Tulsa Law Review

Volume 11 | Number 4

1976

Marijuana Prohibition and the Constitutional Right of Privacy: An Examination of Ravin v. State

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MARIJUANA PROHIBITION AND THE CONSTITUTIONAL RIGHT OF PRIVACY: AN EXAMINATION OF *RAVIN v. STATE*

INTRODUCTION

As marijuana's use increased during the 1960's, it was inevitable that the laws prohibiting its possession and use would be attacked as being unconstitutional.[1] In substance, all of the theories relied on in such cases were attempts to articulate in constitutional terms the felt proposition that there are certain activities which the government cannot validly reach; that there are substantive limitations on the legislative power to make all or some uses of marijuana criminal.[2]

The idea has been expressed in varied forms. Constitutional objections have been based on a freedom of religion claim that some uses of marijuana may not be prohibited by a state because they are essential to the exercise of a bona fide religion.[3] It has also been argued

1. Studies indicating the increasing use of marijuana in the late sixties and early seventies through the sampling of small populations are collected in J. KAPLAN, MARIJUANA—THE NEW PROHIBITION 22-26 (1970) [hereinafter cited as KAPLAN]; NATIONAL INSTITUTE ON DRUG ABUSE, HEW, MARIJUANA AND HEALTH, FOURTH REPORT TO THE UNITED STATES CONGRESS FROM THE SECRETARY OF HEALTH, EDUCATION AND WELFARE 3, 11-15 (1974). The unreliability of conclusions regarding widespread levels of marijuana use based on these studies has been suggested in Josephson, *Trends in Adolescent Marijuana Use*, in DRUG USE: EPIDEMOLOGICAL AND SOCIOLOGICAL APPROACHES 783-87 (E. Josephson & E. Carroll eds. 1974). More definite information shows the number of state marijuana arrests has risen 1000 percent between 1965 and 1970, from 18,815 to 188,682. NATIONAL COMMISSION ON MARIHUANA AND DRUG ABUSE, MARIHUANA: A SIGNAL OF MISUNDERSTANDING, FIRST REPORT OF THE NATIONAL COMMISSION ON MARIHUANA AND DRUG ABUSE app., at 612 (1972) [hereinafter cited as FIRST REPORT].

2. *The Constitutional Dimensions of Marihuana Control*, in FIRST REPORT, *supra* note 1, app. at 1123; Bonnie & Whitebread, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition*, 56 VA. L. REV. 971, 1125 (1970) [hereinafter cited as Bonnie & Whitebread]; Soler, *Of Cannabis and the Courts: A Critical Examination of Constitutional Challenges to Statutory Marijuana Prohibitions*, 6 CONN. L. REV. 601 (1974).

3. No court has found marijuana use to be protected as a religious exercise under the first amendment. Annot., 35 A.L.R.3d 939 (1971). Persons making this argument rely on People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964), which held that the sacramental use of peyote by the Native American Church was essential to bona fide worship, and that the state of California had not shown a sufficiently compelling interest to justify the abridgment of the members' freedom of religion. To distinguish *Woody* courts denying the claim of constitutional protection have used a combi-

under the equal protection clause that a state may not deal inconsistently with drugs having similar effects and that it may not treat alike drugs having different effects without rational bases for such actions.[4] Moreover, the methods which a legislature may use to punish marijuana use have been said to be restricted by the cruel and unusual punishment clause to the extent that a penalty must bear a rational relation to a crime.[5] The inherent limitation of the police power has been urged as a ground rendering unconstitutional any government regulation of an act not directly affecting the health, safety and morals of the public.[6] Of all

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nation of two approaches. Some have found the state's interests in prohibiting marijuana use great enough to outweigh the individual's right to exercise his religion, citing Reynolds v. United States, 98 U.S. 145 (1878), which held that the Mormon practice of polygamy could be prohibited constitutionally. *See, e.g.*, Gaskin v. State, 490 S.W.2d 521 (Tenn.), *appeal dismissed*, 414 U.S. 886 (1973). Many of the same courts also found that marijuana use was not essential to a bona fide religion, (*e.g.*, United States v. Kutch, 288 F. Supp. 439 (D.D.C. 1968)), and ruled in favor of the states' power to regulate marijuana use. *See, e.g.*, Leary v. United States, 383 F.2d 851, 860 (5th Cir. 1967), *rev'd on other grounds*, 395 U.S. 6 (1969). *See* Clark, *Religious Aspects of Psychedelic Drugs*, 56 CALIF. L. REV. 86 (1968); Watts, *Psychedelics and Religious Experience*, 56 CALIF. L. REV. 74 (1968); Note, *Free Exercise: Religion Goes to Pot*, 56 CALIF. L. REV. 100 (1968).

4. A number of courts have found that there is a rational basis for classifying marijuana with opiates. *See* English v. Miller, 481 F.2d 188 (4th Cir. 1973), *rev'g* 341 F. Supp. 714 (E.D. Va. 1972); Warren v. State, 288 So. 2d 817 (Ala. Crim. App. 1973); People v. Stark, 157 Colo. 59, 400 P.2d 923 (1965). *Contra*, People v. McCabe, 49 Ill. 2d 338, 275 N.E.2d 407 (1971); People v. Sinclair, 387 Mich. 91, 194 N.W.2d 878 (1972); State v. Zornes, 78 Wash. 2d 9, 475 P.2d 109 (1970). No case has held that possession of marijuana cannot be made criminal because possession of alcohol is not. *See* Annot., 50 A.L.R.3d 1159 (1973).

5. Two arguments have been advanced. One relies on Robinson v. California, 370 U.S. 660 (1962) (which held that narcotics addiction could not constitutionally be made a crime) to argue that marijuana use cannot be penalized consistently with the cruel and unusual punishment clause of the eighth amendment. No court has so held. *See, e.g.*, United States v. Thorne, 325 A.2d 764 (D.C. App. 1974), *rev'g sub nom.* United States v. Grady, 42 U.S.L.W. 2629 (Super. Ct. D.C. May 17, 1974). A second approach based on Weems v. United States, 217 U.S. 349, 367 (1910) (which held that a punishment is cruel and unusual if it is not "graduated and proportioned to the offense") has been applied to marijuana use penalties by a minority of courts to find that such statutes were unconstitutional because the sentence lengths they required were excessive. *See* Downey v. Perini, 518 F.2d 1288 (6th Cir. 1975), *vacated on other grounds*, 96 S. Ct. 419 (1975); People v. Lorentzen, 387 Mich. 167, 194 N.W.2d 827 (1972). A majority of courts have found *Weems* inapplicable because it dealt with the *type* rather than the *length* of punishment and generally have followed the rule that sentence length cannot constitute cruel and unusual punishment as long as it is within the limits prescribed by statute. *See* Gallego v. United States, 276 F.2d 914 (9th Cir. 1960); Williams v. State, 476 S.W.2d 674 (Tex. Crim. 1972); Note, *Marijuana Possession and the California Constitutional Prohibition of Cruel or Unusual Punishment*, 21 U.C.L.A.L. REV. 1136 (1974).

6. While the argument that the state does not have a legitimate interest in controlling marijuana use has received a great deal of attention from the courts, none have accepted it. *See, e.g.*, Clark v. Craven, 437 F.2d 1202 (9th Cir. 1971); Raines v. State, 225 So. 2d 330 (Fla. 1969).

these attacks the argument that marijuana laws are an unjustified invasion by a state of an individual's right of privacy brings into clearest focus the idea of a substantive limitation and provides the soundest basis in constitutional theory for a broad restriction on the exercise of the legislative power.[7]

Until the Alaska Supreme Court's decision in *Ravin v. State*,[8] no court had declared a statute outlawing the possession and use of marijuana unconstitutional because it impermissibly conflicted with the constitutional right of privacy. Despite a line of decisions that had held that possession and use of marijuana was not constitutionally protected under the right of privacy, *Ravin* should be persuasive authority for future cases in other jurisdictions. This is true even though *Ravin* ostensibly relied on the right of privacy amendment to the Alaska constitution, a provision not incorporated in most other state constitutions. To properly evaluate *Ravin* past applications of the right of privacy to marijuana prohibition statutes will be analyzed, following a brief examination of the foundation and development of the constitutional right of privacy.

SUBSTANTIVE RIGHT OF PRIVACY

The right of privacy was first recognized as a fundamental, unenumerated limitation on the states' police powers in *Griswold v. Connecticut*.[9] In invalidating a Connecticut statute making criminal the use of birth control devices, the United States Supreme Court reviewed its past decisions concerning "those peripheral rights" which limit the reach of the legislatures and "[w]ithout [which the enumerated] rights would be less secure. . . ."[10] and concluded that "specific guarantees in the Bill

7. Generally, the only successful attacks have been those challenging the *degree* of legislative action, rather than the *fact* that the legislature has acted at all. Thus, these decisions permit regulation of marijuana use if it is done properly, *e.g.*, classified in a different category from "hard narcotics" and penalized by minimal sentences. However, a finding that marijuana use is protected by the right of privacy would completely preempt legislative power to prohibit such use within the zone of protection.

8. 537 P.2d 494 (Alas. 1975).

9. 381 U.S. 479 (1965).

10. 381 U.S. at 482-83. The following examples were offered in support of this premise: Baggett v. Bullitt, 377 U.S. 360, 369 (1964) ("freedom of the entire university community" predicated on the first amendment); NAACP v. Alabama, 357 U.S. 449, 462 (1958) ("freedom to associate and privacy in one's associations" based on the first amendment); Wieman v. Updegraff, 344 U.S. 183, 195 (1952) ("freedom of inquiry, freedom of thought and freedom to teach" based on the first amendment); Martin v. Struthers, 319 U.S. 141, 143 (1943) (right "to distribute," "to receive" and "to read" found in the first amendment); Pierce v. Society of Sisters, 268 U.S. 510 (1925) ("right to educate one's children as one chooses" arising from the first amendment); Meyer v.

of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. . . . Various guarantees create zones of privacy".[11]

The Court suggested that these zones of privacy emanate from the first, third, fourth, fifth and ninth amendments and establish limits on the use of governmental power to intrude upon an individual's life.[12] For example, the penumbral rights mapped out by the fourth and fifth amendments together provide "protection against all government invasions 'of the sanctity of a man's home and the privacies of life' "[13] which transcends the specific guarantees of reasonable search and seizure and due process. And the fourth amendment standing alone adumbrates a "right to privacy, no less important than any other right carefully and particularly reserved to the people."[14]

Applying these concepts to the facts of *Griswold*, the Court found that the "privacy surrounding the marriage relationship" fell within one of the protected zones, because the marital association antedated and was unrelated to public affairs.[15] Furthermore, the protection was not

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Nebraska, 262 U.S. 390 (1923) (right of access to the "spectrum of available knowledge" implied in the first amendment).

11. 381 U.S. at 484 (citation omitted).

12. *See id.* at 484-85. For the importance of *Griswold* see Henkin note 15 *infra*.

13. 381 U.S. at 484, *quoting* Boyd v. United States, 116 U.S. 616, 630 (1885).

14. 381 U.S. at 485, *quoting* Mapp v. Ohio, 367 U.S. 643, 656 (1961).

15. 381 U.S. at 485. Justice Douglas, writing for the majority, did not indicate which of these amendments he relied on primarily. But he suggested that the right of marital privacy had a constitutional foundation different from the first amendment right of association. Unlike the right of association, marital privacy is not a necessary adjunct to a democratic form of government, even though its absence would signal totalitarianism; marital privacy is protected because it is an aspect of life in which the government should not interfere:

> 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 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.

381 U.S. at 486.

Justice Goldberg, concurring, found marital privacy to be a right retained by the people within the meaning of the ninth amendment. Justices White and Harlan also concurred, finding that Connecticut had denied married persons liberty without due process of law guaranteed by the fourteenth amendment. Despite the lack of agreement on the theoretical basis for the opinion among the members of the Court, seven of them found a fundamental, unenumerated right of privacy.

The importance of *Griswold* was noted in Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410 (1974) [hereinafter cited as Henkin]:

> Whatever grade the professors might give to Justice Douglas and others for their performance in the art of constitutional interpretation, the result is clear:

limited to the relationship itself, but might also extend to a place connected with it. Thus, a penumbral right would be violated if the law permitted "the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives . . . ."[16] Even though it dealt wtih an otherwise valid state interest, the statute was ruled unconstitutional because it "swept unnecessarily broadly," invading both of these protected zones. In two series of cases the Supreme Court has developed the latent rationale of *Griswold*, recognizing two related zones of privacy, *locus-related* and *autonomy-related privacy*, which prohibit state interference with an individual's life absent a compelling state interest.[17]

A *locus-related right of privacy* has been held to protect activities within the home that would otherwise be valid objects of state regulation. The idea that the setting in which a regulated activity occurs may operate as a limitation on the police power has been applied primarily in obscenity cases. The doctrine was first established in *Stanley v. Georgia*[18] and was later refined by *Paris Adult Theatre I v. Slaton*[19] and other recent obscenity cases.[20]

In *Stanley* the Court declined an opportunity to reverse Stanley's conviction for knowing possession of obscene movies in his home on grounds that well-established search and seizure requirements had been violated.[21] Instead, the decision held that the state could not constitutionally prohibit the possession of obscene materials in the home for

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it is no longer necessary to eke out privacy in small pieces as aspects of other constitutional rights; *there is now a Constitutional Right of Privacy.*

Id. at 1423 (emphasis added).

16. 381 U.S. at 486.

17. The distinction is not merely one of academic interest. Failure to perceive the difference between the two types of privacy has resulted in incomplete treatment of privacy challenges in several marijuana cases; the resolution of one issue was assumed to have disposed of the entire question. *See* text accompanying notes 77-87 *infra.*

The Supreme Court in Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973), distinguished the two types of privacy:

> The protection afforded by *Stanley* . . . is restricted to a *place*, the home. In contrast, the constitutionally protected privacy of family, marriage, motherhood, procreation, and child rearing is not just concerned with a particular place, but with a *protected intimate relationship.* Such protected privacy extends to the doctor's office, the hospital, the hotel room, or as otherwise required to safeguard the right to intimacy involved.

Id. at 66 n.13 (citation omitted) (emphasis added). Note, *On Privacy: Constitutional Protection for Personal Liberty*, 48 N.Y.U.L. REV. 670 (1973).

18. 394 U.S. 557 (1969).

19. 413 U.S. 49 (1973).

20. United States v. Orito, 413 U.S. 139 (1973); United States v. 12,200-Ft. Reels of Super 8mm Film, 413 U.S. 123 (1973); United States v. Thirty-Seven Photographs, 402 U.S. 363 (1971); United States v. Reidel, 402 U.S. 35 (1971).

21. 394 U.S. at 569 (Stewart, J., concurring).

private use.[22] This substantive limitation on the police power was based on a fundamental right to receive information in the home, emanating from the first amendment and the twofold right of privacy outlined in *Griswold*.[23]

The Court found that control of private thoughts was not a valid state interest, even though control of the public dissemination of ideas "inimical to the public morality" might be.[24] While the state may have had a valid purpose in enacting the statute, neither of the interests advanced by the state—the danger of anti-social conduct and the increased difficulty of prohibiting public distribution of obscenity—were found to be *sufficiently compelling* to justify the restriction on the fundamental right to receive ideas in the privacy of the home that the Georgia obscenity statute authorized.[25] In footnote eleven the Court indicated that its holding was limited to the facts because of the presence of first amendment interests:

> What we have said in no way infringes upon the power of the State or Federal Government to make possession of other items, such as narcotics, firearms, or stolen goods, a crime. Our holding in the present case turns upon the Georgia statute's infringement of fundamental liberties protected by the First and Fourteenth Amendments. No First Amendment rights are involved in most statutes making mere possession criminal.[26]

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22. Five Justices joined in the majority opinion which rested on this ground. However, three concurring Justices agreed with the result only because search and seizure requirements had been violated. And Justice Black, concurring, based his opinion exclusively on the first amendment.

23. 394 U.S. at 564-65.

24. 394 U.S. at 566. For example, "the danger that obscene material might fall into the hands of children . . . or that it might intrude upon the sensibilities or privacy of the general public . . . ." would be state interests sufficient to justify prohibition of obscene matter in a public context. *Id.* at 567.

25. *Id.* at 566-68. The Court observed:

> Georgia asserts that exposure to obscene materials may lead to deviant sexual behavior or crimes of sexual violence. There appears to be little empirical basis for that assertion. . . . [T]he State may no more prohibit mere possession of obscene matter on the ground that it may lead to antisocial conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits. . . .
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> . . . [The] difficulties of proving an intent to distribute . . . . [do not] . . . justify infringement of the individual's right to read and observe what he pleases. Because that right is so fundamental to our scheme of individual liberty, its restriction may not be justified by the need to ease the administration of otherwise valid criminal laws.

Id. (citations omitted).

26. *Id.* at 568 n.11.

Despite this dictum, the Court in subsequent obscenity decisions has withdrawn *Stanley's* first amendment underpinnings.[27] In *Paris Adult Theatre I* where it was held that obscene movies in public theaters were not exempted from state regulation under the right of privacy found in *Stanley*, the Court observed:

> If obscene material unprotected by the First Amendment in itself carried with it a "penumbra" of constitutionally protected privacy, this Court would not have found it necessary to decide *Stanley* on the narrow basis of the "privacy of the home," which was hardly more than a reaffirmation that "a man's home is his castle."[28]

Following similar reasoning other decisions have made clear the principle that the right of privacy does not protect the possession of obscene material outside the home and that the constitutional protection given such possession in the home arises not from the nature of the activity, but as a result of the context in which it occurs.[29] If the cases subsequent to *Stanley* were attempting to clarify what they considered to be a good decision, rather than to implicitly overrule a bad one, then the

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27. The retreat was necessary since an extension of *Stanley* based on a fundamental right to receive, in effect, would have overruled the Court's position in Roth v. United States, 354 U.S. 476 (1957), that obscenity is not expression protected by the first amendment. In order to harmonize *Stanley* with *Roth* the Court had to delete *Stanley's* first amendment base.

28. 413 U.S. at 66. In United States v. 12,200-Ft. Reels of Super 8mm Film, 413 U.S. 123, 126 (1973), the idea was restated: "*Stanley* depended, *not on any First Amendment right* to purchase or possess obscene materials, *but on the right to privacy in the home.*" (Emphasis added.)

29. These cases indicate that *Stanley* was not based on *autonomy-related privacy*. Thus, the Court has been able to consistently hold that a right to possess pornography in the home does not give rise to a right to possess it outside of the home. United States v. Orito, 413 U.S. 139, 141-43 (1973) (no right to transport obscene matter in interstate commerce); United States v. 12,200-Ft. Reels of Super 8mm. Film, 413 U.S. 123, 126-29 (1973) (no right to import obscene material for the importer's private use); United States v. Thirty-Seven Photographs, 402 U.S. 363, 376-77 (1971) (no right to import obscene matter for commercial purposes); United States v. Reidel, 402 U.S. 351, 355 (1971) (no right to distribute obscene materials through the mail).

Furthermore, the language of these cases reveals the Court's understanding that *Stanley* was based on a *locus-related right of privacy*. *See* United States v. 12,200-Ft. Reels of Super 8mm Film, 413 U.S. 123, 126-27 (1973); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 66-67 (1973). In United States v. Orito, 413 U.S. 139 (1973) the Court said:

> The Constitution extends special safeguards to the privacy of the home, just as it protects other special privacy rights such as those of marriage, procreation, motherhood, child rearing, and education. . . . [V]iewing obscene films in a commercial theater . . . or transporting such films in common carriers in interstate commerce, has no claim to such special consideration. *It is hardly necessary to catalog the myriad activities that may be lawfully conducted within the privacy and confines of the home, but may be prohibited in public.*

Id. at 142-43 (citation and footnotes omitted) (emphasis added).

effect has been to recognize a locus-related right of privacy that is a substantive limitation on the states' power to regulate activity within the home in the absence of a demonstrable compelling state interest.

The other type of privacy foreshadowed in *Griswold, autonomy-related privacy*, has been developed through several cases which have held that the government may not interfere with activities affecting individuality which are not sufficiently public to justify government regulation—that there is a fundamental, unenumerated right to make decisions concerning one's personal life.[30] The Supreme Court explicitly recognized an autonomy-related right of privacy in *Roe v. Wade*.[31]

In *Roe* it was held that a right of privacy protects a woman's choice of whether or not to terminate her pregnancy and that her decision could not constitutionally be restricted by a state absent some compelling interest.[32] Thus, the Texas criminal statutes that prohibited abortions except for the purpose of saving the life of the mother were void on their face because they were unconstitutionally vague and overbroad. However, the Court cautioned that the right of privacy protects only a limited group of activities: "These decisions [recognizing a constitutional right of privacy] make it clear that only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' . . . are included in this guarantee of personal privacy."[33]

Thus far, autonomy-related privacy has been extended only to

30. *See* notes 34-38 *infra* and accompanying text; A. Doss & D. Doss, *On Morals, Privacy, and the Constitution*, 25 U. MIAMI L. REV. 395, 410, 414-19 (1971); Note, *On Privacy: Constitutional Protection for Personal Liberty*, 48 N.Y.U.L. REV. 670, 719-43, 760-70 (1973).

31. 410 U.S. 113 (1973).

32. *Id.* at 153-54. In contrast with the lack of consensus about the theoretical basis for the *Griswold* decision (*see* note 15 *supra*), seven Justices in *Roe* agreed that the right of privacy arose from the fourteenth amendment, and the decision intimated that the presence or absence of agreement on this point was of secondary importance:

> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.

410 U.S. at 153. The Court, rejecting the argument "that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses . . . ." found that the state had a compelling interest in regulating abortions for the purposes of protecting the health of the mother after the first trimester of pregnancy—when the probability of mortality in normal childbirth becomes greater than the probability of mortality in abortion—and of protecting potential life after the fetus becomes viable. *Id.* at 153, 163.

33. *Id.* at 152 (citation omitted).

protect individual decisions concerning contraception,[34] education,[35] clothing and hair length,[36] child rearing[37] and family relationships.[38] The principle established by these cases is that there is a substantive limitation on governmental power to regulate certain personal activities which are private in the sense that if left unregulated they effect no significant public harm when such regulation would deny an individual meaningful self-control.

THE POLICE POWER AND FUNDAMENTAL RIGHTS: THE SIGNIFICANCE OF THE BURDEN OF PROOF IN JUDICIAL REVIEW OF MARIJUANA PROHIBITION

The state's authority to prohibit the use and possession of marijuana is derived from the police power—the inherent plenary power of the state to protect the health, safety, welfare and morals of society.[39] The police power is broad but exists only to the extent that a public benefit results from its exercise.[40] Since a legislature could exceed the inherent limitations of its authority under the police power, due process has been interpreted as requiring state statutes to be rationally related to

34. Eisenstadt v. Baird, 405 U.S. 438 (1972).

35. *See* Baggett v. Bullitt, 377 U.S. 360 (1964) ("freedom of the entire university community" based on the first amendment); Wieman v. Updegraff, 344 U.S. 183 (1952) ("freedom of inquiry, freedom of thought and freedom to teach" based on the first amendment); Martin v. Struthers, 319 U.S. 141 (1943) (right "to distribute," "to receive" and "to read" found in the first amendment); Meyer v. Nebraska, 262 U.S. 390 (1923) (right of access to the "spectrum of available knowledge" implied in the first amendment).

36. Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969), *cert. denied*, 398 U.S. 937 (1970) (right of privacy protects high school student's decision to wear long hair). *Contra*, Freeman v. Flake, 448 F.2d 258 (10th Cir. 1971), *cert. denied*, 405 U.S. 1032 (1972).

37. *See* Pierce v. Society of Sisters, 268 U.S. 510 (1925) ("right to educate one's children as one chooses" based on the first amendment).

38. *See* Loving v. Virginia, 388 U.S. 1 (1967) ("fundamental freedom to marry" protected by the due process clause); Prince v. Massachusetts, 321 U.S. 158 (1944) ("private realm of family life which the state cannot enter" recognized in dicta); Norton v. Macy, 417 F.2d 1161 (D.C. Cir. 1969) (right of privacy limits civil service's power to fire persons for private homosexual conduct); Cotner v. Henry, 394 F.2d 873 (7th Cir.), *cert. denied*, 393 U.S. 847 (1968) (sodomy between consenting adults protected by the right of privacy). *In re* Labady, 326 F. Supp. 924 (S.D.N.Y. 1971) (right of privacy prohibits Immigration and Naturalization Service from denying citizenship for private homosexual acts). *But see* Doe v. Commonwealth's Attorney, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd per curiam*, 44 U.S.L.W. 3543 (U.S. March 29, 1976) (sodomy between consenting adults in the home not protected by right of privacy).

39. Nebbia v. New York, 291 U.S. 502, 524 (1933); Jacobson v. Massachusetts, 197 U.S. 11, 24-25 (1905); Note, *The Police Power in Illinois: The Regulation of Private Conduct*, 1972 U. ILL. L. REV. 158, 159.

40. West Coast Hotel Co. v. Parrish, 300 U.S. 379, 391 (1937); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925).

a valid police power objective.[41] The police power is also extrinsically limited by specific constitutional guarantees.[42]

Absent a showing that a statute infringes a fundamental right, courts have deferred to the legislature's role as fact finder when statutes are attacked as being unconstitutionally violative of substantive due process. A statute is presumed to be constitutional and the burden of proof is on the person attacking the statute to show that it is arbitrary or bears no rational relation to the public welfare.[43] This burden is not met if the state can establish that any public benefit arguably results from the statute.[44]

When an individual is able to show that an exercise of the police power infringes a fundamental right, the presumption that the statute is constitutional evaporates. In such a case the burden of proof shifts to the state to show that the statute "promotes a compelling government interest"[45] and "there is no reasonable way to achieve those goals with a lesser burden on the constitutionally protected activity."[46]

Recently the traditional two-tiered doctrine of judicial review has been criticized for its inflexibility. Critics argue that courts considering the validity of statutes which purportedly infringe nonenumerated constitutional rights are forced to choose between virtually preempting legislative power without express authority and "[abdicating their] role as the interpreter[s] of basic constitutional principles."[47] To correct this dilemma, two versions of an intermediate standard of review have been advocated. Under the first, no presumption of constitutionality would attach to the regulation of noncommercial activities; if the state could show that the regulation *in fact* furthered legitimate state goals, the statute would be valid.[48] The second standard would require in addi-

41. Goldblatt v. Town of Hempstead, 369 U.S. 590, 594-96 (1962), *citing* Lawton v. Steele, 152 U.S. 133, 137 (1894).

42. *See* notes 45-46 *infra* and accompanying text.

43. *E.g.*, Salsburg v. Maryland, 346 U.S. 545, 553 (1954).

44. *E.g.*, United States v. Carolene Products Co., 304 U.S. 144, 154 (1938) (applicability of standard limited in dictum to the evaluation of "regulatory legislation affecting ordinary commercial transactions").

45. Roe v. Wade, 410 U.S. 113, 155 (1973); Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

46. Dunn v. Blumstein, 405 U.S. 330, 343 (1972); Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

47. Nowak, *Realizing the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral and Permissive Classifications*, 62 GEO. L.J. 1071, 1096 (1974); notes 48-49 *infra*.

48. *Id.* at 1081-82; Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 20-24 (1972).

tion that the state show that its interests in enforcing the statute outweigh those of the individual.[49] Authorities urging the adoption of the intermediate standard find support in Supreme Court cases which strictly apply the rational relation test.[50]

Establishing that a statute is not rationally related to the public health, safety, welfare and morals is difficult when the statute is presumed constitutional, since every activity affects those interests to some extent. In the case of marijuana prohibition, there is a sufficient basis for finding that such laws arguably protect public interests in at least two ways and are therefore valid if reviewed under the rational relation standard. First, marijuana prohibition could be justified by the argument that it directly affects the health of anyone who uses it. Even though a few courts have found, in other contexts, that the state has no legitimate interest in preventing individuals from causing themselves harm,[51] the majority have found sufficient justification for such laws in the social detriment that results from individual debilitating acts.[52] Second, prohibition of all marijuana might be justified by the indirect public detriment it caused in limited instances. Thus, without main-

49. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 98-110 (1973) (Marshall, J., dissenting); Comment, *Equal Protection in Transition: An Analysis and a Proposal*, 41 FORDHAM L. REV. 605, 622-631 (1973).

50. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677 (1973); Jackson v. Indiana, 406 U.S. 715 (1972); Reed v. Reed, 404 U.S. 71 (1971).

51. *E.g.*, American Motorcycle Ass'n v. Davids, 11 Mich. App. 351, 158 N.W.2d 72 (1968).

52. *See, e.g.*, Borras v. State, 229 So. 2d 244 (Fla. 1969), which found the regulation of marijuana to be a valid exercise of the police power:

> "[I]t is to the interest of the state to have strong, robust, healthy citizens, capable of self-support, of bearing arms, and of adding to the resources of the country." Since marijuana, in addition to harming the individual, is a threat to society as a whole, we have no difficulty in upholding its prohibition by the state.

Id. at 246.

As a practical matter if this sort of argument is accepted the category of activities which do not affect society is eliminated and any activity which "lessen[s] the full development of an individual's perfection" may be regulated within the police power. Kaplan, *The Role of the Law in Drug Control*, 1971 DUKE L.J. 1065, 1070. The problems that this principle creates are illustrated by a hypothetical used by Oteri & Silvergate, *The Pursuit of Pleasure: Constitutional Dimensions of the Marihuana Problem*, 3 SUFFOLK L. REV. 55, 56 (1968) [hereinafter cited as Oteri & Silvergate]. The authors suggest that because there is no limitation placed on the kind of harms that can be used to justify police power legislation, a state's prohibition of Beethoven's music could be held constitutional, since a legislature could conclude that the measure was necessary to avoid the violent reactions that the music caused in some. A rational relation standard of justification would be applied since listening to Beethoven is not a right fundamental to the American concept of ordered liberty requiring the state to establish a compelling interest to justify its infringement. The rational relation standard would be satisfied by the minute public harms sought to be avoided by the legislature.

taining that the drug itself affected individuals' health, the state could argue that the short term loss of motor control that it causes creates a danger of a person driving while under the influence of the drug and that this danger justifies complete prohibition. Because in both cases there is some evidence to support the conclusion that marijuana poses a public threat and total prohibition is not an irrational way of dealing with that danger, either argument would validate such a statute.

While present knowledge would not support a finding that prohibition of marijuana in order to protect the public welfare is irrational, it is questionable whether it would be sufficient to justify such laws under a standard of review more stringent than the rational relation test.[53] Thus, the validity of marijuana laws is determined by the burden of proof required of the state; unless the fundamental right or immediate standards of review are applied to marijuana laws, they will be upheld. Because courts have largely rejected attempts to show that other established constitutional doctrines require marijuana laws to be subject to a strict standard of review,[54] the developing constitutional right of privacy is significant as a possible vehicle for invalidating such laws. If a court dealing with a privacy attack determined that an aspect of marijuana use was protected by a zone of privacy, the state would have the burden of showing that its infringement of the right was the least restrictive means of furthering a compelling state interest.

PRIVACY V. MARIJUANA PROHIBITION: THE JUDICIAL TREATMENT OF THE CONFLICT

Other than *Ravin* no court has held that a state could not prohibit private possession and use of marijuana because a right of privacy would be violated. Rejection of the privacy argument has taken varied forms, but no case has given the argument extensive treatment.

In several cases no rationale was given for the conclusion that marijuana possession is not protected by the right of privacy; these

53. *See* State v. Baker, — Hawaii —, 525 P.2d 1394, 1402-06 (1975) (Kobayashi, J., dissenting) (presumption that marijuana prohibition is constitutional rebutted by defendant's evidence that marijuana is not sufficiently harmful to rationally justify the imposition of criminal sanctions for mere possession); State v. Knatner, 53 Hawaii 327, 493 P.2d 306, 313-18 (Levinson, J., dissenting) (state unable to establish compelling interest justifying prohibition of marijuana for personal use); People v. Sinclair, 387 Mich. 91, 194 N.W.2d 878, 879 (1972) (Kavanagh, J., concurring) (state unable to establish compelling interest justifying prohibition of marijuana for personal use); Bonnie & Whitebread, *supra* note 2, at 1152 (state unable to establish rational scientific basis for marijuana legislation).

54. *See* notes 2-6 *supra.*

courts simply held that no right to possess and use marijuana existed and that the Supreme Court privacy cases were inapplicable.[55] While little can be said about such an approach, the brevity of the treatment suggests that these courts not only considered the right of privacy in general to be somewhat suspect, but also assumed that the argument was not seriously offered by defendant. This approach is especially surprising since these cases were decided after *Griswold* and *Stanley*.

A similar problem of interpretation is created by cases whose opinions do not make clear whether the basis of a constitutional attack can be correctly characterized as the right of privacy.[56] Typically it is alleged that marijuana prohibition infringes "personal liberty" or "happiness" and no authority is cited. Understandably the disposition of such arguments has been no more rigorous than the attack, making it difficult to determine just what the court decided.

At least one court has handed down a sufficiently explicit opinion to conclude that its result was based on a misunderstanding of the right of privacy. In *Scott v. United States*[57] defendant appealed his conviction for possession of fertile marijuana seeds, arguing that the District of Columbia Narcotic Drug Act violated substantive due process. Amicus curiae argued, *inter alia*, that the "rights of privacy . . . afforded a right to the personal use of marijuana . . . ."[58] and that the statute was unconstitutional because it infringed that right. The court affirmed the conviction because the scant evidence offered by both sides at trial was "a very slender basis . . . for declaring an Act of Congress unconstitutional . . . ."[59] In the absence of evidence to support the allegations of unconstitutionality, the traditional presumption of rationality was found sufficient to uphold the statute.

Failing to decide whether marijuana use fell within a zone of privacy, the court begged the privacy challenge. Its failure was not justified by the lack of trial evidence, since the scope of a zone of privacy is a question of law. The court's avoidance of the issue may have resulted from a confusion of the right of privacy and substantive due process. Even though the court characterized amicus' theories as

55. *See* Kreisher v. State, 319 A.2d 31 (Del. 1974); Gaskin v. State, 490 S.W.2d 521 (Tenn.), *appeal dismissed*, 414 U.S. 886 (1973); Miller v. State, 458 S.W.2d 680 (Tex. Crim. App. 1970).

56. *See* State v. Deschamps, 105 Ariz. 530, 468 P.2d 383 (1970); People v. Glaser, 238 Cal. App. 2d 819, 48 Cal. Rptr. 427 (1965), *cert. denied*, 385 U.S. 880 (1966).

57. 395 F.2d 619 (D.C. Cir.), *cert. denied*, 393 U.S. 986 (1968).

58. *Id.* at 620.

59. *Id.*

"different" from those of the defendant, it apparently felt that the privacy argument was sufficiently similar to the due process argument for the rational basis test to be the appropriate litmus of both.

While it is difficult to extract from the language of their opinions the factors that actually persuade courts, several decisions appear to have failed to distinguish adequately due process and the right of privacy.[60] The courts in those cases took the step omitted by *Scott* and concluded that marijuana use and possession were not protected by the right of privacy. However, their refusal to extend the right of privacy was supported by a finding that regulation of marijuana was a proper object of the police power. Since the question of the applicability of the right of privacy arises *only if* an activity is properly regulated under the police power,[61] these cases were based at least in part on irrelevant considerations.

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60. *See, e.g.*, Borras v. State, 229 So. 2d 244 (Fla. 1969), *cert. denied*d, 400 U.S. 808 (1970); State *ex rel.* Scott v. Conaty, 187 S.E.2d 119 (W. Va. 1972). *See also* State v. Workman, 186 Neb. 467, 183 N.W.2d 911 (1971) (possession of depressant and stimulant drugs not protected by right of privacy because the state has a legitimate interest in prohibiting the possession of narcotics).

61. The right of privacy is a substantive limitation on the police power. The substantive due process argument makes the distinct assertion that the police power is not validly exercised in a particular instance. When determining whether the right of privacy protects an activity, the issue is the importance of that activity under our system of government. When evaluating a claimed violation of substantive due process inquiry is focused on the social effects of the activity. *See* notes 30, 40, 52 *supra* and accompanying text.

Even though the arguments are distinct, confusion of privacy and substantive due process is understandable since both attack legislative authority to regulate an activity. Henkin suggests a reason for this similarity; he argues that the right of privacy developed as an imperfect substitute for substantive due process, as the latter was abandoned by the Supreme Court. Henkin, *supra* note 15, at 1419.

The functional similarity of the arguments is seen when modern privacy decisions are compared with older cases which held that it was beyond the inherent limitations of the police power to prohibit possession of alcohol for individual use:

> [T]he question of what a man will drink, or eat, or own, provided the rights of others are not invaded, is one which addresses itself alone to the will of the citizen. It is not within the competency of government to invade the privacy of a citizen's life and to regulate his conduct in matters in which he alone is concerned . . . .

Commonwealth v. Campbell, 133 Ky. 501, 117 S.W. 383, 385 (Ct. App. 1909). The reasoning and result are virtually indistinguishable from an application of locus-related privacy; the protection offered by both theories is overcome if an act is shown to have a significant impact on the public welfare. These cases would not reach the same result today because the requirement of a significant impact has been all but eliminated by the presumption of constitutionality given statutes attacked as violative of substantive due process. *See* text accompanying notes 44 and 52 *supra*; note 72 *infra*.

The identity of the arguments is asserted by authorities who argue that *Roe* represents a misapplication of substantive due process, because it shifted the burden of proof to the state in a case where the Constitution did not require it. Thus, in their view *Roe* can only be interpreted as improperly holding that first trimester abortions do not sufficiently affect the public welfare to be proper objects of regulation. Ely, *The Wages*

Other courts which distinguish the right of privacy and the police power arguments have uniformly rejected the contention that the use and possession of marijuana is protected as an aspect of autonomy-related privacy. In reaching this result, these courts did little more than repeat the Supreme Court's privacy tests in the negative. In *Commonwealth v. Leis*[62] the court applied the *Griswold* test and anticipated *Roe*:

> No such right [to smoke marijuana] exists. It is not specifically preserved by either Constitution. The right to smoke marijuana is not . . . "necessary to an Anglo-American regime of ordered liberty". . . . It is not within a "zone of privacy" formed by "penumbras" of the First, Third, Fourth, and Fifth Amendments and the Ninth Amendment of the Constitution of the United States. . . . The defendants have no right, fundamental or otherwise, to become intoxicated by means of the smoking of marijuana.[63]

In *State v. Kantner*[64] the court, fearful of becoming a "super-legislature," found that the right to smoke marijuana was not fundamental under *Griswold* because it was not "essential . . . for the exercise of the specifically enumerated rights."[65]

One case has held that a general right-to-privacy amendment to a state constitution did not protect possession and use of marijuana. In *Baker v. State*,[66] defendants appealing their conviction for possession of less than an ounce of marijuana argued, *inter alia*, that they had a right to smoke marijuana under *Roe, Griswold, Eisenstadt v. Baird*,[67] and the privacy amendment to the Hawaii constitution.[68] *Griswold* and *Eisenstadt* were found inapplicable since "the [contraceptive] statutes struck down had as their object the dictating of the lifestyle of the individual, not the prevention of harm."[69] Apparently *Roe* was also distinguished on its facts; the case's holding was summarized but its relation to marijuana prohibition was not made clear. The right-to-privacy amendment was held to forbid only "unreasonable invasions of privacy" which

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of Crying Wolf: A Comment on Roe v. Wade, 82 YALE L.J. 920, 935-43 (1973) [hereinafter cited as Ely]; Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159, 170-85; Vieira, *Roe and Doe: Substantive Due Process and the Right of Abortion*, 25 HASTINGS L.J. 867, 870-77 (1974).

62. 243 N.E.2d 898 (Mass. 1969), *aff'g* 3 SUFFOLK L. REV. 23 (Super. Ct. 1968).

63. 243 N.E.2d at 903-04 (citation omitted).

64. 53 Hawaii 327, 493 P.2d 306, *cert. denied*, 409 U.S. 948 (1972).

65. *Id.* at —, 493 P.2d at 310 (footnote omitted).

66. — Hawaii —, 535 P.2d 1394 (1975).

67. 405 U.S. 438 (1972) (right of privacy alternate basis for holding prohibition of nonprofessional distribution of contraceptives unconstitutional).

68. HAWAII CONST. art. I, § 5.

69. — Hawaii at —, 535 P.2d at 1401.

did not include the regulation of drugs. In addition, the court found that the amendment was not intended to create fundamental rights. In reaching this result the court rejected the rationale of an Alaskan case[70] which held that a similar amendment created a fundamental zone of privacy protecting the ingestion of food, beverages or other substances.[71]

Thus, courts have held that possession and use of marijuana is not in itself protected as an aspect of autonomy-related privacy because it is not the sort of activity entitled to the highest constitutional protection. Regardless of the cogency of the cases' rationales,[72] this result seems justified under the analysis of the Supreme Court decisions. The right to use and possess marijuana is clearly less important than the rights protected in those cases.[73]

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70. Gray v. State, 525 P.2d 524 (Alas. 1974). In *Gray* the Alaska Supreme Court avoided the question of whether the Federal Constitution's right of privacy protected the use and possession of marijuana but found that the Alaska constitution's right-to-privacy amendment did shield the ingestion of marijuana, and remanded the case to determine whether the state had established a compelling interest justifying the prohibition of marijuana. While the case was on remand *Ravin* was decided. It is likely that *Ravin* overruled *Gray's* extension of autonomy-related privacy. *See* note 88 *infra.*

71. *Id.* at 528.

72. Several cases which refused to find that marijuana possession and use was protected as an aspect of autonomy-related privacy relied on Supreme Court decisions which validated state statutes prohibiting possession of alcoholic beverages. *E.g.*, People v. Aguilar, 257 Cal. App. 2d 597, 65 Cal. Rptr. 171, 175, *cert. denied*, 393 U.S. 970 (1968); Commonwealth v. Leis, 243 N.E.2d 898, 904 (Mass. 1969), *aff'g* 3 SUFFOLK L. REV. 23 (Super. Ct. 1968). These cases held that such regulations were necessary incidents to other valid exercises of the police power, *i.e.*, regulation of the *sale* of alcohol, and that "the right to hold intoxicating liquors for personal use is not one of those fundamental privileges . . . which no State may abridge." Crane v. Campbell, 245 U.S. 304, 308 (1917).

In spite of the similarity of the prohibition of alcohol to modern marijuana laws, there are several reasons why the alcohol cases are not strong authority for denying the privacy claim. First, the issue in those cases was whether the prohibition of mere posession of alcohol was beyond the inherent limitations of the police power; the distinct privacy question was not considered. *See* note 61 *supra.* Second, since the two-tiered test of judicial review had not yet evolved, "fundamental" was not intended to evoke its modern technical connotations. Finally, the necessary-incident-to-other-valid-regulations argument on which the alcohol cases rested has been held by the Supreme Court not to justify the regulation of an activity protected by the right of privacy. *See* note 25 *supra;* Wallenstein, *Marijuana Possession as an Aspect of the Right of Privacy*, CRIM. LAW BULL. 59, 77-78 (1968) [hereinafter cited as Wallenstein].

73. *E.g.*, State v. Kantner, 53 Hawaii 327, 493 P.2d 306, 310, *cert. denied*, 409 U.S. 948 (1972). *Contra, id.* at —, 493 P.2d at 313 (Levinson, J., dissenting); People v. Sinclair, 387 Mich. 91, 194 N.W.2d 878, 896 (1972) (Kavanagh, J., concurring); Town, *Privacy and the Marijuana Laws*, in THE NEW SOCIAL DRUG 118 (D. Smith ed. 1970); Boyko & Rotburg, *Constitutional Objections to California's Marijuana Possession Statute*, 14 U.C.L.A.L. REV. 773, 791-95 (1967); Oteri & Silvergate, *supra* note 52, at 67; Wallenstein, *supra* note 72; Weis & Wizner, *Pot, Prayer, Politics and Privacy: The Right to Cut Your Own Throat in Your Own Way*, 54 IOWA L. REV. 709 (1969); Note, *Marijuana Laws: A Need for Reform*, 22 ARK. L. REV. 359, 372 (1968); Note, *Substantive Due Process and Felony Treatment for Pot Smokers: The Current Conflict*, 2 GA. L.

The argument that certain aspects of marijuana use and possession are protected by locus-related privacy has not been accepted in any case other than *Ravin*. Most of the courts faced with the issue have uncritically relied on footnote eleven of *Stanley*,[74] in which the Court stated that the decision, ostensibly based in part on freedon of speech, was inapplicable to activities such as possession of narcotics not involving the reception of information and ideas. Distinguishing *Stanley* from the marijuana privacy claim, these courts did little more than quote the footnote, apparently feeling that nothing more need be said. Only one court has bothered to formulate the alleged first amendment interest it was rejecting. In *State v. Renfro*,[75] *Stanley* was found inapplicable to marijuana because "the Supreme Court has never intimated that freedon of speech attaches to chemical substances which physically affect the workings of the brain, or that the ingestion of such substances involves the reception of 'information or ideas'."[76]

The interpretation of *Stanley* protection as a hybrid of locus- and autonomy-related privacy—its existence dependent on *both* the nature of the activity protected and the place where it occurs—was made less defensible by *Paris Adult Theatre I*. After *Paris Adult Theatre I*, *Stanley* could also be seen as having protected possession of obscenity solely because it occurred within a zone of autonomy-related privacy.[77] However, with the exception of *Ravin*, no court has considered the second interpretation, even after *Paris Adult Theatre I* was decided. *Louisiana Affiliate of National Organization for Reform of Marijuana Laws v. Guste*[78] illustrates judicial treatment of the locus-related privacy challenge.

REV. 247, 252-69 (19668); Note, *Marijuana and the Law: The Constitutional Challenges to Marijuana Laws in Light of the Social Aspects of Marijuana Use*, 13 VILL. L. REV. 851, 861-68 (1968). The following decisions, while holding that there is no fundamental right to sell marijuana or possess it for sale, suggest that a contrary result might obtain in the case of possession for private consumption: United States v. Kiffer, 477 F.2d 349, 352 (2d Cir. 1973); United States v. Maiden, 355 F. Supp. 743, 746-47 (D. Conn. 1973); People v. Alexander, 56 Mich. App. 400, 223 N.W.2d 750, 752 (1972).

74. *See* United States v. Drotar, 416 F.2d 914 (5th Cir. 1969), *vacated on other grounds*, 402 U.S. 939 (1971); Louisiana Affiliate of Nat'l Organization for Reform of Marijuana Laws v. Guste, 380 F. Supp. 404 (E.D. La. 1974), *aff'd mem.*, 511 F.2d 1400 (5th Cir. 1975), *cert. denied*, 96 S. Ct. 129 (1975); Borras v. State, 229 So. 2d 244 (Fla. 1969), *cert. denied*, 400 U.S. 808 (1970); Blincoe v. State, 231 Ga. 886, 204 S.E.2d 597 (1974); State v. Baker, — Hawaii —, 535 P.2d 1394 (1975).

75. — Hawaii —, 542 P.2d 366 (1975).

76. *Id.* at —, 542 P.2d at 369. *But see* note 83 *infra*.

77. *See* notes 27-29 *supra* and accompanying text.

78. 380 F. Supp. 404 (E.D. La. 1974), *aff'd mem.*, 511 F.2d 1400 (5th Cir. 1975), *cert. denied*, 96 S. Ct. 129 (1975).

In *Guste*, the plaintiffs contended that the right of privacy gave one the right "to do what one wishes in his home and with his own body," citing *Roe* and *Stanley* for support, and that state and federal laws prohibiting the possession and use of marijuana should be declared unconstitutional and their enforcement enjoined because there was no compelling justification for them. The court found that the right claimed was neither expressly nor implicitly protected by the Constitution:

> Plaintiff in the present case bases his claim to privacy on a far too expansive interpretation of this phrase. . . . Although plaintiff does claim enforcement of this right of privacy through the Fifth and Fourteenth Amendment and through the Ninth Amendment he does not ground it or even attempt to ground it on any one of the amendments which protect certain guaranteed rights and which in doing so create constitutionally guarded zones of privacy. The right of plaintiff to possess marijuana in his own home can under no factual or legal interpretation be classified as fundamental or implicit in the concept of ordered liberty.[79]

In support of its conclusion, the court invoked footnote eleven of *Stanley* and a pre-*Paris Adult Theatre I* case[80] which resolved an attack based on *Stanley* in a similar fashion.[81]

The correctness of *Guste*'s reliance on footnote eleven to support its holding that marijuana is not protected under a hybrid theory of privacy is questionable for several reasons. First of all, it is not clear that marijuana use is devoid of first amendment interests.[82] Furthermore,

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79. *Id.* at 406-07.

80. United States v. Drotar, 416 F.2d 914 (5th Cir. 1969), *vacated on other grounds*, 402 U.S. 939 (1971).

81. The court went on to find that even if there were a fundamental right to possess marijuana it was overcome by the state's compelling interest in prohibiting marijuana use. However, the court did not consider the question properly, since it refused to balance the individual's and the state's interests or to shift the burden to the state in any way:

> Congress and the state legislature have both found it necessary for general health and welfare to regulate the use and possession of dangerous drugs. This court is in no position to substitute its judgment for that of the legislature.

380 F. Supp. at 408.

82. Two types of first amendment interests may be involved in the use of marijuana. First, it could be argued under cases such as Tinker v. Des Moines School Dist., 393 U.S. 503 (1969) (wearing of black armbands as protest against the Vietnam war protected under the first amendment), that marijuana use constitutes symbolic speech because it implicitly expresses a rejection of majoritarian values. State v. Renfro, — Hawaii —, 542 P.2d 366, 369 (1975) (rejects the contention that marijuana use involves the reception of ideas, but suggests that the result would be different if symbolic speech theory had been alleged); Weis & Wizner, *Pot, Prayer, Politics and Privacy: The Right to Cut Your Own Throat in Your Own Way*, 54 IOWA L. REV. 709, 718-23 (1969). In fact, it has been argued that the marijuana controversy resulted from the fact that mari-

from the other examples given in the footnote, it appears the Court was referring only to hazardous activities the regulation of which the state could justify even if a fundamental right were found to be violated. As cases which decline to include marijuana within the ambit of statutes prohibiting "narcotics" and *Ravin* suggest, marijuana is not the sort of a hazardous activity considered in footnote eleven.[83]

The reasoning of *Guste* is also unpersuasive because the court failed to treat plaintiff's allegations as raising the issue of whether locus-related privacy protects marijuana use and possession. If the explanation of *Stanley* suggested by *Paris Adult Theatre I* is valid, the right of privacy in the home is itself a fundamental right. Under this interpretation the nature of the activity occurring within the zone is relevant only to the question of whether the state has established an interest sufficient to justify regulation of the activity. The rationale of *Guste* is not inconsistent with a recognition of locus-related privacy. Focusing on the nature of marijuana use, the cases holding that marijuana use and possession is in no instance protected by a right of privacy rests on the implicit assumption that privacy in the home is not a fundamental right.

In several respects *Guste* is representative of the judicial treatment of the marijuana prohibition and privacy conflict. By distinguishing the Supreme Court privacy cases on their facts and refusing to analyze the bases of the right of privacy, courts, such as the one in *Guste*, have summarily decided that marijuana use and possession are not protected by a fundamental right. While this result may be theoretically proper, the opinions suggest that the courts were influenced more by the absence of an express amendment protecting marijuana use than by the inapplicability of the right of privacy. One court[84] reflected this influence when it voiced its fear of encroaching the legislative domain by creating

juana use connotes different things to different segments of the population. KAPLAN, *supra* note 1, at 3; FIRST REPORT, *supra* note 1, at 9. Under this view marijuana remains prohibited because it has become a symbol of disorder to the majority and is used because its illegality makes it a symbol of protest and disaffection with traditional society to others. Symbolic speech has only been protected in public contexts in the Supreme Court cases. But even though minimized in the home, the symbolic aspect of marijuana use could be held to provide an adequate first amendment interest to trigger hybrid privacy protection under *Stanley*.

Second, it could be argued that marijuana use provides new sources of belief and experience and is protected under the first amendment because it supplies these necessary preconditions to speech and expression. Town, *Privacy and the Marijuana Laws*, in THE NEW SOCIAL DRUG 118 (D. Smith ed. 1970); Laughlin, *LSD-25 and the Other Hallucinogens: A Pre-Reform Proposal*, 36 GEO. WASH. L. REV. 23, 39-43 (1967).

83. *See* notes 4 *supra* & 98 *infra* and accompanying text.

84. State v. Kantner, 53 Hawaii 327, 493 P.2d 306, 310, *cert. denied*, 409 U.S. 948 (1972).

fundamental rights based only on a subjective interpretation of the Constitution.[85] Such restraint may be less appropriate than these courts realize if it engenders a hesitancy to recognize values implicit in the Constitution but so basic as to be unenumerated.[86]

The failure of cases such as *Guste* to consider locus-related privacy is significant since the fear of judicial legislation should be much less when this type of privacy is involved. In view of the Constitution's express solicitude of the home, it is likely that courts which consider the locus-related privacy issue, as did *Ravin*, will reach a contrary result to those that have considered the autonomy-related privacy issue.[87]

Thus, before *Ravin* the marijuana-privacy cases were clouded by judicial confusion concerning the issues raised and the disjointed development of constitutionally protected privacy. *Ravin* does not represent a minority approach inasmuch as it protected private use of marijuana but rather because it comprehensively considered the issue.

RAVIN V. STATE: MARIJUANA USE AS AN ASPECT OF LOCUS-RELATED PRIVACY

Ravin was indicted for possession of marijuana. In a motion to dismiss, he contended, *inter alia*, that the state violated his right to privacy under the state and federal constitutions. The district court's denial of the motion to dismiss was affirmed by the superior court and the Alaska Supreme Court granted review.

Like other cases considering the issue, *Ravin* rejected the argument that marijuana use was protected by an autonomy-related right of privacy under either the Alaska privacy amendment[88] or the Federal Constitution. As in *Leis* it reasoned that marijuana use was not implicit in the concept of ordered liberty: "Few would believe they have been deprived of something of critical importance if deprived of marijuana

85. *See* note 103 *infra* and accompanying text.

86. *See* Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975); Heymann & Barzelay, *The Forest and the Trees: Roe v. Wade and Its Critics*, 53 B.U.L. REV. 765 (1973).

87. *See* note 105 *infra* and accompanying text.

88. 537 P.2d at 502. In so holding the court reversed Gray v. State, 525 P.2d 524 (Alas. 1974), without comment. In *Gray* the Alaska Supreme Court held that the right of privacy amendment "shield[ed] the ingestion of food, beverages or other substances" which included marijuana and that this right of privacy could be restricted only if the state could establish a compelling justification for doing so. *Id.* at 528. Relying on the right to privacy amendment and *Gray* the two concurring judges suggested that marijuana was protected outside the home as an aspect of autonomy-related privacy. 537 P.2d at 514-15 (Boochever & Connor, JJ., concurring).

. . . ."[89] Unlike other cases, *Ravin* interpreted *Stanley* through the lens of the recent obscenity cases. Noting the importance of the home in the enumerated rights of the Constitution[90] and the special treatment given the home in state law and tradition[91] *Ravin* recognized a locus-related right of privacy in the home:

> The home . . . carries with it associations and meanings which make it particularly important as the situs of privacy. Privacy in the home is a fundamental right, under both the federal and Alaska constitutions.[92]

Following language in *Stanley*, *Ravin* held that this zone of privacy included only "purely private, noncommercial" activities.[93] The court also emphasized that the protection was limited in another sense, finding that the right would be forced to "yield when an appropriate public need [was] demonstrated."[94] To establish this need *Ravin* held that the state would be required to show "a close and substantial relationship between the public welfare and control of ingestion of marijuana or possession of it in the home for personal use."[95]

In determining whether the state's interests were "close and substantial" *Ravin* assumed that "the authority of the state extended only to activities of the individual which affect others or the public at large."[96] Thus, the state has a valid interest in prohibiting driving under the influence of marijuana because it affects psychomotor functions.[97] Since, in the court's view, there was "no firm evidence that marijuana, as

89. 537 P.2d at 502. In order to reach this result the court distinguished Breese v. Smith, 501 P.2d 159 (Alas. 1972) on its facts. *Breese* held a school hair length regulation unconstitutional because it conflicted with the student's right of autonomy-related privacy. *See* note 36 *supra*.

90. U.S. CONST. amends. III & IV.

91. This court has consistently recognized that the home is constitutionally protected from unreasonable searches and seizures, reasoning that the home itself retains a protected status under the Fourth Amendment and Alaska's constitution distinct from that of the occupant's person. The privacy amendment to the Alaska Constitution was intended to give recognition and protection to the home. Such a reading is consonant with the character of life in Alaska.

537 P.2d at 503-04 (footnote omitted).

92. *Id.* at 504.

93. *Id.* This phrase may simply be an attempt to define what constitutes a home giving rise to a locus-related right of privacy. However, the qualification could also be interpreted as being inconsistent with *Ravin's* finding that privacy in the home is in itself a fundamental right, since it appears to make the existence of the zone of privacy dependent on the nature of the activity protected. The only case that has relied on *Ravin* is consistent with both interpretations. Belgarde v. State, 543 P.2d 206 (Alas. 1975) (sale of marijuana in public place not protected by the right of privacy).

94. 537 P.2d at 504.

95. 537 P.2d at 511.

96. 537 P.2d at 509. *Cf.* notes 51-52 *supra* and accompanying text.

97. 537 P.2d at 510.

presently used in this country, is generally a danger to the user or to others[,]"[98] the state was held not to have met its burden of proof. As a result the state of Alaska was foreclosed from regulating possession and use of marijuana in the home because such regulation impermissibly violated the right of privacy.[99]

The court was predisposed to invalidate the state's marijuana law, probably because it regulated individual choice in the absence of a public need to do so.[100] This predisposition was evidenced by the court's broad interpretation of the right-to-privacy amendment in a prior case in which the prohibition of marijuana was challenged.[101] The case may also reflect the same political climate which led the Alaska legislature to make the possession of marijuana a civil crime.[102] Given this inclination *Ravin* properly based its holding on locus-related privacy and the right-to-privacy amendment, and placed an intermediate burden of justification on the state when a higher standard could have been required in order to make its result constitutionally palatable.

Courts avoid protecting nonenumerated rights for at least two reasons. Primarily protection of such rights is felt to be a violation of the separation of powers required by the Constitution. Under this view a court overturning a law when such action is not necessary to protect a textually demonstrable constitutional interest usurps the policy making power of the legislature, substituting its beliefs for the judgment of a democratically responsive body.[103] It has also been suggested that protection of nonenumerated rights is undesirable for the practical reason that such decisions tend to weaken the power of the judiciary.[104]

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98. *Id.* at 508.

99. Ravin's case was remanded to the district court to develop the facts concerning the circumstances of his possession of marijuana, which did not appear in the trial court record. While his constitutional attack was successful, Ravin's conviction should be upheld since he was arrested for possession of marijuana while driving a car. N.Y. Times, May 28, 1975, at 8, col. 4-5; Rolling Stone, July 31, 1975, at 27-28.

100. *See id.* at 504, 511-12.

> We believe this tenet to be basic to a free society. The state cannot impose its own notions of morality, propriety, or fashion on individuals when the public has no legitimate interest in the affairs of those individuals.

Id. at 509.

101. Gray v. State, 525 P.2d 524 (Alas. 1974). *See* notes 70 & 88 *supra.*

102. ALASKA STAT. §§ 17.12.110(d)-(e) (1975) (fine not exceeding $100 for public possession of one ounce or less marijuana).

103. Griswold v. Connecticut, 381 U.S. 479, 507 (1965) (Black, J., dissenting); Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting); Ely, *supra* note 61. *But see* note 86 *supra* and accompanying text.

104. Ratner, *The Function of the Due Process Clause,* 116 U. PA. L. REV. 1048, 1062-63 (1968). Ratner suggests that the executive branch, on which the judiciary is dependent for the enforcement of its decisions, tends to defer to and enforce decisions

By basing its result on locus-related privacy *Ravin* was able to minimize the problems inherent in protecting nonenumerated rights. Since the home is an interest clearly protected by the Constitution,[105] the opportunity for a court to inject its own values into a decision protecting the right of privacy in the home is much less than in a case protecting an interest not enumerated in the Constitution; in the second instance the existence and the scope of the protection given is determined solely by ascertaining how fundamental that interest is in the American concept of ordered liberty. Thus, by relying on the locus-related privacy of the home the court was able to refrain from legislating unjustifiably while acting as interpreter rather than policymaker.

Assuming the need to ground protection of marijuana use in the home in enumerated constitutional interests, the significance of *Ravin*'s reliance on the state right-to-privacy amendment becomes clear. While the Federal Constitution provided a sufficient foundation for the decision, reliance on the state amendment broadened the case's constitutional base. Even though the language of the amendment is unspecific and does not mention privacy in the home,[106] it does indicate that the Alaska constitution requires special consideration of private matters. Thus, while any constitutional protection given marijuana use in other jurisdictions will probably be done under the theory of locus-related privacy of the home, the presence of a privacy amendment, even though corroborative, will be inessential to such protection.[107]

In addition to its reliance on the privacy amendment, the *Ravin* court also used an intermediate burden of proof in an attempt to diminish the decision's potential for judicial fiat;[108] by avoiding the

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based on enumerated constitutional rights and values. Conversely, decisions protecting nonenumerated values tend not to be enforced and weaken the judicial branch by eroding deference to other decisions.

105. *See* U.S. CONST. amends. III & IV. There is also historical evidence that privacy in the home was considered to be a right implicit in the concept of ordered liberty at the time the Constitution was drafted and was thus intended to be one of the nonenumerated rights "retained by the people" through the ninth amendment. *See* D. FLAHERTY, PRIVACY IN COLONIAL NEW ENGLAND 85-88 (1972). *See also* note 13 *supra* and accompanying text.

106. *See* ALASKA CONST. art. I, § 22: "The right of the people to privacy is recognized and shall not be infringed."

107. *Cf.* note 71 *supra* and accompanying text.

108. *See* notes 47-49 *supra* and accompanying text. It is unclear whether the court intended to apply a rationality in fact or a balancing test. *Compare*:

> Here, mere scientific doubts will not suffice. The state must demonstrate a need based on proof that the public health or welfare will *in fact* suffer if the controls are not applied.

537 P.2d at 511 (majority opinion) (emphasis added), *with*:

compelling interest test the court attempted to give the state a reasonable opportunity to justify its regulation of marijuana. In spite of the court's language, it could be argued that the compelling interest test was in fact applied, since the court found that privacy in the home was a fundamental right and none of the state's justifications were sufficient to regulate privacy within that zone. Even so a more plausible conclusion is that the court's holding reflected more the nature of the regulation overcome than the identity of the frameworks of review. It is very likely that in cases where an infringement of the right of privacy is recognized the withdrawal of the presumption of constitutionality from legislation is the significant aspect of any standard of proof applied in evaluating that infringement.[109] Regardless of which burden of proof was applied, the cogency of the *Ravin* court's evaluation of the state's interests remains intact; if the state was unable to meet an intermediate burden of justification, clearly it would have been unable to meet the more strict standard applied in the Supreme Court privacy cases. Thus, *Ravin* is precedent for later courts applying either standard of review.

Ravin's reliance on locus-related privacy was constitutionally sound and politically wise. Application of the case's rationale to other drugs and activities will not crack the shield of the law, leaving society less able to protect itself from real dangers. The right of privacy recognized in *Ravin* should instead provide a framework for determining what activities do present real dangers to society and when in other instances the legal shield is used improperly.

Bruce Brashear

> I would apply a single flexible test dependent first upon the importance of the right involved. . . . *I agree with the majority opinion that interference with rights of privacy within one's home requires a very high level of justification.*

Id. at 515 (Boochever & Connor, JJ., concurring) (emphasis added).

109. *See* note 53 *supra* and accompanying text.