

Privacy and the New Jersey State Constitution

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The right to privacy under the New Jersey Constitution takes the form of a fundamental right to personal integrity. Although the word privacy does not appear in the state constitution, the New Jersey Supreme Court has explicitly articulated and broadly defined a right of privacy that protects individuals from state interference on illegitimate grounds.

As a legal right, privacy has been aptly described as “a haystack in a hurricane,”¹ and indeed, recognition of a constitutionally protected right has been subject to considerable controversy. The very notion of a legally protected right to be let alone is of comparatively recent vintage.² New Jersey protects the variety of interests that are encompassed by that right more effectively than any federal constitutional precedents.

The constitutional right to privacy takes the form, under the New Jersey Constitution, of a right to be free from state interference on illegitimate grounds. It is found in two paragraphs of Article I. The first paragraph provides that:

All persons are by nature free and independent, and have certain natural and inalienable rights, among which are those of enjoying life and liberty, of acquiring, possessing and protecting property and of pursuing and obtaining safety and happiness.

Paragraph 7 of Article I provides a privacy right in the context of search and seizure:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated

....

Interpreting both paragraphs, the New Jersey Supreme Court has departed from the standards applied by the United States Supreme Court under the federal constitution. With respect to the search and seizure provision of the seventh paragraph, for example, the Court has held that the “reasonable expectation of privacy” rubric used by the United States Supreme Court is a vague standard subject to the potential for inconsistent and capricious application, and runs contrary to the state constitution.³ Thus, telephone billing records are private under the state constitution, although not under the Fourth Amendment.⁴

As to Article I, paragraph 1, the New Jersey Supreme Court has made it clear that “the language of that paragraph is more expansive than that of the U.S. Constitution. It incorporates within its terms the right of privacy and its concomitant rights.”⁵ In contrast to federal constitutional jurisprudence, the Court does not limit itself to rigid tiers of scrutiny. Nor does it limit privacy protection to “spheres of privacy” or state action.

Contrasting the Federal Constitution

The best-known invocation of a constitutional right to privacy is probably Justice William O. Douglas's opinion in *Griswold v. Connecticut*, which struck down a longstanding criminal statute that prohibited the use of contraceptives, even by married couples. The opinion provided no explicit textual ground for recognizing a right to privacy, but said "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." Various guarantees created zones of privacy, such as the right of association contained in the First Amendment, the Third Amendment's prohibition against the quartering of soldiers in peacetime, the Fourth Amendment right of the people to be secure in their houses, papers, and effects, against unreasonable searches and seizures, and the self-incrimination clause in the Fifth Amendment.

The notion of a fundamental right to privacy that protected women's reproductive choices became the analytical centerpiece of substantive due process litigation. In 1965, *Griswold* was understood to protect the right of privacy that "inhered in the marital relationship." By 1972, it attached to the right of single women to use contraceptives.⁷ In 1973, *Roe v. Wade* held that the right to privacy encompassed constitutional protection for a pregnant woman's choice to obtain a legal and medically safe abortion.⁸ The privacy analysis, however, drew scorn from constitutional scholars.⁹

Please Don't Emanate in the Penumbras

By 1992, less than 20 years after *Roe*, the U.S. Supreme Court's analysis had changed. In *Planned Parenthood v. Casey*,¹⁰ the Court reaffirmed the constitutional right to abortion, but jettisoned the “emanations and penumbras” on which *Griswold* and *Roe* had relied. The construct of privacy was completely supplanted by the Court's invocation of the constitutional concept of liberty. The word privacy is mentioned nowhere in *Casey*; instead, the Court gave substance to the liberty interest of the due process clause of the Fourteenth Amendment, which declares that no person will be denied “life, liberty, or property, without due process of law.”

Thus, instead of referring to emanations and penumbras, *Casey* states that “there is a realm of liberty which the government may not enter.” The opinion of the Court characterized *Roe* as “an exemplar of *Griswold* liberty,” and emphasized the importance of “*Roe*'s concept of liberty in defining the capacity of women to act in society and to make reproductive decisions.” In every reproductive rights case since 1992, the U.S. Supreme Court has consistently used the Fourteenth Amendment liberty interest as the jurisprudential foundation for its decisions. Indeed, the Court's first abortion case of the 21st century, fails to mention the word privacy even once.¹¹

The New Jersey Constitution Creates and Protects Fundamental Rights

The New Jersey Supreme Court never made the jurisprudential shift seen in the federal abortion cases; it remains a leading exponent of an express right to

privacy. To be sure, it has made a clear connection between the privacy right protected under the state constitution and the liberty interest of the due process clause of the Fourteenth Amendment: “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.”¹² Indeed, its conception of privacy extends well beyond the parameters of federal jurisdiction, encompassing the mystery of human life from conception¹³ to the right to die.¹⁴

This so at least in part because the New Jersey Constitution is a separate source of fundamental liberties.¹⁵ State law may recognize liberty interests more extensive than those independently protected by the federal constitution,¹⁶ and the New Jersey Supreme Court has seized its prerogative avidly. “Although the state constitution may encompass a smaller universe than the federal constitution, our constellation of rights may be more complete.”¹⁷ In appropriate cases, therefore, the state may accord greater respect than the federal government to these fundamental rights.

The right to privacy found in Article I, paragraph 1 is a fundamental right. As such, governmental interference with the right can be justified only by a compelling state interest.¹⁸ What is more, the fundamental rights guaranteed by the state constitution can be asserted as against private parties, not just the government.¹⁹ For example, the free speech guarantee under the state constitution attaches in private shopping malls (unlike the First Amendment),²⁰ and the right to privacy may be asserted against private employers.²¹

The Major New Jersey Privacy Cases

The first privacy case to come before the New Jersey Supreme Court in the 1970s was *In re Quinlan*, where the Court held, as a matter of state constitutional law, that the right of privacy was broad enough to encompass the personal freedom to make the decision to discontinue artificial life support.²² The Court noted that the right of privacy had theretofore been primarily associated with decisions involving contraception and family life, but also found that its underlying concern was with the protection of personal decisions.

The Court concluded that in some circumstances, an individual's right to control her own body and life would supersede the state's general interest in preserving life. Contemplating the point at which an individual's rights overcome the state's interests, it said "We think that the state's interest *contra* weakens and the individual's right to privacy grows as the degree of bodily invasion increases and the prognosis dims."

A year later, the Court grappled with fornication, which in 1977 was a crime. In *State v. Saunders*, it determined that the right of privacy extended to consensual sexual relations between adults. "Private personal acts between two consenting adults are not to be lightly meddled with by the state. The right of personal autonomy is fundamental to a free society." The Court specifically rejected state interests that were based on moral rather than secular grounds: "Our conclusion today extends no further than to strike down a measure which has as its objective the regulation of *private* morality."²³ To the extent the fornication statute served as an official sanction of certain conceptions of

desirable lifestyles, social mores or individualized beliefs, the Court declared it was “not an appropriate exercise of the police power.”

In *Saunders*, the Supreme Court said the ultimate interest protected by the constitution was “the freedom of personal development.” It recognized privacy as a right of personal autonomy and dignity. “Whether one defines that concept as a right to intimacy and a freedom to do intimate things, or a right to the integrity of one’s personality, the crux of the matter is that governmental regulation of private personal behavior under the police power is sharply limited.”

Soon thereafter, the Supreme Court ruled in *State v. Baker*,²⁴ that the concept of privacy extended to the right of unrelated people to live as a single unit. “Although this right is not absolute, it may be restricted only when necessary to promote a compelling government interest.”

The first privacy case bearing upon the question of procreation was not about abortion, but about voluntary sterilization for a mentally retarded woman. In *In re Grady*,²⁵ the Court found that the right to sterilization, which “bears so vitally upon a matter of deep personal privacy may also be considered an integral aspect of the ‘natural and inalienable’ right of all people to enjoy and pursue their individual well-being and happiness.”

The abortion issue came before the Court in *Right to Choose v. Byrne*.²⁶ Although decided on equal protection grounds, the decision makes clear that individual privacy would be sufficient to restrict the Legislature’s exercise of authority. In fact, the Court implied that abortion rights may be stronger under the state constitution than under the federal.

In *Greenberg v. Kimmelman*, the Court said that the right to marry and the right to familial association are “a vital part of life in a free society,” and recognized that the decision to marry invokes a privacy interest safeguarded by the New Jersey Constitution.²⁷

Drug testing in the workplace was the privacy issue in *Hennessey v. Coastal Eagle Point Oil Co.*²⁸ In this case the Court held that existing constitutional privacy protections may form the basis for a clear mandate of public policy that would support a wrongful discharge claim. Indeed, mandatory urine testing by private employers can be an invasion of privacy sufficient to breach public policy. *Hennessey* suggests that without a reasonable good faith objective suspicion of drug use, a private employer cannot require drug tests (so long as there is no safety hazard).

Information privacy came before the Court in *Doe v. Poritz*²⁹ where the Court found that the public disclosure of home addresses implicated privacy interests under both the federal and state constitutions. Because of this privacy interest, the Court held that the home addresses of many sex offenders could not be disclosed to the public. New Jersey voters subsequently approved an amendment to the state constitution that would strip sex offenders of any privacy rights they might claim.³⁰ For the rest of us, *Doe v. Poritz* still stands for the proposition that we have a privacy interest our home addresses.

Abortion arose again in *Planned Parenthood v. Farmer*,³¹ where the Court struck down a parental notification statute that unduly burdened the right of minors to make the intensely personal decision of whether to become parents.

Again ruling on equal protection grounds, as it had in *Right to Choose v. Byrne*, the Court explicated the right to privacy in its precedents, reaffirming procreational autonomy as a fundamental attribute of the privacy rights guaranteed by the state constitution.

Most recently, the Court held that its decisions protecting the rights of personal intimacy, marriage, sex, family and procreation provided the framework for resolving a dispute over frozen embryos.³² For homosexuals as well, the notion of privacy extends to the fundamental right of a legal parent to the care, custody and nurture of his or her child.³³

Justifying Invasions of Privacy

Fundamental rights can be curtailed only when the state asserts a compelling governmental interest. Moreover, “even if the governmental purpose is legitimate and substantial, the invasion of the fundamental right of privacy must be minimized by utilizing the narrowest means which can be designed to achieve the public purpose.”³⁴

Ordinarily, state statutes do not violate due process if they are reasonably related to a legitimate legislative purpose and are not arbitrary or discriminatory. If a statute is supported by a conceivable rational basis, it will survive a substantial due process attack. In due process cases involving fundamental rights, however, the United States Supreme Court applies a more exacting standard. With respect to family living arrangements, for example, the state may not interfere unless it has a compelling governmental interest, and its means

must be narrowly tailored to serve that interest.³⁵ If a substantial right is affected only indirectly, or if a semi-suspect class is involved (such as gender), the Court applies intermediate scrutiny, meaning that the state must articulate an important governmental interest in support of any intrusion.

With respect to privacy, the government's burden is heavier under the New Jersey Constitution than under the federal. In *Grady*, the Supreme Court noted that "governmental intrusions into privacy rights may require more persuasive showing of a public interest under our state constitution than under the federal constitution." Moreover, "even if the governmental purpose is legitimate and substantial, the invasion of the fundamental right of privacy must be minimized by utilizing the narrowest means which can be designed to achieve the public purpose."³⁶

Instead of using tiers of scrutiny, the New Jersey Supreme Court uses a balancing test, weighing the nature of the affected right, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction. As the Court explained, "When a court invalidates a statute on due process grounds, the court is saying, in effect, that the statute seeks to promote the state interest by impermissible means. In contrast, when a court declares a statute invalid on equal protection grounds, it is not saying that the legislative means are forbidden, but that the Legislature must write evenhandedly."³⁷

This means that the state bears the heavy burden of making a strong connection between its conduct and the governmental interests to be served. For example, the government's interest must be secular, and intrusions based

exclusively on religious traditions must fail.³⁸ Accordingly, since privacy implicates intimate life and sexual expression, the state may not impair the use of contraceptives by criminalizing their sale and use.

The Future of Privacy

The right to privacy implicit in Article I, paragraph I of the New Jersey Constitution embraces the right to make procreative decisions, the right to engage in sexual conduct, the right to sterilization and the right to die. Under the state constitution, invasions of privacy can be justified only by compelling governmental interests, and, indeed, the New Jersey Supreme Court often requires a stronger showing of public need than is traditionally required in construing the federal constitution. The state's balancing test is more protective of privacy than the two-tier scrutiny used by the U.S. Supreme Court.

This raises provocative questions about the future of the right to privacy under the state constitution. For example, homosexuals are entitled to adopt children, form intimate loving relationships and engage in sexual expression. These rights, like marriage, are fundamental privacy rights under the state constitution, and cannot be impaired absent a secular and compelling governmental interest.³⁹ Now that gender stereotypes are condemned as a measure of rights and responsibilities in public and private life, it is hard to see any reason why homosexuals should not be permitted to marry.

As a source of fundamental rights, our constitution also speaks to the problem of privacy in public. In New Jersey, we have learned from hard

experience that although skin color is “public” in a sense, the state must nevertheless assert a compelling governmental interest before using preconceived notions about the implications of skin color to justify police conduct. Failing to make a sufficient connection between drug interdiction and its practice of stopping motorists of color on the Turnpike, the New Jersey State Police were compelled to abandon racial profiling.

With respect to passive and general video surveillance, the government must similarly demonstrate that its surveillance actually reduces crime, rather than merely relocating it. Biometrics, like face recognition and iris scans, may be useful if they serve a legitimate governmental purpose, but not if they serve merely to intimidate disfavored groups.

In the absence of specific legislation, individual privacy is rarely strong enough to withstand the imperatives of efficiency, profit and plain curiosity. As technology improves, the old barriers will yield. Thermal imaging can melt the walls of our homes. Consumer profiling can produce detailed mosaics that reveal intimate details from innocuous and unrelated sources.⁴⁰ We are the more fortunate, therefore, in New Jersey to have privacy guaranteed as a fundamental right, under a state constitution that protects us from unjustified violations.

Endnotes

1. *Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 481, 485 (3d Cir.), *cert. denied* 351 U.S. 926 (1956). The Restatement (Second) of Torts, § 625(b) (1977) identifies four tortious privacy invasions: intrusion (such as hidden

video cameras), appropriation (such as the commercial use of name or likeness), false light (misrepresentation); and public disclosure of private facts (such as disclosing confidential communications). See *Bisbee v. John C. Conover Agency*, 186 N.J. Super. 335 (1982).

2. The right of privacy in America traces its origins to an article by Samuel Warren and Louis Brandeis in the *Harvard Law Review*, which addressed the right to control personal information. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 *Harvard L. Rev.* 193 (1890).

3. *State v. Alston*, 88 N.J. 211, 227-228 (1981).

4. *State v. Hunt*, 91 N.J. 338 (1982).

5. *Planned Parenthood v. Farmer*, 165 N.J. 609 (2000).

6. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

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

8. *Roe v. Wade*, 410 U.S. 113 (1973).

9. See, e.g., John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 *Yale L. J.* 920 (1973).

10. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

11. *Stenberg v. Carhart*, 120 S. Ct. 2597 (2000) (late term abortion) See generally David J. Garrow, *Privacy and the American Constitution*, 68 *Social Research* 56 (2001).

12. *Planned Parenthood v. Farmer*, 165 N.J. 613 (2000) (quoting *Casey*, 505 U.S. 833, 851 (1992)).

13. *Right to Choose v. Byrne*, 91 N.J. 287 (1982).

14. *In re Quinlan*, 70 N.J. 10 (1976), *cert. denied. sub nom. Garger v. New Jersey*, 429 U.S. (1976).
15. See generally, Brennan, "State Constitutions and the Protection of Individual Rights." 90 *Harvard L. Rev.* 489 (1977).
16. *Mills v. Rogers*, 457 U.S. 291, 300 (1982).
17. *Right to Choose*, 91 N.J. at 300.
18. *State v. Saunders*, 75 N.J. 200, 217 (1977).
19. The first New Jersey decision to articulate a privacy right that encompassed a notion of fundamental personal integrity was *McGovern v. Van Riper*, 137 N.J. Eq. 24 (Ch. 1945), *aff'd* 137 N.J. Eq. 548 (E&A 1945). It found in the 1844 constitution a "natural and inalienable" right of an individual to be "protected from any wrongful intrusion into his private life which would outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities." Unhappily for privacy advocates who genuinely believe in such a fundamental right, the *McGovern* case involved a highly political effort to protect one of Boss Hague's cronies in Jersey City, and was sharply limited two years later. 140 N.J. Eq. 341 (Ch. 1947). I am indebted to Professor John Wefing for calling attention to this case.
20. *Green Party of New Jersey v. Hartz Mountain Industries*, 164 N.J. 127, 146 (2000).
21. *Hennessey v. Coastal Eagle Point Oil Co.*, 129 N.J. 81 (1992).
22. *In re Quinlan*, 70 N.J. 10 (1976), *cert. denied. sub nom. Garger v. New Jersey*, 429 U.S. (1976).

23. *State v. Saunders*, 75 N.J. 200, 219 (1977) (emphasis in original).
24. *State v. Baker*, 81 N.J. 99, 109 (1979).
25. *In re Grady*, 85 N.J. 235 (1981). The Court's subsequent cases on decisions regarding medical treatment have been based on a common law right of self-determination, leaving room for legislative enactments, rather than constitutional interpretations. *In re Conroy*, 98 N.J. 321, 348, (1985); *In re Farrell*, 108 N.J. 335, 348 (1987).
26. *Right to Choose v. Byrne*, 91 N.J. 287 (1982).
27. *Greenberg v. Kimmelman*, 99 N.J. 552, 570 (1985).
28. *Hennessey v. Coastal Eagle Point Oil Co.*, 129 N.J. 81 (1992).
29. *Doe v. Poritz*, 142 N.J. 1 (1995).
30. The amendment to the state constitution has been challenged.
31. *Planned Parenthood v. Farmer*, 165 N.J. 609 (2000).
32. *J.B. v. M.B.*, ___ N.J. ___, 2001 N.J. Lexis 955 (2001).
33. *V.C. v. M.J.B.*, 163 N.J. 200, 218 (2000).
34. *In re Martin*, 90 N.J. 295, 318 (1982) (balance government's need of information against the individual's right of confidentiality).
35. *Moore v. East Cleveland*, 431 U.S. 494 (1977).
36. *In re Martin*, 90 N.J. 295, 318 (1982).
37. *Greenberg*, 99 N.J. at 562.
38. *Planned Parenthood v. Farmer*, 165 N.J. at 631 n.6.
39. The governmental interest must be non-religious. See *Doe v. Bridgeton Hosp. Ass'n*, 71 N.J. 478 (1976), cert. denied 433 U.S. 914 (1977) (private non-

sectarian hospitals may not use moral concepts to limit common law right of access to hospital facilities for elective abortions); David A. Richards, "Is My Body My Property?" 68 *Social Research* 83 (2001).

40. *Kyllo v. United States*, ___ U.S. ___, 2001 U.S. Lexis 4487 (2001).

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