The Beat Goes On
Griswold v. Connecticut and the Rhythms of the Law

BY JENNIFER SPRENG

Every time I teach Constitutional Law II, I consider skipping Griswold v. Connecticut. There are so many cases. We cannot cover everything. And Griswold does not matter anyway.

Oops! My parents taught me better than to make such a cocktail party faux pas. It is not good form to silence a gathering of polite company with radical claims about religion, politics and sex all in one sentence. Such a faux pas would also be intellectually unfounded: Griswold is no longer a central player in constitutional law, but it makes an enduring contribution to an even more universal and foundational respect for individual privacy in the law.

Griswold holds that an unenumerated constitutional right of marital privacy protects a couple’s use of contraceptives, but there its doctrinal impact ends. Its signature concept of “penumbras” emanating from Bill of Rights guarantees was not original, nor did it survive. Within 12 years, the Supreme Court had read the significance of the marital relationship out of reproductive rights law—and with it Griswold’s remaining analytical significance.

The case was not the historical catalyst for the widespread legalization of contraception. As early as 1953, only two states still enforced bans on advertising, sale and distribution of contraceptives. In 1965, 48 states permitted prescription of contraceptives. Connecticut’s ban on contraceptive use was a national outlier.

Griswold may have had some impact on women’s changing social roles, but more powerful trends were already well established by 1965.

Nevertheless, Griswold testifies to the increasing influence of individual privacy as a universal, foundational rhythm in American law that informs legal analysis. The Griswold Court’s doctrinal struggles over “zones of privacy” pale in comparison to its observation that “[w]e deal with a right of privacy older than the Bill of Rights.”

In fact, the Court’s struggle with its ill-fated penumbras analysis illustrates just how pervasive is the law’s respect for privacy.

Protection for privacy simply had to be in the Constitution, because it is everywhere.

Technological and social changes drive expansions in the legal solicitude to individual privacy. In 1890, Samuel D. Warren and eventual Supreme Court Justice Louis D. Brandeis identified a common-law “right to privacy” in longstanding contract and property law. They urged judicial recognition of a tort to protect “the acts and sayings of a man in his social and domestic relations” from “recent inventions” that permitted the press, for example, “[t]o satisfy a prurient taste [in] the details of sexual relations.”

By 1960, most states recognized the tort of invasion of privacy. In 1963, the Ninth Circuit held that a woman had a cause of action based on 14th Amendment protections from an “arbitrary invasion of
This month, ARIZONA ATTORNEY launches a new recurring feature that we hope will shed light on remarkable historical events. In Law’s Attic, we will publish occasional short essays on noteworthy cases, laws or legal events whose anniversary is ripe—whether they are 10 years old, or 500. If you have suggestions for legal historical events that we should cover in 2011, contact the editor at arizona.attorney@azbar.org.

We begin with an essay on the right to privacy and Griswold v. Connecticut—45 years old this year.

Griswold expanded such solicitude to privacy in the wake of significant improvements in the efficacy of oral contraceptives that brought them to pharmacies in 1957. Just how pulsating is the rhythm of which Griswold is an exemplar will continue to be tested, as two of my students’ research reminds me. The “border search doctrine” that permits searches of electronic devices without reasonable suspicion should chill which brought them to pharmacies in 1957.

Pharmacists’ computers record every purchase of emergency contraceptives, some of which are traceable to the individual customer. I am glad that Griswold does not undermine statutory protections for pharmacists who refuse to sell it, but I shudder to think that users might be involuntarily exposed.

I remain undecided about Griswold for my 2011 Constitutional Law II class. I prefer to teach a few cases well, and Planned Parenthood v. Casey often consumes multiple precious classes. Sometimes mattering to everything is mattering to nothing.

Yet the beat goes on. 

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endnotes

1. 381 U.S. 479 (1965).
2. Id. at 485.
7. Ken Gormley, One Hundred Years of Privacy, 1992 WISC. L. REV. 1335, ____.
9. See Griswold, 381 U.S. at 485-86.
11. York v. Story, 324 F.2d 450, 455-56 (9th Cir. 1963).
13. See generally Kimberly J. Garde, This Will Only Hurt For ... Ever: Compulsory Vaccine Laws, Injured Children, and No Redress, 3 PHOENIX L. REV. 508 (2010).