme Court squarely confronted in 1986 in
_Bowers v. Hardwick_. Five justices upheld the constitutionality of Georgia's sodomy
statute, which made criminal certain combinations of private parts. The law applied to
heterosexual as well as homosexual behavior, but Justice White's opinion of the Court,
perhaps deliberately, regarded the act as if it made only the latter criminal.

The 5-4 split revealed that no consensus existed on the Court concerning what
privacy encompassed. Since _Griswold_, privacy's "score card" in the Supreme Court had
been good. Many observers were surprised that five balked at an extension. Close reading
of Justice White's majority opinion and the principal dissent by Justice Blackmun provides
insight. To discover what rights, though not expressly mentioned, are constitutionally
protected, White looked to two sources: those "implicit in the concept of ordered liberty"
and those "deeply rooted in the nation's history and tradition." Framing the investigation in
this way, White concluded "that neither of these formulations would extend a fundamental
right to homosexuals to engage in acts of consensual sodomy." For Blackmun, the
majority asked the wrong question. The case was not "about 'a fundamental right to engage
in homosexual sodomy.' . . . Rather, this case is about 'the most comprehensive of rights . . .
the right to be let alone.' [W]hat the Court really has refused to recognize is the
fundamental interest all individuals have in controlling the nature of their intimate
associations with others." White scanned a category of rights. Blackmun focused on a
constitutionally protected realm of intimate association.

The Court revisited sexual intimacy in _Lawrence v. Texas_ (2003), which not only
invalidated a statute that criminalized same-sex sodomy but went out of its way to impugn
the intellectual integrity of White's opinion in _Bowers_.

On the basis of _Lawrence_ and Scalia's fierce dissent in that case, the Court may soon
have to confront laws defining marriage as a union only between a woman and a man. In
1999, the Vermont Supreme Court held that the common benefits clause in the state
constitution entitled same-sex couples to the legal benefits and protections offered married
couples in Vermont (Baker v. State, 1999)- The decision led the state legislature to authorize
'civil unions' that amount to ordinary marriages in everything but name. As of 2007, three
other states (Connecticut, New Hampshire, and New Jersey allow civil unions. Relying on its
state constitution, the Supreme Judicial Court of Massachusetts has gone further, ruling that
same-sex couples have a legal right to marry (Goodridge v. Dept. of Public Health, 2003).
Congress had already acted to isolate any such nuptial innovations. The Defense of
_Marriage Act_ (1996) provides that no "State, territory, or possession of the United States, or
Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding
of any other State, territory, possession, or tribe respecting a relationship between persons of
the same sex that is treated as a marriage under the laws of such other State, territory,
possession, or tribe, or a right or claim arising from such relationship. Moreover, for purposes of federal law the statute defines 'marriage' to mean 'only a legal union between one
man and one woman as husband and wife' and the word 'spouse' to refer "only to a person of
the opposite sex who is a husband or a wife."

Questions of sexual practice and orientation, like other privacy issues, will continue
to arise. Heightened sensitivity throughout the United States to issues of individual
privacy virtually guarantees a continued involvement by judges in marking the dimensions
of the constitutional right "to be let alone."