IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA	:	
	:	
v.	:	**Criminal No. B-93-0391**
	:	
DAVID EDWIN BOEGGEMAN, ET AL.,	:	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT WILLIAM JOHN TROY, III MOTION TO DISMISS INDICTMENT ON THE GROUNDS THAT NINTH AND TENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION PROHIBIT PUNISHMENT OF CRIMES WITHOUT VICTIMS AS A VIOLATION OF THE RIGHT RETAINED BY THE PEOPLE, TO BE FREE FROM CRIMINAL PROSECUTION FOR POSSESSING A SUBSTANCE HAVING RELATIVELY HARMLESS EFFECTS ON THE USER, OTHER PERSONS OR SOCIETY

I. THE HISTORICAL FOUNDATION OF THE NINTH AND TENTH AMENDMENTS SUPPORTS THE PROPOSITION THAT THEY WERE INCLUDED IN THE CONSTITUTION TO AFFORD SUBSTANTIVE PROTECTION FOR UNENUMERATED RIGHTS WHICH ARE RETAINED BY THE PEOPLE.

A. Punishment of victimless crimes is a holdover from the enforcement of religious morality prevalent in the pre-revolutionary colonial period.

In pre-revolutionary colonial American, religion and religious moral value were a way of life and all of the colonies' institutions reflected these religious values. The foundations for the strict moral standards of the colonists lay in the Puritan beginnings of New England. "Because Puritanism was a way of life, it had social and political implications of great magnitude. It assumed that its disciples would regulate not only their own conduct, but that of others, so that the world could be refashioned into the society ordained by God in the Bible." G.L. Haskins, Law and Authority in Early Massachusetts 16 (1968). Thus, the early settlers "adopted the Judicial Laws of Moses which were given to the Israelites of Old . . . (and)

punished Adultery . . . (and Blasphemy, with Death . . ." Grand Jury charge by Hutchinson, C.D. Suffolk Super. (T., March 1768) in J. Quincy, Reports of Cases Argued and Adjudged in the Superior Court of Judicature of the Province of Massachusetts Bay, Between 1761 and 1722 258-59 (S. Quincy ed. 1865). "The close bond that existed between religious and political thought in the seventeenth century . . . was not by any means restricted to Puritan thinking." The Puritans believed that God had instituted government to save men from their own depravity, and hence that civil rulers must be obeyed. "More importantly, they believed that the welfare of the whole was more significant than individual advantage, that society was an organism in which each part was subordinate to the whole . . . At the same time they accepted the principles of contemporary political philosophy which prescribed that religion and politics were one. Orthodoxy in matters of religion and politics was accepted as axiomatic, and hence there was no room for diversity of belief or toleration, which was viewed nearly everywhere . . . as subversive to morals, to national independence, and to the compulsory uniformity essential to preserve both church and state. Individual liberty, therefore, was viewed as permissible only within the limits of conformity as prescribed by civil and ecclesiastical authority." Haskins, supra p.2, at 17-18.

The criminal law was thus concerned primarily with protecting community religious and moral values:

> (T)he criminal law of pre-revolutionary Massachusetts was remarkably similar to that of the Puritan era. The old Puritan ethic remained strong enough in the 1750's so that crime was still looked upon as sin; the criminal as a sinner; and criminal law, as the earthly arm of God. Criminal law surely was not the

> tool of the royal government in Boston, which was unconcerned with the outcome of most cases and, in any event, has little power to influence that outcome. As a result, the chief function of the courts, the primary law-enforcement agencies, remained, as in the early colonial era, the identification and punishment of sinners.

Nelson, "Emerging Notion of Modern Criminal Law in the Revolutionary Era: An Historical Perspective," 42 N.Y.U. L. Rev. 450, 451 (1967).

While no scheme for the classification of crimes was developed in colonial America, most lawyers in Massachusetts and elsewhere were familiar with Blackstone's classification scheme in England. It included offenses against God and religion, offenses against government, offenses against public justice, offenses against public trade and health, homicide, offenses against the person, and offenses against habitations and other private property. 4 Blackstone, Commentaries on the Laws of England, Table of Contents, (Oxford 1765-1769).

The majority of all criminal prosecutions fell within the category of "offenses against God and Religion." Of 2,784 prosecutions in the Superior and General Sessions Court of Massachusetts between 1760 and 1774, 1,074, or 38%, were for sexual offenses, including adultery, cohabitation, indecent exposure, lewdness and prostitution. The great bulk of sexual offenses - over 95% - were for fornication. Nelson, Americanization of Common Law 37 (1975).

A detailed study of the laws has shown that Virginia "did not differ radically from Episcopal England or even Puritan Massachusetts so far as legislation against vice and profaneness were concerned; nor were earnest efforts at the enforcement of laws entirely lacking." Arthur P. Scott,

Criminal Law in Colonial Virginia (1930). Historian Arthur P. Scott notes that:

> The earliest records of the civil court show that they regularly dealt with many offenses which in England would have gone preferably before church courts . . . The beginnings of a similar movement can be traced in the English county courts, but it was greatly hastened in Virginia. In dealing with various forms of immorality, the Virginia Magistrates frequently imposed penances which were substantially the same as those employed in the ecclesiastical courts at home, notably appearing in church in a white sheet, carrying a wand, and there making a confession. After about 1650 these disappear, and while the laws still speak of the displeasure which certain offenses give to God, and the records refer to the "sin" of fornication, for example, the penalties are those provided by civil and not ecclesiastical law.

Scott, supra, at 254.

In summarizing the situation in colonial Virginia, Scott draws the following general conclusions:

1. Jurisdiction over public morals, which in England was divided between the civil and ecclesiastical court, in Virginia was entirely in civil courts, although the churchwardens in many cases were required to present offenders.

2. Several English statutes and a few common-law provisions were in force in the colony, and other English laws were re-enacted by title only.

3. The assembly passed many more laws dealing with public moral than with offenses against the state, or religion, or the person or property. But in numerous instances the language of the Virginia statute was largely copied from a corresponding English law.

> 4. In general, the same kind of offenses was singled out for punishment in England. There was little difference in the severity of the penalties inflicted at home and in the colony.

Scott, supra p.4, at 291.

The historical record is thus clear that the sole rationale for the criminalization of acts which have no harmful effect on persons other than the actor, i.e., victimless, was the enforcement of the societal majority's religious and moral values. That these acts are still subject to criminal sanctions today - 200 years later - is testimony to the fact that they are anachronistic vestiges of a concept of governmental authority which has no place in today's society and was not intended to have a place in a new nation founded on the concept of maximum individual liberty and minimum governmental interference.

B. Legal development and law enforcement in the American Colonies during and immediately preceding the adoption of the Ninth and Tenth Amendments indicates that the intention of the framers was to remove government from the enforcement of personal morality.

The American Revolution and the years following brought profound changes in attitudes toward crime and the criminal. Prosecutions for various sorts of immorality nearly ceased, while economically motivated crimes and prosecutions therefor greatly increased. 42 N.Y.U. L. Rev., supra p.3, at 455. As noted by Historian William E. Nelson:

> During the fifteen years before the Revolution . . . there had been an average of seventy-two prosecutions per year for sexual offenses, nearly all for fornication. The first ten years after independence produced only a slight decline to fifty-eight cases each year. However, in 1786 the General Court enacted a new statute for the punishment of fornication, permitting

a woman guilty of the crime to confess her guilt before a justice of the peace, pay an approximate fine, and thereby avoid prosecution by way of indictment in the court of sessions. The number of prosecutions for sexual offenses immediately declined to an average of eleven per year during 1786-1790 and to less than five per year during the four decades thereafter.

Prosecutions for religious offenses also continued near the prewar rate of twenty-four per year until the mid-1780's. But by the 1790's the number of cases had declined to about ten per year . . . The decrease is explained by the fact that after the 1780's prosecutions continued only for the offenses of working and traveling on Sunday. Even the Sunday work and travel laws were less rigidly enforced, with the result that by the 1810's "the Laws . . . against profanations of the Sabbath, had fallen into general neglect . . (and) thousands of violations occurred every year, with scarcely a single instance of punishment."

The law's attitude toward adultery was also changing, although the number of prosecutions remained relatively constant. In 1973 the Supreme Judicial Court began regularly to grant divorces on the ground of adultery, yet prosecutions for the crime remained rare.

Too many contemporaries the de-emphasis of prosecution for sin appeared to be a decline in morals. President Timothy Dwight of Yale traced the decline to the French and Indian War and especially to the Revolution, which, he said, has added . . . "to the depravation still remaining (from the French War) . . . a long train of immoral doctrines and practices, which spread into every corner of the country. The profanation of the Sabbath, before unusual, profaneness of language, drunkenness, gambling and lewdness were exceedingly increased . . . " Others also alluded to habits of card playing and gambling and to instances of social vice and illegitimacy. Chief Justice William Cushing, for example, feared that . . . "some men ha(d) been so liberal in thinking as to religion as to shake off all religion, and while they ha(d) labored to set up heathen above Christian morals, ha(d) shown themselves destitute of all morality . . ."

Notwithstanding these complaints, it does not appear that there was any deep-seated coarseness or general immorality during the closing years of the eighteenth century. What was beginning to occur after the Revolution was not significantly more immoral but an abandonment of the pre-revolutionary notion that government should act to enforce morality. Over time, however, the abandonment by government of its enforcement role would impair the notion that there was any one set of ethical standards that all men ought to obey.

Nelson, supra p.4, at 110-111 (emphasis added) (footnotes omitted).

As Chief Justice Cushing explained at the time, when men rejected the old religious traditions, they also rejected many of the old moral ones, among them the theretofore unquestioned assumption that government should enforce morality. W. Cushing, "Notes on Biennial Elections and Other Subjects Under Debate in the Massachusetts Ratifying Convention," in William Cushing Papers, (1788). Thus, men at the time of the adoption of the Constitution and Bill of Rights were taking a step toward a modern view of criminal law - the view that its purpose is to protect men and women of unwanted invasions of their rights. 42 N.Y.U. L. Rev. supra p.3, at 465.

It was within this context and spirit and James Madison and the framers of the Ninth Amendment were concerned that . . ." (unenumerated) rights . . . retained by the people" not be denied or disparaged.

C. The use of the State's police power to promote and protect the health, safety, morals and welfare of the people does not grant the State, and was not intended to grant the State, the power to regulate the private moral values and behavior of the people.

The classic definition of the police power of a state is the exercise of the sovereign right of a government to promote and protect public order,

safety, health, morals and general welfare within constitutional limits, Marshall v. Kansas City, 355 S.W.2d 877, 883, 93 A.L.R.2d 1012 (Mo. 1962), and is addressed to "the public health, the public morals, or the public safety." Best v. Zoning Bd. of Adjustment of City of Pittsburgh, 141 A.2d 606, 611, 393 Pa. 106 (1958) (emphasis added).

It is significant that this definition speaks of "promoting" and "protecting" these facets of societal interest, and not "regulation" of them. "Promote" means to contribute to the growth, enlargement, or prosperity of; to forward; to further; to encourage; to advance. People v. Augustine, 204 N.W. 747, 749, 232 Mich. 29 (1925); Coden Beach Marine, Inc. v. City of Bayou La Batre, 284 Ala. 718, 228 So. 2d 468, 470 (1969). The word "protect" means to defend, guard, shield from danger, preserve. See Keystone Tankship Corp. v. Williamette Iron and Steel Co., 222 F. Supp. 320, 322 (D.C. Ore. 1963) and Reino v. Montana Mineral Land Development Co., 99 p. 852, 855, 38 Mont. 291 (1909). "Regulate" means generally "to prescribe the manner in which a thing . . . may be conducted." Marshall, 355 S.W.2d at 882. Thus, the inclusion of "morals" in those areas does not mean that the state has the power to "regulate" the moral values of the people, but rather to protect each person's right to formulate and exercise his or her own moral values so long as they do not infringe on the right of others to do the same. "To sustain legislation under the 'police power,' the operation of the law must in some degree tend to prevent offense or evil or preserve public health, morals, safety or welfare; it should appear that the means used are reasonably necessary for accomplishment of the purpose and not unduly oppressive upon individuals". People v. Braun, 330 N.Y.S.2d 397, 941, 69 Misc. 2d 682 (1972)

(emphasis in original).

It is significant also that the police power applies only to "public" morals. "Public morals" have been defined as "the moral practices or modes of conduct pertaining to a whole community - relating to the whole body of people." Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control, 84 Cal. Rptr. 113, 123, 465 P.2d 1, 2 Cal. 3d 85 (1970) (emphasis added). It is clear that the use of the police power is to be limited to public practices and behavior and not to private, individual acts having no effect on the community. "To constitute a valid exercise of police power, legislation . . . must not interfere with private rights beyond the necessities of the situation." Nolden v. East Cleveland City Commission, 232 N.E.2d 421, 425, 12 Ohio Misc. 205 (1966).

Thus, the "regulation" of private moral behavior and values is a power which was, by definition, never intended to be granted to the federal or state governments when the Constitution was established, and the use of the State's police power to enforce particular moral values is an usurpation of a power and right which was intended to be retained by the people within the meaning of the Ninth and Tenth Amendments.

D. The legislative history of the Ninth Amendment supports an interpretation of the Amendment as providing substantive protection for unenumerated rights.

In the process of the ratification of the Constitution, the defect most successfully attacked by its critics was the absence of a bill of rights. Supporters of the Constitution argued that any enumeration of rights would necessarily be imperfect and would create the inference that no rights existed except those itemized. The new

government being created was to be one of enumerated powers, and as long as no contrary inferences prevailed, it would have no claim of power to interfere with the exercise of the citizen's rights. James Wilson, speaking at the Pennsylvania Ratifying Convention in 1788, gave the strongest expression of this thesis:

> ... in a government consisting of enumerated powers, such as is proposed for the United States, a bill of rights would not only be unnecessary, but, in my humble judgement, highly imprudent. In all societies, there are many powers and rights which cannot be particularly enumerated. A bill of rights annexed to a constitution is an enumeration of the powers reserved. If we attempt an enumeration, everything that is not enumerated is presumed to be given. The consequence is that an imperfect enumeration would throw all implied power into the scale of the government, and the rights of the people would be rendered incomplete. On the other hand, an imperfect enumeration of the powers of government reserves all implied power to the people; and by that means the constitution becomes incomplete. But of the two, it is much safer to run the risk on the side of the constitution; for an omission in the enumeration of the power of government is neither so dangerous nor important as the omission in the enumeration of the rights of the people.
>
> To every suggestion concerning a bill of rights, the citizens of the United States may always say, We reserve the right to do what we please.

2 Elliot's Debates, 436-37 (2d ed. 1836).

Hamilton, in the Federalist No. 84, likewise voiced this argument:

> I go further, and affirm, that bill of rights, in the sense and to the extent they are contended for, are not only unnecessary in the proposed constitution, but would even be dangerous.

> They would contain various exceptions to powers not granted, and on this very account, would afford a colourable pretext to claim more than were granted. For why declare that things shall not be done, which there is no power to do? Why, for instance, should it be said, that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretence for claiming that power. They might urge with a semblance of reason, that the constitution ought not to be charged with the absurdity of providing against the abuse of an authority, which was not given and that the provision against restraining the liberty of the press afforded a clear implication that a right to prescribe proper regulations concerning it, was intended to be vested in the national government. This may serve as a specimen of the numerous handles which would be given to the doctrine of constructive powers, by the indulgence of an injudicious zeal for bills of rights.

James Madison, the primary draftsman of the Constitution and its leading advocate, had also expressed his personal opposition to the numeration of a bill of rights. However, he gave in at the Virginia ratifying convention and promised to take affirmative action in proposing the adoption of a bill of rights.

Upon ratification by the states of the Constitution in their respective conventions, several adopted certain resolutions to be affixed to their ratification. These resolutions formed the basis for Madison when he drafted the amendments for submission to the First Congress. The resolutions adopted by Virginia and New York formed the nucleus for what was later to become the Ninth Amendment, and reflected the concern of the states with the dangers inherent in the enumeration of a bill of rights, as espoused by Wilson and Hamilton:

From the amendments proposed by Virginia:

> 17th. That those clauses which declare that Congress shall not exercise certain powers be not interpreted in any manner whatsoever to extend the powers of Congress. But that they be construed as either making exceptions to the specified powers where this shall be the case, or otherwise as inserted merely for greater caution.

The Debates in the Federal Convention of 1787, 665 (Hunt and Scott Ed. 1920) (No. 18 in the North Carolina propositions).

From the New York Act of Ratification:

> . . . That those clauses in the said Constitution which declare, that Congress shall not have or exercise certain Powers, do not imply that Congress is entitled to any Powers not given by the said Constitution, but such Clauses are to be construed either as exceptions to certain specified Powers, or as inserted merely for greater caution.

Id. at 666 (Part of the third Article of the Rhode Island Declaration).

On June 8, 1789, Madison moved in the House of Representatives that the House resolve itself into a committee of the whole so as to consider his proposed amendments. A select Committee of eleven members, Madison among them, was appointed for this purpose, and Madison proceeded to state his proposed amendments with extensive analysis. 1 Annals of Congress 424 (1834). During the weeks which Congress had been meeting, Madison had assiduously studied the proposals for a bill of rights made by various state ratifying conventions.

Primarily influenced by the proposals of his own state, Virginia, Madison's proposals took the form of nine resolutions. It was Madison's intention that the proposals appear not as an appendage to

the Constitution in the form of amendments, but that they be woven into the very text of the Constitution. Madison's Fourth resolution contained ten sections which he desired to be inserted between Clause 3, prohibiting bills of attainder and ex post facto laws, and Clause 4, prohibiting direct taxation, of Article I, Section 9, of the Constitution. This Fourth resolution contained substantially the same rights as are now included in the First through the Fourth, Sixth, Eighth and Ninth Amendments. The last of the ten sections of this Fourth resolution provided:

> The exceptions here or elsewhere in the Constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the Constitution: but either actual limitations of such powers, or was inserted merely for greater caution.

1 Annals 435.

The language of Madison's proposal 4(10) is similar to Virginia's proposed Amendment 17, which by inference served as Madison's model -- with one essential difference. Both amendments express a rule of construction, i.e., the expression of certain enumerated rights shall not be construed to enlarge the powers delegated by the Constitution to the federal government. Madison's amendment presented to the First Congress contained a second meaning, absent, or at least unexpressed, in Virginia proposed Amendment number 17. To quote for purposes of emphasis from Madison's proposed 4(10):

> The exceptions . . . shall not be construed as to diminish the just importance of other rights retained by the people . . .

(emphasis added).

The following is Madison's explanation of the purpose of Resolution 4, Section 10:

> It has been objected also against the Bill of Rights, that, by enumerating particular exceptions to the grant of powers, it would disparage those rights which were not placed in that enumeration; and it might follow, by implication, that those rights which were not singled out, were intended to be assigned into the hands of the general government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but as I conceive, that it may be guarded against, I have attempted it, as gentlemen may see, by turning to the last clause of the Fourth Resolution.

1 Annals 439 (emphasis added).

Madison's reasoning suggests the dual import of the Amendment as originally proposed. First, the canon of statutory construction, the expression of one is the exclusion of all others, i.e., the expression of certain rights is the exclusion of rights not expressed, is not to be applied in construing the Constitution, the result being a reaffirmation of the common belief that the federal government was to be a government of limited powers. Second, important human rights are retained by the people which remained unexpressed in the Constitution or its first eight amendments. The crucial language of Madison's proposed amendment is the language, "other rights retained by the people," language which was absent from Virginia's proposed Fourteenth Resolution.

Thus, as submitted by Madison, Resolution Four, Section 10, is a

rule of construction limiting the encroachment of governmental power, as was Virginia's Fourteenth Resolution, as well as an affirmative assertion of the remaining natural rights of man which are not expressly guaranteed by the Constitution or by the first eight amendments.

On July 28, the select committee, four of whose membership had originally subscribed to the Constitution at Philadelphia, proposed the following be adopted as a replacement for Resolution Four, Section 10:

> The enumeration in this Constitution of certain rights shall not be construed to deny or disparage other rights retained by the people.

1 Annals 754.

The words "this Constitution" were then changed to "the Constitution," a comma added after the word "Constitution," and the Ninth Amendment was adopted in its final form.

On August 18, 1789, the House of Representatives, as a committee of the whole, commenced debate on the proposed amendments. The House voted at this time to change Madison's proposed method of incorporating the Amendments into the Body of the Constitution and decided that they would be added by appending them to the Constitution. On August 24, 1789, the House adopted the Articles of Amendment, designating Resolution 4(10) as Article 15 of seventeen articles. 1 Annals 767.

No records were maintained on the Senate debates on the adoption of the Amendments but House Article Fifteen was adopted without alteration. Both Houses concurred on twelve amendments which were submitted to the states for ratification. Madison's Resolution 4(10) had become Article Eleven of the proposed amendments. Two proposed

amendments failed to obtain ratification by three-fourths of the states, and the Eleventh proposed amendment was finally adopted as the Ninth Amendment to the Constitution.

As one of the first commentators on the Ninth Amendment, Knowton Kelsey, observed:

> The Ninth Amendment is not meaningless or superfluous. Surely it is more than a mere negative on implied grants of power that might otherwise be asserted because of the express enumeration of rights in respect of matters where no power was granted. It must be more than a mere net to catch fish in supposedly fishless water. It is certainly more than a mere emphasis on the doctrine of delegated and enumerated powers. It must be a positive declaration of existing, though unnamed rights, which may be vindicated under the authority of the Amendment whenever and if ever any governmental authority shall aspire to ungranted power in contravention of "unenumerated rights."

Kelsey, The Ninth Amendment of the Federal Constitution, 11 Ind. L.J. 309, 323 (1936) (emphasis added).

Thus, the Ninth Amendment was intended by the First Congress to embody substantive protection for unenumerated rights of the people.

> E. The Tenth Amendment, by reserving to the States or to the people, powers not delegated to the Federal Government, supports the substantive interpretation of the Ninth Amendment and establishes that the creation of crimes without victims is a usurpation of the power reserved to the people.

The Tenth Amendment states: "The powers not delegated to the United States Constitution, nor prohibited by it to the states, are reserved to the States respectively or to the people." Const. Amend.

X. What is now the Tenth Amendment was Madison's Eighth Resolution, which he intended to be inserted after Article VI, which contains the supremacy clause of the Constitution. As initially proposed by Madison, Resolution Eight did not include the final clause "or to the people." 1 Annals 433-436. The absence of this final clause accounts for Madison's oral analysis of the Eighth Resolution when the resolutions were proposed:

> Proposition Eight may be considered superfluous . . . I admit they may be deemed unnecessary; there can be no harm in making such a declaration, if gentlemen will allow that the fact is as stated.

1 Annals 459.

The Senate added the words "or to the people," after it was determined by the House that the Resolutions would be appended to the Constitution rather than integrated into the document. The Senate kept no record of their debates, and the House accepted the Senate version without further debate.

Madison's initial proposal was a self proclaimed truism which defined the division of powers between the Federal Government and the states, thus emphasizing the commonly held proposition that the Federal government was a government of limited powers. House debates antedating the Senate addition, "or to the people" concerned the manner of limited the powers of the Federal government, specifically, whether it should be phrased as powers not "expressly" delegated are reserved to the states. 1 Annals 790.

The addition of the final clause of the Tenth Amendment obviated an obvious inconsistency with the Ninth Amendment. If, as provided by

the Ninth Amendment, certain rights were retained by the people, an express limitation on the scope of federal power, it would have been inconsistent to provide in the Tenth amendment that all powers were reserved to either the federal government or the states. The Senate addition, consented to by the House without debate, harmonized and in effect made mutual the purpose of the Ninth and Ten Amendments to reaffirm the principle that there are unenumerated rights retained by the people and that for this very reason, there were powers which neither the federal government nor the states possessed. Although the Senate kept no copy of debate, the inclusion of this final clause "or to the people," indicates their degree of solicitude for upholding "other rights retained by the people," as expressed in the Ninth Amendment.

The view was recently assumed by A.H. Kelly, constitutional theorist:

> To admit a given federal power as a matter of convenience would go far to impair the validity of the Tenth Amendment. The doctrine that the federal government was one of the enumerated powers would then be replaced by the theory that federal authority could encompass any matter of sufficient importance to the national welfare. The whole Jeffersonian conception of the union would be subtly altered, even destroyed.

A.H. Kelly, The American Constitution, 220 (3d Ed. 1963)

The import of the clause of the Tenth Amendment is inaccurately reflected by its contemporary disregard. The last clause of the Tenth Amendment has never been subjected to careful Supreme Court analysis, nor has any case been argued or decided on its merits. In the first forty years of this century, the Tenth Amendment was often invoked by

litigants who claimed that certain federal laws invaded the powers "reserved to the state." The Supreme Court, in three major cases (Hamman v. Dagenhart, 247 U.S. 251, 62 L. Ed. 1101 (1981) (commerce clause), Schecter v. United States, 295 U.S. 495 (1935) (commerce clause), and United States v. Butler, 247 U.S. 1 (1936) (taxation)), guided by its view as to where the dividing line between the state and the Federal jurisdiction should be drawn, restricted delegated federal powers. In these decisions, it was determined that the asserted federal power was not within the purview of the commerce clause or the power of taxation.

In the 1941 decision of United States v. Darby, 312 U.S. 100, 61 S. Ct. 451 (1941), the Supreme Court expressly reversed the earlier interpretation of the commerce clause in Hamman v. Dagenhart, stating as follows:

> Our conclusion is unaffected by the Tenth Amendment . . . The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the Amendment, or that its purpose was other than to allay fears that a new government might seek to exercise power not granted, and that the states might not be able to exercise fully their reserved powers.

312 U.S. at 123-124 (emphasis added).

The decision of the Court in Darby was limited exclusively to the issue of the relationship between the national and state governments so as to resolve the question of federal versus state authority and impose a proper interpretation of the commerce clause of the Constitution. As applied to the relationship between the states and the federal

government, the Tenth Amendment may be viewed as a "truism," as was pointed out by both the Court in Darby and Madison when his Eighth Proposal was submitted. However, the Tenth Amendment is not a truism with its final clause; viewed in conjunction with the Ninth Amendment, it is properly conceived as delineating powers possessed by neither the federal government nor the states, but by the people.

Thus, the basic principle embodied in the Ninth Amendment may be stated as follows: As the rights of the people of the United States are not created by government, so they are not to be diminished by government, unless by the appropriate exercise of an express power.

The power to punish victimless crimes was not granted to the federal government by the Constitution. Indeed, the social and legal history of the time indicates that it was the intention of the framers to remove the government from the enforcement of such "moral" crimes. Consequently, the criminalization of those acts by Congress and the State legislatures was an unconstitutional assumption of power reserved to the people under the Tenth Amendment and a denial and disparagement of other rights retained by the people under the Ninth Amendment.

II. JUDICIAL APPLICATION OF THE NINTH AMENDMENT SINCE ITS ENACTMENT PROVIDES PRECEDENT FOR A SUBSTANTIVE INTERPRETATION.

A. Supreme Court Treatment.

Until Justice Goldberg's concurrence on Ninth Amendment grounds in Griswold v. Connecticut, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed.2d

510 (1965), the Ninth Amendment had been discussed by the Supreme Court in only three decisions: Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936); Tennessee Electric Power Company v. T.V.A., 306 U.S. 118, 59 S. Ct. 366 (1939); United Public Workers v. Mitchell, 330 U.S. 75, 67 S. Ct. 556 (1946). In the T.V.A. cases of 1936 and 1939, the Supreme Court rejected allegations by opponents of T.V.A. that by engaging in production and sale of electrical power, the federal government had prevented private individuals from using their property and earning a livelihood. The Court found no violation of the Ninth Amendment as had been urged, stating the Ninth Amendment does not withdraw rights expressly granted to the central government." 287 U.S. at 330.

In United Public Workers v. Mitchell, employees of the executive branch of the federal government asserted that citizen have a fundamental right to engage in political activity and express their views. Not found to be violative of the First, Ninth and Tenth Amendment were provisions of the Hatch Act which forbid civil service employees from active participation in management of political campaigns. In rejecting the employee's arguments, the Supreme Court accepted their contentions that the nature of political rights reserved to the people by the Ninth and Tenth Amendments were involved:

> The right claimed as inviolated may be stated as the right of a citizen to act as a party official or worker to further his own political views. Thus we have a measure of interference by the Hatch Act in the rules with what otherwise would be the freedom of the civil servant under the First, Ninth and Tenth Amendments . . . Of course, it is accepted constitutional doctrine that these fundamental human rights are not absolutes . . . The powers granted by the Constitution to the federal government are

> subtracted from the totality of sovereignty originally in the state and the people. Therefore, when objection is made that the exercise of a federal power infringes upon rights reserved by the Ninth and Tenth Amendments, the inquiry must be directed toward the grant of power under which the action of the Union was taken. If granted power is found, necessarily the objection of invasion of those rights, reserved.

330 U.S. at 75, 94-96.

These three cases, although they reject the particular rights contended, uphold in principal, that the Ninth and Tenth Amendments are a proper mechanism for retaining, or regaining, "those rights reserved by the Ninth and Tenth Amendments" which are not "granted to the federal government."

Two trends in Supreme Court decisions antedating Griswold are relevant to the Ninth Amendment. First, there exists an extensive body of decisions which although they do not mention the Ninth Amendment, express the view that the American Constitutional system of government is based on the concept of natural law, e.g., Yick Wo v. Hopkkins, 118 U.S. 356, 369, 30 L. Ed. 220 (1886); Gulf, Colorado and Sante Fe Railway v. Ellis, 165 U.S. 150, 159, 41 L. Ed. 666 (1897), and that the individual has certain natural inalienable rights, which a government of limited powers must not infringe upon:

> It must be conceded that there are such rights in every free government beyond the control of the States. A government which recognized no such rights, which held the lives, the liberty and the property of its citizen subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is nonetheless a despotism. It may well be doubted if a man is to hold all that he is

> accustomed to call his own, all in which he has placed his happiness, and the security of which is essential to that happiness, under the unlimited dominion of others, whether it is not wiser that this power should be exercised by one man than by many.

The theory of our government, state and national, is

> opposed to the deposit of unlimited power anywhere. The executive, the legislative and the judicial branches of these governments are all of limited and defined powers.

There are limitations on such power which grow out of the

> essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to name.

Savings and Loan Association v. City of Topeka, 87 U.S. (20 Wall.) 655, 662, 22 S. Ct. 455, 461 (1875); see also Kent v. Dulles, 357 U.S. 116, 125, 78 S. Ct. 1113 (1958).

These values have been transmuted into concepts of due process, as typified by the language which appears in Rochin v. California: Even though the concept of due process of law is not final

> and fixed, these limits are derived from considerations that are fused in the whole nature of our judicial process . . These are considerations deeply rooted in reason and in the compelling traditions of the legal profession . . . due process of law thus conceived is not to be derided as resort to a revival of natural law . . They are only instances of the general requirement that states, in their prosecutions, respect decencies of civilized conduct. Due process of law, as a historic and generative principle, precluded the defying, and thereby confining these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend "a sense of justice."

342 U.S. 165, 170-173, 72 S. Ct. 205, 208-210 (1951).

The second trend in Supreme Court decisions enunciated as fundamental and protected from infringement by governmental interference, rights unenumerated in the original constitution or the first eight amendments. Viewed as rights fundamental to the functioning of a free society, and occasionally held as concomitant to the proper functioning of an already established right, e.g. Aptheker v. Secretary of State, 378 U.S. 500, 521, 84 S. Ct. 1659, 12 L. Ed.2d 992 (1963), these rights are frequently articulated as within the due process clauses of the Fifth or Fourteenth Amendments. Rights unexpressed in the Constitution but advanced by the Supreme Court by finding unconstitutional a state or federal statute without relying on the Ninth Amendment, have included: the right to earn a livelihood, Traux v. Raich, 239 U.S. 33, 60 L. Ed. 131 (1915); the right of parents to send their children to private school, Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510, 69 L. Ed. 1070 (1925); the right of privacy, Olmsted v. United States, 277 U.S. 438, 72 L. Ed. 944 (1929), (J. Brandeis, dissenting); the right of employees to self-organization and chosen representation, N.L.R.B. v. Jones and Laughlin Steel Corp, 301 U.S. 1, 57 S. Ct. 334 (1937); right of marriage and procreation, Skinner v. Oklahoma, 316 U.S. 535, 62 S. Ct. 1110 (1941), Loving v. Virginia, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 1010 (1967); freedom of association and privacy in one's association, N.A.A.C.P. V. Alabama, 357 U.S. 449, 78 S. Ct. 1163 (1957); freedom to travel within frontiers, Kent v. Dulles, 357 U.S. 116, 78 S. Ct. 1113 (1958); right to advice concerning what lawyer a union member could confidently reply upon, Railroad Trainmen v.

Virginia Board of Elections, 383 U.S. 663, 86 S. Ct. 1079, 16 L. Ed.2d 169 (1966); the right to vote in federal elections, Oregon v. Mitchell, 400 U.S. 112, 91 S. Ct. 260, 27 L. Ed.2d 272 (1970). It should suffice to merely comment that by advancing as fundamental, individual rights which lack enumeration in the federal Constitution, the Supreme Court has reaffirmed the principle set forth by the Ninth Amendment and the final clause of the Tenth Amendment that other rights are retained by the people.

In Griswold v. Connecticut, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965); the Supreme Court in a series of separate decisions and by a seven-to-two majority, held unconstitutional a Connecticut state statute prohibiting the use of contraceptives by married couples. In an opinion by Justice Douglas, expressing the views of five members of the Court, the statute was held invalid as an unconstitutional invasion of the right to privacy of married persons. Justice Douglas' opinion represented a departure from customary constitutional terminology. He expressed the view that there exist unenumerated "peripheral rights" without which "specific rights would be less secure." 381 U.S. at 483. After brief discussion of several cases in which the Supreme Court held as fundamental to due process, rights unenumerated in the Constitution or its Amendments, Justice Douglas stated:

> The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.

381 U.S. at 484.

Guarantees which Douglas felt gave substance to the right of marital privacy appear in the First Amendment, the Third Amendment's prohibition against quartering soldiers "in any house" in time of peace, the Fourth Amendment's express affirmation of the "right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures," the Fifth Amendment's self-incrimination clause, and the provisions of the Ninth Amendment, which he quoted in full. For the first time since its ratification, the Supreme Court held a right was retained by the people under the Ninth Amendment.

Mr. Justice Goldberg, in a separate concurring opinions in which Chief Justice Warren and Justice Brennan joined, extensively analyze the meaning of the Ninth Amendment. Although he agreed that the due process concept of liberty protects personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights. Goldberg expressly clarified that the purpose of his separate opinion was "to emphasize the relevance of that Amendment (the Ninth) to the Court's holding." 381 U.S. at 487. Justice Goldberg briefly discussed the legislative history of the Ninth Amendment, quoting from Madison's statements before the First Congress, Hamilton in Federalist Paper Number 84 and from Justice Story's Commentaries on the Constitution, each supportive of a new and important role for the Ninth Amendment. He concluded:

> The statements of Madison and Story make clear that the framers did not intend that the first eight amendments be construed to exhaust the basic and fundamental rights which the Constitution guaranteed to the people.

381 U.S. at 490.

Justice Goldberg, after discussion and citations of decisions in which the Supreme Court asserted as fundamental rights unenumerated in the Constitution, reached the conclusion that the Ninth Amendment did not broaden the authority of the Supreme Court, but rather, served "to support what this Court has been doing in protecting fundamental rights." 381 U.S. at 493. It is clear that Justice Goldberg intended greater reliance upon the provisions of the Ninth Amendment in furthering unenumerated human rights:

> While the Ninth Amendment -- and indeed the entire Bill of Rights -- originally concerned restrictions upon federal power, the subsequently enacted Fourteenth Amendment prohibits the State as well from abridging fundamental personal liberties. And, the Ninth Amendment, indicating that not all such liberties are specifically mentioned in the first eight amendments, is surely relevant in showing the existence of other fundamental personal rights, now protected from states, as well as federal, infringement.

381 U.S. at 493.

He concluded by saying:

> In sum, I believe that the right of privacy in the marital relation is fundamental and basic -- a personal right "retained by the people" within the meaning of the Ninth Amendment. Connecticut cannot constitutionally abridge this fundamental right which is protected by the Fourteenth Amendment from infringement by the States.

381 U.S. at 499.

More recently, the Supreme Court again relied upon the Ninth Amendment as the basis for judicial protection of rights not explicitly listed in the Constitution. In Richmond Newspapers, Inc. v. Virginia, 448 U.S. 578, 579 (1980) (plurality opinion), the State argued that the

public had no right to attend trials since this right could not be found in the text of the Constitution. Chief Justice Burger, writing for the plurality, dismissed this argument based on the Ninth Amendment and its historical underpinnings. Id. at 579-80. The State's argument, said the Court,

> did not escape the notice of the Constitution's draftsmen; they were concerned that some important rights might be thought disparaged because not specifically guaranteed. It was even argued that because of this danger no Bill of Rights should be adopted. See, e.g., The Federalist No. 84 (A. Hamilton). . . . But arguments such as the State makes have not precluded recognition of important rights not enumerated.

Id. at 579. The Court noted that James Madison perceived the need for some sort of constitutional "saving clause,"

> which, among other things, would serve to foreclose application to the Bill of Rights of the maxim that the affirmation of particular rights implies a negation of those not expressly defined. See 1 Annals of Cong. 438-440 (1789). See also, e.g., 2 J. Story, Commentaries on the Constitution of the United States 651 (5th ed. 1891). Madison's effort's, culminating in the Ninth Amendment, served to allay the fears of those who were concerned that expressing certain guarantees could be read as excluding others.

Id. at 579 n. 15. The Court ultimately held that the right of the public and the press to attend criminal trials is implicit in the guarantees of the First Amendment. Id. at 580.

Thus, while the Supreme Court has not definitely and expressly given the Ninth Amendment a substantive interpretation, the clear thrust of its opinions in this area is directed toward substantive protection of unenumerated rights. The lack of a clear statement from the Court is probably due more to the fact that it has never been

presented with the appropriate case upon which to apply it, rather than any reluctance to provide a substantive reading.

B. Lower Court Treatment

Review of the decisions of the district courts displays the willingness of the judiciary to adopt the Ninth Amendment as a substantive source of unenumerated rights. In Babbitz v. McCann, 310 F. Supp. 293 (E.D. Wisc. 1970), vacated on other grounds, 402 U.S. 903 (1971), the court, after detailed analysis of Griswold and the alternatives of the Fourteenth Amendment due process or Ninth Amendment reasoning declared the state statute an unconstitutional violation of a woman's Ninth Amendment private right to refuse to carry an unquickened embryo during her early months of pregnancy. In doing so, the District Court quoted from Union Pacific Railroad Co. v. Botsford, 141 U.S. 250, 35 L. Ed. 734 (1891), a decision which the Supreme Court in Roe v. Wade followed with favor. The Supreme Court in Union Pacific, as quoted in Babbitz, stated:

> No right is more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. As well said Judge Cooley, "The right to one's person may be said to be a right of complete immunity: to be let alone."

141 U.S. at 251.

The Court in Babbitz chose language strikingly similar to that used by former Justice Clark, one of the members of the Court that

decided Griswold. In his essay -- Religion, Morality and Abortion: A Constitutional Appraisal, 2 Loy. L. Rev. 1 (1969), Clark stated that since 1965, an entire "zone of individual privacy" exists around "marriage, home, children and day-to-day living habits," protected by the Ninth Amendment in the absence of a clearly demonstrable compelling state interest. "This is one of the most fundamental concepts that the Founding Fathers had in mind when they drafted the Constitution." 2 Loy. L. Rev. at 8.

The district court in Roe v. Wade held the Texas abortion statute prima facie unconstitutional for infringing upon the Ninth Amendment right of "choice over events which, by their character and consequences, bear in a fundamental manner on the privacy of individuals." 314 F. Supp. 1217, 1331 (N.D. Tex. 1970).

In numerous state and federal decisions, the right of personal privacy and the integrity of individual private expression has been developed and fully articulated as a Ninth Amendment right of the individual against arbitrary or unlawful interference. Examples of its application include: the termination of employment of a postal employee because of his cohabitation with a woman with whom he was not married was held in violation of one's Ninth Amendment right to privacy, Mindel v. U.S. Civil Service Commission, 312 F. Supp. 485 (N.D. Cal. 1970); dismissal of a teacher charged with immorality for sending a letter to a former student containing profane language was held unconstitutional and the letter to be a private communication under the Ninth Amendment, and the teacher reinstated, Jarvella v. Willoughby-Eastlake School District, 233 N.E.2d 143 (Ohio 1967); where evidence is to be presented

at a preliminary hearing which will not be admissible at trial, and where publicity will make it unlikely that an impartial jury may be selected, or would adversely affect the reputations of defendants, failure to close such a hearing for the purpose of determining probable cause would constitute a violation of defendant's Ninth Amendment right to privacy, Hooper v. Gooding, 282 F. Supp. 624 (D.C. Ariz. 1968).

In 1969, the United States Supreme Court, in Stanley v. Georgia, 394 U.S 557, 89 S. Ct. 1243, 22 L. Ed.2d 542 (1969) held that the categorization of films as obscene was insufficient justification for a drastic invasion of the privacy of one's home for mere possession. The Court stated:

> If the First Amendment means anything, it means that a state has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the though of giving government the power to control men's minds...The line between the transmission of ideas and mere entertainment is much too elusive for this Court to draw, if indeed such a line can be drawn at all.

394 U.S. at 565-566 (emphasis added).

Although not a trace of Ninth Amendment consideration by the Court may be inferred by this decision, the federal district court in United States v. B & H Distributing Corp., 319 F. Supp. 1231 (W.D. Wisc. 1970) held unconstitutional as violative of the First (speech) and Ninth (privacy) Amendments, a state statute prohibiting unlawful transportation of obscene materials in interstate commerce by means of common carriers. The Court viewed its decision to be mandated by Stanley v. Georgia. The Supreme Court vacated judgment and remanded for

reconsideration in light of its decisions in United States v. Reidel, 402 U.S. 351, 91 S. Ct. 1410, 28 L. Ed.2d 813 (1971); United States v. Thirty-Seven Photos, 402 U.S. 363, 91 S. Ct. 1400, 28 L Ed. 2d 822 (1971), United States v. B & H Distributing Corp., 403 U.S. 924, 91 S. Ct. 2248, 29 L. Ed.2d 705 (1971). These two decisions were companion cases in which the Supreme Court held that the right of private possession in the privacy of one's home of contraband obscene movies neither gave a commercial operation the right to use the mails for delivery of obscene material nor an individual the right to import through customs in his own luggage thirty-seven photographs of nudes. Nonetheless, the decision of the District Court indicates the willingness of members of the judiciary to apply the Ninth Amendment as the protector of individual rights.

In the case of Manfredonia v. Barry, 401 F. Supp. 762 (E.D.N.Y. 1975), the court awarded damages to the plaintiffs arising out of the illegal arrest and jailing of the plaintiffs, a lecturer on birth control and an audience member, who were charged with the misdemeanor of endangering the welfare of the audience member's child. The court held that the plaintiff audience member "was clearly exercising her parental right under the Ninth Amendment to have her own child with her regardless of its age." 401 F. Supp. at 767.

In Bishop v. Colaw, 450 F.2d 1069 (8th Cir. 1971), the court upheld the right of the individual to govern his personal appearance, stating that the acceptance of the dress code by the majority of students and the community does not justify the infringement. The court continued, emphasizing that "toleration of individual differences, is basic to our democracy, whether those differences be in religion, politics, or life-style." 450 F.2d at 1077. The court appears to have adopted the standard that the activity need not be

engaged in by the majority, that it may in fact be offensive to the majority, but so long as its impact upon the fundamental rights of others is de minimis, the burden of proof is upon the state to show an evident need of the community (compelling state interest) to justify its infringement. This standard was likewise professed by the Court in Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970) in which the issue of whether a right need be fundamental to fall within the protection of the due process clause was discussed. Although the court declined to adopt a Ninth Amendment rationale and chose instead a due process basis for overruling the actions of the school board, the issue is of equal importance to Ninth Amendment analysis and depicts the solicitude of the court to protect an individual's daily activities:

> We do not say that the governance of the length and style of one's hair is necessarily so fundamental as those substantive rights already found implicit in the "liberty" assurance of due process, requiring a compelling showing of the state before it may be impaired. Yet, "liberty" seems to us an incomplete protection if it encompasses only the right to do momentous acts, leaving the state free to interfere with those personal aspects of our lives which have no direct bearing on ability of others to enjoy their liberty...we think the founding fathers understood themselves to have limited the government's power to intrude into this sphere of personal liberty, by reserving some powers to the people.

424 F.2d at 1284-85 (emphasis added).

The sampling of case law presented serves to indicate the concern of members of the judiciary to protect the citizenry from unauthorized infringement of unenumerated personal or human rights. The Ninth Amendment contains discrete relevancy and meaning of its own, unshared and unnecessarily clouded by due process analysis.

C. State Court Treatment.

In 1968 the Supreme Court of Hawaii, in an unprecedented decision for that state, unanimously concluded that a general right of privacy is one of the rights retained and protected by the Ninth Amendment. The Ninth Amendment was found to protect an individual from a statute which, because it was overbroad, stifled the fundamental right of privacy, when the end could be more narrowly achieved. The statute made it unlawful for any person to engage, participate in, or be present at a cockfight exhibition. The court viewed mere presence a sweeping infringement on the dual freedoms of movement and privacy.

Critical of Justice Douglas' approach of penumbras and emanations as providing little basis for constitutional stability, the court noted that the source of protection for a right of privacy had not been determined by a majority of the Supreme Court, and continued, stating: The Ninth Amendment may well be the cornerstone of the

> Constitution in years to come...Historically, it was included to nullify the argument that the enumerated rights were intended to be the only protected. Therefore, to reject the Ninth Amendment as a source of substantive rights would be to accept the precise argument it was intended to nullify. As for its applicability to the state, by definition, the rights protected by the Ninth Amendment are those fundamental to a free society and therefore are included in the Fourteenth Amendment. The Ninth Amendment is a reservoir of personal rights necessary to preserve the dignity and existence of Man in a free society.

State of Hawaii v. Abellano, 441 P.2d 333, 337 (Haw. 1968).

In a thoughtfully worded and cogently articulated decision, the Supreme Court of Hawaii, carefully examined the admonitions of Justices Black and Stewart in their Griswold dissent, and arrived at the following

conclusion:

> The standard to be used in testing the constitutionality of a statute infringing on the right of privacy should depend on the precise aspect of privacy invaded. Where the aspect of privacy asserted is analogous to the right of property or contract, a lesser standard similar to the rationality test of substantive due process should suffice. But where, as here, the aspect of privacy involved is a constituent element in the definition of freedom, only the more stringent compelling interest-narrow specificity standard will suffice.

441 P.2d at 340.

The Justices of the Hawaii Supreme Court interpreted both the legislative history and Justice Goldberg's concurrence in Griswold as intending the Ninth Amendment to be a relevant source of unenumerated rights. The Justices clearly expressed that which they were in fact accomplishing, incorporation of the rights protected by the Ninth Amendment directly into the due process clause of the Fourteenth, rendering the protective features of the Ninth applicable to state action.

More recently, in Post v. State, 715 P.2d 1105 (Okl. Cr. App. 1986), cert. denied, 479 U.S. 890 (1986), the Oklahoma Court of Criminal Appeals held that a statute prohibiting "Crimes Against Nature," as applied to consensual sexual activity between adults, violated the constitutional right to privacy. Id. at 1109. The court explicitly relied, in part, on Justice Goldberg's concurrence in Griswold emphasizing the relevance of the Ninth Amendment to the Griswold holding. Id. at 1107-1108.

An area of adjudication which has proven particularly favorable to Ninth Amendment developments involves the issue of school dress and grooming codes. Few state court cases have been litigated because of the preference of student's counsel for federal courts. This is partly attributable to the traditional reluctance of state courts to hold that school regulations are beyond the authority of the local school board.

The Supreme Court has denied review in two decisions which upheld the asserted right as protected by the Ninth Amendment, Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969), cert. denied, 398 U.S. 937 (1970); Olff v. East Side Union High School, 305 F. Supp. 557 (Calif. 1969), rev'd 445 F.2d 932 (9th Cir. 1971), cert. denied, 404 U.S. 1042 (1972). In Olff v. East Side Union High School, Justice Douglas dissented, noting the irreconcilable conflict in federal court decisions. Encouraging the Supreme Court to decide the issue, he stated:

> The word "liberty" is not defined in the Constitution. But as we held in Griswold...it includes at least the fundamental rights retained under the Ninth Amendment...safeguarding the rights of personal taste. One's hair style, like one's taste for clothing, or one's liking for certain kinds of music, art, reading, recreation, is certainly fundamental in our constitutional scheme--a scheme designed to keep government off the backs of people.

404 U.S. 1042, 30 L. Ed. 736, 737 (emphasis added).

A number of courts, state and federal, have advanced the asserted rights of the student on Ninth Amendment grounds, either as a fundamental right of privacy, Arnold v. Carpenter, 459 F.2d 939 (7th Cir. 1972); Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969); Cossen v. Fatsi, 309 F. Supp. 114 (D.C. Conn. 1970); Reichenberg v. Nelson, 310 F. Supp.

248 (D.C. Neb. 1970); Dunham v. Pulsifer, 312 F. Supp. 411 (D.C. Vt. 1970); Black v. Cothren, 316 F. Supp. 468 (D.C. Neb. 1970); Berryman v. Hein, 329 F. Supp. 616 (D.C. Idaho 1971), the liberty to govern one's personal appearance, Bishop v. Colaw, 450 F.2d 1069 (8th Cir. 1971), or, as expressed by Justice Douglas, the right of personal taste, Murphy v. Pocatello School District No. 25, 480 P.2d 878 (Idaho 1971).

In In the matter of J.S.& C., 129 N.Y. Super. 486, 324 A.2d 90 (1974), the court held the right of a homosexual parent to the companionship and care of his or her children to be a fundamental right protected by the First, Ninth and Fourteenth Amendments. In that case, the Court concluded that the fact that one divorced parent is a homosexual does not per se provide sufficient basis for a deprivation of visitation rights. 324 A.2d at 94.

Numerous other state court cases have recognized the Ninth Amendment as providing substantive protection for individual rights, Lehrhaupt v. Flynn, 357 A.2d 35, 140 N.J. Super. 250 (1976) (privacy); State v. O'Neill, 545 P.2d 97 (Or. 1976)(privacy); Minnesota State Board of Health v. City of Brainerd, 241 N.W.2d 624 (Minn. 1976) (bodily integrity); and Aden v. Younger, 57 Cal. App.3d 662, 129 Cal. Rptr. 535 (1976) (privacy of mind). The Minnesota State Board of Health case, while upholding the power of the city to fluoridate the city water supply, recognized that the right of personal privacy, guaranteed under the First, Fourth, Fifth, Ninth and Fourteenth Amendments, extends to protecting an individual's decision regarding what he will or will not ingest into his body. The court noted that "this concept of bodily integrity is rooted in common law." 241 N.W.2d

at 631.

Thus, it is clear that the courts, both state and federal, have used the Ninth Amendment as a source of substantive protection for an increasing number of individual rights not enumerated in the Constitution, but nevertheless "retained by the people."

III. RULES OF STATUTORY INTERPRETATION SUPPORT A SUBSTANTIVE READING OF THE NINTH AMENDMENT.

As a general rule, a statute should not be read so as to deprive any of its words of meaning. The Ninth Amendment states that there are other unenumerated rights "retained by the people."

While the Constitution explicitly states that these unenumerated rights of the people exist, the traditional interpretation of the amendment has shielded these rights from constitutional protection. However, the wording in itself seems to raise certain unenumerated rights to a constitutional plane. "(I)t cannot be presumed that any clause in the Constitution is intended to be without effect." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803). In interpreting the Constitution, "real effect should be given to all the words it uses." Myers v. United States, 272 U.S. 52, 151, 71 L. Ed. 160 (1926). See also, Griswold v. Connecticut, 381 U.S. 478, 85 S. Ct. 1678, 14. Ed.2d 510 (1965), (Goldberg, J., concurring).

An interpretation which denies the existence of constitutionally protected unenumerated rights clearly does violence to those words in the Constitution which state that there are unenumerated rights "retained by the people." As Justice Goldberg has noted:

> The Ninth Amendment to the Constitution since 1791 has been a basic part of the Constitution which we are sworn to uphold. To hold that a right so basic

> and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because the right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever.

Griswold v. Connecticut, 381 U.S. 479, 490-491 (1965) (Goldberg, J., concurring).

IV. THE STANDARD TO BE APPLIED IN DETERMINING WHETHER THE ACTIVITY OR BEHAVIOR CONSTITUTING VICTIMLESS CRIMES IS PROTECTED BY THE NINTH AND TENTH AMENDMENTS SHOULD BE WHETHER THE ACT OR BEHAVIOR TO BE REGULATED CAUSES HARM TO PERSONS OTHER THAN THE ACTOR.

Victimless crimes have been defined as:

> Those nonforceful offenses where the conduct subjected to control is committed by adult participants who are not willing to complain about their participation in the conduct, and where no direct injury is inflicted upon other persons not participating in the proscribed conduct.

Decker, The Case for Recognition of an Absolute Defense or Mitigation in Crimes Without Victims, 5 St. Mary's L.J. 40, 41 (1973).

The major political theorist of the American colonial period, James Otis, in his pamphlet, The Rights of the British Colonies Asserted and Proved, enunciated the natural rights of man concept, and in doing so, formulated a standard with the following guidelines:

> The natural liberty of man is to be free from any superior power on earth, and not to be under the will or legislative authority of man, but only to have the law of nature for his rule. The colonists being men, have a right to be considered as equally entitled to all the rights of nature with the Europeans, and they are not to be restrained, in the exercise of any of these rights, but for the evident good of the community. By being or becoming members of society, they have not renounced their natural liberty in any greater degree than other good

> citizens, and if 'tis taken from them without their consent they are enslaved...

(emphasis added).

The assertion of the existence of natural rights "not to be restrained but for the evident good of the community" approaches closely the compelling state interest requirement adopted by Goldberg in Griswold:

> In a long series of cases this court has held that where fundamental personal liberties are involved, they may not be abridged by the states simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose. Where there is significant encroachment upon personal liberty the State may prevail only upon showing a subordinating interest which is compelling.

381 U.S. at 497. Professor William Marnell, in his book, Manmade Morals; Four Philosophies That Shaped America, discussed Alexander Hamilton's view of society as the protector of personal liberties, and stated that Hamilton was fond of quoting from Blackstone that "the principle aim of society is to protect individuals in the enjoyment of those absolute rights which

were vested in them by the immutable laws of nature; that the first and primary end of laws is to maintain and regulate these absolute rights of individuals." Id. at 158. Hamilton, in Federalist No. 78 extends the protective authority of the judiciary to encroachments by the majority upon rights which a minority intended to express:

> This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors which the acts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate

> reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.

The Federalist Papers 469 (Rossiter Ed. 1961) (emphasis added).

On the basis of views expressed by Hamilton and Otis, for a right to fall within the parameters of Ninth Amendment protection, an activity need not be engaged in by the majority, but so long as an individual's expression of the asserted right does not infringe upon the fundamental rights of others or endanger the "evident good of the community," the asserted right would remain within the ambit of unenumerated protected rights. Stated differently, but with the same result, the less the likelihood that an expression of the asserted right will interfere with the fundamental rights of others, the greater the likelihood that the right falls within the protection of the Ninth Amendment.

Such a standard coincides with the principle enunciated by the brilliant Nineteenth-Century English political philosopher and libertarian, John Stuart Mill, for the application of governmental power in controlling the behavior of its citizens:

> The object of this Essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion. That principle is that the sole end for which mankind are warranted, individually or collectively, or in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightly exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot

> rightfully be compelled to do or forebear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil, in case he does otherwise. To justify that, the conduct from which it is desired to deter him must be calculated to produce evil to someone else. The only party of the conduct of anyone, but which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.
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> * * * * * *
>
> No society in which these liberties are not, on the whole, respected is free, whatever may be its form of government; and none is completely free in which they do not exist absolute and unqualified. The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it. Each is the proper guardian of his own health, whether bodily, or mental and spiritual. Mankind are greater gainers by suffering each other to live as seems good to themselves, than by compelling each to live as seems good to the rest.

J. S. Mill, On Liberty 13, 16-17 (Liberal Arts Ed. 1956) (emphasis added).

It should be made clear that Mill's philosophy is not offered as an absolute or exclusive criterion for the determination of Ninth Amendment rights. It is offered rather as a standard which will raise a presumption that an interest is protected.

It is Mill's lack of originality which renders his work a useful tool in that determination. The Court is not asked to adopt a philosophy more desirable than that of the authors of the Constitution

but rather to apply a very clear statement of the philosophy which prompted the Ninth Amendment. Russell Kirk refers to On Liberty a follows:

> Some books form the character of their age; others reflect it; and Mill's Liberty is the latter order ...as Mill himself was the last of the distinguished line of British empiricists, so his Liberty, with its foreboding remarks on the despotism of the masses was more an epilogue to middle-class liberalism than a rallying cry.

Kirk, Introduction to J. Mill, On Liberty vii (Gateway ed. 1959).

Mill was born in 1806 and published his essay On Liberty in 1859. Obviously Mill himself did not influence the writers of the Constitution. However, he did elaborate on many of the concepts of political freedom which had evolved in the century before him. It is in this sense that Mill was one of the most eloquent spokesmen of these concepts. See Note, Limiting the State's Police Power: Judicial Reaction to John Stuart Mill, 37 U. Chi. L. Rev. 605, N. 3 (1970).

While Mr. Justice Black's objection in Griswold v. Connecticut to the application of standards based on "natural justice", 381 U.S. at 522 (Black, J., dissenting), might appeal to an age which does not accept that concept, it does not obviate the fact that the authors the Constitution did believe in it.

James Otis spoke of "natural inherent and inseparable rights" that would remain even if the charter privileges of the colonies were disregarded or revoked. C. P. Patterson, The Constitutional Principles

of Thomas Jefferson, 49-50 (1953). John Adams, Vice-President and presiding officer of the Senate when the Bill of Rights was passed, had written some years earlier:

> I say RIGHTS, for such (the poor people) have, undoubtedly, antecedent to all earthly government Rights, that cannot be repealed or restrained by human laws--Rights, derived from the great Legislator of the universe.

3 Adams, Works 449 (1851) (Emphasis in original).

Thomas Jefferson declared in 1774 that the rights of Americans were "derived from the laws of nature." Jefferson, Summary View (1774) quoted in C. P. Patterson, supra, at 52. In summarizing the philosophical background to the American Revolution, C.P. Patterson has stated:

> Natural rights, in conclusion, was a juristic conception regarded as embodied in immutable law. Violations of natural rights by the English Parliament were null and void since contrary to natural justice. To the forefathers, these rights were not merely moral beatitudes, abstractions of the Age of Reason, but irrevocable rights conferred by the "law of nature and nature's God"--the basis of all law, to which man-made law must conform in order to be law.

C.P. Patterson, supra, at 49. "The ruling principle of (Mill's) essay on Liberty...is similar in some respects to the ancient theory of natural rights." Anschutz, The Philosophy of J.S. Mill, 58 (1953). If Courts are going to protect rights which the framers of the Constitution meant to be protected, they must deal with "natural" or "inherent" rights no matter how difficult it might be in the modern era. It is this modern inability to treat natural law concepts that makes Mill's work particularly valuable. He provides a workable

criterion for determining which rights were considered protected by the authors of the Constitution.

Although the fact situation in Mill's time (1850's) was not the same as the framers' time or the same as today, his concepts have retained their vitality:

> (T)here is a sphere of action in which society, as distinguished from the individual, has, if any, only an indirect interest; comprehending all that portion of a person's life and conduct which affects only himself, or if it also affects others, only with their free, voluntary, and undeceived consent and participation. When I say only himself, I mean directly, and if the first instance; for whatever affects himself, may affect others through himself ... this, then, is the appropriate region of human liberty. It comprises, first the inward domain of consciousness; demanding liberty of conscience in the most comprehensive sense; liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, oral, or theological ... Secondly, the principle requires liberty of tastes and pursuits; of framing the plan of our life to suit our own character; of doing as we like subject to such consequences as may follow; without impediment from our fellow creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong. Thirdly, from this liberty of each individual, follows the liberty, within the same limits, of combination among individuals; freedom to unite, for any purpose not involving harm to others; the persons combining being supposed to be of full age, and not forced or deceived.

Mill, supra, at 15-16 (emphasis added).

Mr. Justice Brandeis, in a dissenting opinion which has since risen above mundane legalisms and attained independent literary status, wrote:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of

> happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfaction of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions, and their sensations. They conferred, as against the Government, the right to be let alone--the most comprehensive of rights and the right most valued by civilized man.

Olmstead v. United States, 277 U.S. 438, 478, 72 L. Ed. 944 (1928).

The "right to be let alone" includes the privilege of an individual to plan his own affairs, for, "...outside of areas of plainly harmful conduct, every American is left to shape his own life as he thinks best, do what he pleases, go where he pleases." Kent v. Dulles, 357 U.S. 116, 126, 78 S. Ct. 1113, 2 L. Ed.2d 1204 (1958) (emphasis added). To determine these rights, standards must be developed, and whether called privacy or liberty, Brandeis' "right to be let alone" is probably the functional equivalent of Mill's right to act as one will short of harming others.

Mill was quick to point out, however, that his principle applied only to adults of competent age and understanding:

> It is, perhaps, hardly necessary to say that this doctrine is meant to apply only to human beings in the maturity of their faculties. We are not speaking of children or of young persons below the age which the law may fix as that of manhood or womanhood. Those who are still in a state to require being taken care of by others must be protected against their own actions as well as against external injury.

Mill, supra, at 13.

The courts have also recognized this necessary exception. The United States District Court for the Middle District of Pennsylvania,

in upholding a juvenile curfew ordinance, recognized that the constitutional rights of adults and juveniles are not co-extensive, and that the conduct of minors may be constitutionally regulated to a greater extent than that of adults, with the age of a minor a significant factor in assessing whether a minor has the requisite capacity for individual choice. Bykofsky v. Borough of Middletown, 401 F. Supp. 1242 (M.D. Pa. 1975).

Thus, John Stuart Mill has provided us with a workable standard by which to determine whether the Ninth Amendment provides protection for those acts committed by adults which the state has determined to denominate as criminal but which do not involve the infliction of harm upon other persons.

A. Application of the Standard

Encapsulated, Mill's philosophy is that a person of sound mind and proper age is free to do what he will either individually or in concert with others, short of harming another. Mill, however, did not offer this criterion as solely a simplistic measure of rights. He was aware that liberty could only be preserved by balancing collective rights with individual rights.

> I fully admit that the mischief which a person does to himself may seriously affect, both through their sympathies and their interests, those nearly connected with him, and, in a minor degree, society at large. When, by conduct of this sort, a person is led to violate a distinct and assignable obligation to any other person or persons, the case is taken out of the self-regarding class and becomes amenable to moral disapprobation in the proper sense of the term. If, for example, a man, through intemperance or extravagance, becomes unable to pay his debts, or having undertaken the moral responsibility of a family, becomes from the

> same cause incapable of supporting or educating them, he is deservedly reprobated and might be justly punished; but it is for the breach of duty to his family or creditors, not for the extravagance. If the resources which ought to have been devoted to them had been diverted from them for the most prudent investment, the moral culpability would have been the same. George Barnwell murdered his uncle to get money for his mistress, but if he had done it to set himself up in business, he would equally have been hanged. Again, in the frequent case of a man who causes grief to his family by addiction to bad habits, he deserves reproach for his unkindness or ingratitude; but so he may for cultivating habits not in themselves vicious, if they are painful to those with whom he passes his life, or who from personal ties are dependent on him for their comfort. Whoever fails in the consideration generally due to the interests and feelings of others, not being compelled by some more imperative duty, or justified by allowable self-preference, is a subject or moral disapprobation for that failure, but not for the cause of it, nor for the errors, merely personal to himself, which may have remotely led to it. In like manner, when a person disables himself, by conduct purely self-regarding, from the performance of some definite duty incumbent on him to the public, he is guilty of a social offense. No person ought to be punished simply for being drunk; but a soldier or a policeman would be punished for being drunk on duty. Whenever, in short, there is a definite damage, or a definite risk of damage, either to an individual, or to the public, the case is taken out of the province of liberty and placed in that of morality or law.

Mill, supra, at 98-100 (emphasis added).

Since there is little behavior which is either purely collective or purely individual, the preservation of liberty is dependent on the establishment of a wise balance between the competing interests. It is this balancing process which the Ninth Amendment requires.

In applying this standard, the court must progress through three

major steps:

1. First, it must be determined that the right advanced is neither protected nor prohibited by another provision of the Constitution. If it is found to be neither protected nor prohibited by another provision, the asserted right may be an activity which lies within the ambit of Ninth Amendment protection as a right to be retained by the people. United Public Workers v. Mitchell, 330 U.S. 75, 67 S. Ct. 550 (1946).

2. Second, it must be shown that the activity asserted as a protected right neither infringes upon another's asserted or constitutionally protected right, nor endangers the evident good of the community. The fact that it is a personal right which only the minority upholds as essential neither denies nor disparages Ninth Amendment protection. In analyzing the "evident good of the community" the following sub-questions must be answered:

a. Does the challenged regulation affect the behavior of competent adults?

b. Does the law limit the ability of the individual to shape his conscience or plan his lifestyle?

c. Does the behavior which the law attempts to modify affect persons other than the actor?

Third, once a prima facie showing is made that the asserted right is an "individual liberty," not an "economic liberty," and that the liberty espoused does not interfere with the rights of another or do harm to another person, the presumption of constitutionality of the statute falls and the burden then shifts to the state to prove that

infringement of the asserted Ninth Amendment right, by applying criminal sanctions, is justified by a compelling state interest. As the Supreme Court has noted in a similar context:

> The freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual. It is such conflicts which most frequently require intervention of the State to determine where the rights of one end and those of another begin. But the refusal of these persons to participate in the (flag-saluting) ceremony does not interfere with or deny rights of others to do so. Nor is there any question ... that their behavior is peaceable and orderly. The sole conflict is between authority and the rights of the individual.

W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 630, 63 S. Ct. 1178 (1943).

"There may be narrower scope for operation of the presumption of the constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced with the Fourteenth." United States v. Carolene Products Co., 304 U.S. 144, 152 n. 4, 58 S. Ct. 778 (1938). Thus, a law which infringes upon a right protected by the Ninth Amendment would undergo the same judicial scrutiny as one violative