that dollar grants be given to states whose medical plans insure the right to privacy for computerized medical systems.

tax data

The smaller the number of people with access to Americans' income tax forms the less the danger that information on the forms will be put to an improper use.

Some Files Linger On

What may be as startling as the breadth of the intelligence agencies' intrusion on privacy is the ease with which they slipped into abusive activity. As in Watergate, there never seemed to be anyone to say nay.

Snoopers Now On Every Side

"We haven't done the job unless we've found out and reported . . . if promiscuous . . . class of partners . . . possible homosexuality . . . dress . . . associations with opposite sex?"

"A lot of our investigations now are pre-employment checks, general backgrounders, and we do pre-marital checks. There's actually a need for this," Jerry Poth said.

"I'd say," Jerry Poth claimed, "we could tell you just about everything about yourself."

Even where I went after leaving the Tug Tavern?

"I'm sure."

That's the worst part about snooping. No one should be able to know what you can't even remember.

Repeal of No-Knock

Bank Accused Of Snooping

Midland Bank has been charged in a $250,000 lawsuit with intercepting and opening the mail of a man on whose business the bank had foreclosed.

"The improper procurement and use of medical information has had devastating effects upon unsuspecting individuals. Marriages have been ruined and reputations have been destroyed," he said.

- By 81 to 13 per cent, Americans believe overwhelmingly in the right "not to have one's phone conversations tapped for any reason, except with a court order."
- By 77 to 14 per cent, they assert the right "not to have one's mail opened by the government, except with a court order."
- By 80 to 12 per cent, they claim the right "not to be spied on by any kind of electronic surveillance, except with a court order."

Birth Control Bill

Data Banks

Anybody who has ever disputed an erroneous department store bill with the firm's computer must experience a thrill of horror at the information that 54 executive branch agencies of the federal government now possess no fewer than 868 data banks, containing more than a billion records on individuals.

The Fourth Amendment, we should remember, forbids only "unreasonable" searches and seziures. Reasonableness is a disputed term but over the years the courts have defined its main characteristics.

Financial Disclosure

surveillance

more than 50 federal agencies and 20,000 investigators were engaged in surveillance of individual citizens.

"I catch hell about this even when I go to church," Mr. Cooper reports, adding:

"A lot of folks, particularly small-town Southerners, figure it isn't anybody's business what their kin are up to. The reports are open to the public, for anyone who want to come in and look around."

Autonomy and Privacy

Rights to personal autonomy and privacy are nowhere expressly guaranteed in the U.S. Constitution. Yet in recent years the Supreme Court, and lower courts as well, have upheld both the claims of individual citizens to a generalized "right to be let alone" and more specific demands for greater control over the uses made of personal information. Judges and legislators have not always found it easy to balance rights of individual privacy and autonomy against competing interests, such as freedom of the press and the upholding of accepted community values. Here two scholars discuss these growing issues: A. E. Dick Howard examines autonomy and Kent Greenawalt looks at privacy.

THE SUPREME COURT AND MODERN LIFESTYLES

by A. E. Dick Howard

Constitutional litigation in America frequently mirrors the shifting moods and conflicts of the nation. Successive generations have developed a habit of bringing great policy issues to the federal courts for resolution, rather than looking only to legislative bodies. The results are not always predictable. In the early years of the New Deal, a stubborn Supreme Court lagged behind the rest of the country. In the historic school desegregation decision of 1954, the Court opened a new chapter in American race relations.

As often as not, the courts have been a special source of

redress for those persons and groups labeled "different"—such as members of racial, political, and religious minorities. If the Constitution was meant to create a representative democracy, it also established unmistakable anti-majoritarian restraints. Thanks to the Bill of Rights, the rights of free speech do not depend on the consent of a political majority. But sometimes, to uphold these individual rights, important competing interests must yield, as when society's interest in effective law enforcement conflicts with the Fourth Amendment's ban on unreasonable searches and seizures.

In the 1960s and 1970s, no social trend has been more publicized than changing personal "lifestyles"—new attitudes toward family roles, greater sexual permissiveness, unconventional manners and dress. The war in Vietnam and unrest on American campuses brought in its wake challenges to conventional morals and old ways. High school boys wanted to wear long hair; women sought unrestricted access to abortions; homosexuals talked of "gay rights."

Limits to Sovereignty

The debate over personal autonomy—over what is loosely called "doing your own thing"—did not originate in the 1960s. John Stuart Mill, hoping in the 19th century to reform English law, asked in his classic essay *On Liberty* (1859) whether there was a sphere of personal autonomy that the state and the law should respect: "What, then, is the rightful limit to the sovereignty of the individual over himself? Where does the authority of society begin?" Mill's answer: "The sole end for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."

Shades of Mill's thesis appear in modern efforts to change the laws to accommodate new lifestyles. One example is the American Law Institute's Model Penal Code, which proposes

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that homosexual conduct taking place in private between consenting adults no longer be a criminal offense. But state and national legislators are often slow to respond to such proposals to amend the laws, especially when a lifestyle conflicts with traditional notions of morality. Hence, those who seek the freedom to do what others may think unconventional or aberrational, or perhaps immoral, have often gone to court. In doing so, the petitioners have drawn on the now venerable American notion that one's personal preferences are a constitutional entitlement.

The Constitution says nothing about the right to an abortion, the right to wear one's hair the length he pleases, or the right of consenting adults to have sex in the fashion they prefer. So petitioners have invoked the "majestic generalities" of constitutional law—for example, notions of "liberty" protected by due process of law, an alleged right to privacy, and the Ninth Amendment (declaring that the Constitution's listing of certain rights does not imply that there are not other, unstated rights).

Although specific claims arise out of modern contexts, such constitutional arguments have earlier roots. In 19th-century America, conservative lawyers and judges looked for ways to give capital and industry judicial protection against reformist social legislation. They found the "due process" clause of the Fourteenth Amendment made to order. In an 1897 opinion (*Allgeyer* v. *Louisiana*), Justice Rufus W. Peckham defined "liberty," as used in the Fourteenth Amendment, to mean

> not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways, to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.

Substantive due process was then used, above all, in defense of economic enterprise and laissez faire—for example, to strike down minimum wage and maximum hour statutes (as in *Lochner* v. *New York,* 1905). But the doctrine could be used to protect noneconomic rights, too, as when the Supreme Court in 1923 (*Meyer* v. *Nebraska*) struck down a Nebraska statute forbidding

THE SUPREME COURT AND AUTONOMY:

Griswold v. Connecticut (1965)
Invoking a right of marital privacy, the Court invalidated a Connecticut statute that forbade the use of drugs or devices for the purpose of contraception.

Loving v. Virginia (1967)
Declaring marriage to be one of the "basic civil rights of man," the Court unanimously struck down a Virginia statute prohibiting interracial marriages.

Stanley v. Georgia (1969)
Noting both privacy and First Amendment interests, the Court held that a state may not prosecute a person for possession of obscene material in his own home.

Papachristou v. City of Jacksonville (1972)
The Court unanimously invalidated a municipal vagrancy ordinance that was capable of being applied to people of nonconforming lifestyles.

Roe v. Wade (1973)
Interpreting the Fourteenth Amendment as a protector of "liberty," the Court held that a woman, in consultation with her doctor, has an absolute right to decide to have an abortion in the first trimester of pregnancy and a qualified right thereafter.

Planned Parenthood of Central Missouri v. Danforth (1976)
Reinforcing the right to an abortion declared in *Roe* v. *Wade,* the Court in *Planned Parenthood* invalidated several provisions of a Missouri statute enacted after *Roe,* including the requirement that, for an abortion, an unmarried woman under 18 must have her parents' consent, and a married woman of any age her husband's.

the teaching of foreign languages to young children.

Another spur to personal autonomy cases is the idea of legal protection for privacy. Perhaps the classic sense of privacy is that stated by Columbia University Professor Alan Westin: "Privacy is the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others." Claims to the right to control information about oneself are, however, only one aspect of privacy as that term has come to be used in modern law. Sometimes an individual resists intrusions, not in order to restrict access to information about himself, but rather in the

IMPORTANT RECENT CASES

Doe v. Commonwealth's Attorney (1976)
Without giving reasons, the Court summarily affirmed the decision of a federal district court in Virginia, dismissing a challenge to Virginia's sodomy law by male homosexuals.

Kelley v. Johnson (1976)
Distinguishing the "liberty" interests recognized in cases such as *Griswold* and *Roe*, the Court held that a county police department need only show a "rational basis" in order to uphold a regulation limiting the style and length of policemen's hair.

Carey v. Population Service International (1977)
Finding a decision whether or not to bear or beget a child to be "at the very heart" of constitutionally protected rights of privacy, the Court struck down a New York statute that made it a crime (1) for any person to sell or distribute contraceptives to minors, (2) for anyone other than a licensed pharmacist to distribute contraceptives to persons over 16, and (3) for anyone to advertise or display contraceptives.

Moore v. City of East Cleveland (1977)
Ruling that the Constitution protects the "extended" family, the Court found that a municipal ordinance violated the rights of a grandmother by preventing her from living with her two grandsons (who were cousins).

Beal v. Doe (1977); **Maher v. Roe** (1977); **Poelker v. Doe** (1977)
In *Beal* and *Maher*, the Court held that neither the Constitution nor federal legislation requires the states to fund nontherapeutic abortions for poor women. In *Poelker*, the Court rejected an attack on the refusal by the city of St. Louis to permit elective abortions in its public hospitals.

interest of being left alone, in having peace and quiet, or in not being an unwilling audience for unwanted messages or images (for example, music and advertisements piped into public buses and nude figures in sidewalk ads for pornographic movies). This is also the kind of "privacy" desired by people objecting to door-to-door solicitors or to obscene advertisements received in their mail.

Yet another kind of "privacy" claim turns out, on examination, to be a claim to personal autonomy or individuality—an assertion of the right to make choices as to one's behavior or lifestyle. Sometimes the behavior is private, such as the use of

birth control devices; sometimes it is public, such as the wearing of long hair or casual dress in public schools. In either instance there is a claim to do as one pleases, free of state interference.

Zones of Privacy

The cornerstone case in the modern Supreme Court is *Griswold* v. *Connecticut,* a 1965 decision overturning the criminal conviction of defendants, including a doctor, who had been charged under Connecticut law with giving information and medical advice to married persons on means of preventing conception.* A majority of Justices agreed in striking down the law, but their reasons differed. Justice William O. Douglas found a "zone of privacy" formed by "emanations" from explicit guarantees in the Bill of Rights. Other concurring Justices looked to the Ninth Amendment and to the due process clause of the Fourteenth Amendment.

Justice Hugo L. Black, who dissented, thought the Connecticut law "every bit as offensive" as did his brethren. But that, he said, did not make it unconstitutional. Remembering how judges of another generation had read their own economic philosophy into the Constitution, Black complained of the *Griswold* majority's excessive willingness to discover a right of privacy: "The Court talks about a constitutional 'right of privacy' as though there is some constitutional provision forbidding any law ever to be passed which might abridge the 'privacy' of individuals. But there is not."

Notwithstanding Black's sharp dissent, *Griswold* quickly became a standard citation for litigants hoping to bring other kinds of behavior within the zone of privacy. That *Griswold* was concerned with the intimacy of a socially approved institution, marriage, did not prevent the decision's being cited in support of a wide range of behavior—such as sexual conduct between consenting adults—having nothing to do with marriage.

The concept of a constitutional zone of personal autonomy received a further boost in 1969 in *Stanley* v. *Georgia,* when the Court reversed a conviction for knowing possession of obscene matter. State and federal agents, looking for evidence of bookmaking in Robert Eli Stanley's home in Fulton County, Georgia, had instead found three reels of pornographic movie film. Georgia, seeking to uphold the conviction, said in effect, "If the State

*Earlier challenges had failed when the courts ruled that the Connecticut law was not being enforced. However, in *Griswold,* a doctor at the Yale Medical School and the officers of Planned Parenthood in New Haven had openly defied the Connecticut statute by opening a birth control clinic in the city.

can protect a citizen's body, may it not also protect his mind?" To that the Court responded 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 thought of giving government the power to control men's minds."

The composition of the Supreme Court changed markedly after 1969. By January 1972, four Nixon appointees—Chief Justice Warren E. Burger and Justices Harry A. Blackmun, Lewis F. Powell, Jr., and William H. Rehnquist—had come to the bench. When they took their seats, the idea of constitutional protection for personal autonomy—as suggested by decisions like *Griswold* and *Stanley*—was largely untested, its underpinnings unsure, its contours unclear. One might well suppose that a tribunal in many ways more conservative than the Warren Court might be reluctant to expand the zone of personal autonomy and privacy. For one thing, the behavior for which protection was sought in some of the autonomy cases was often unconventional, even offensive to many citizens. Moreover, four justices appointed by a President proclaiming his belief in judicial "conservatism" might be slow to embark on an activist path of discovering new rights for which the Constitution offered no explicit textual support.

Nevertheless, some decisions of the Burger Court strongly endorse the thesis that there is an emerging zone of personal autonomy and lifestyle protected by the Constitution. By far the most remarkable opinion—as activist as any handed down by the Warren Court—is *Roe* v. *Wade* (1973), holding that the Fourteenth Amendment's due process clause protects a woman's right, as a matter of privacy, to decide whether to have an abortion. (Anti-abortion groups have reacted vigorously to *Roe* v. *Wade*, urging state statutes to limit its effects, congressional action to cut off federal funds for elective abortions under Medicaid, and a "right-to-life" constitutional amendment.)

Abortion and Vagrancy

The scope of the "privacy" right in *Roe* goes far beyond that declared in *Griswold*. For one thing, *Griswold* was more nearly concerned with privacy in the traditional sense, as the case involved the intimacy of the marital bedroom. What was at stake in *Roe*, on the other hand, was a claim of personal autonomy—the right to make and carry out the abortion decision without state interference. A further difference in the two cases lies in the nature of the competing state interest. In *Griswold*, the state was

hard pressed to show that a persuasive interest was served by regulating the contraceptive practices of married couples. In *Roe,* by contrast, the state could claim that in preventing abortions it was protecting an incipient life, that of the fetus.

The Burger Court has also decided several cases that give freer play to unconventional lifestyles. In a unanimous decision (*Papachristou* v. *City of Jacksonville,* 1972), the Court invalidated a locality's vagrancy ordinance under which, in the Court's words, "poor people, nonconformists, dissenters, idlers" might be required to comport themselves "according to the lifestyle deemed appropriate by the Jacksonville police and the courts." In another case (*Wisconsin* v. *Yoder,* 1972) the Court vindicated the preferred lifestyle of the Amish by upholding their challenge to Wisconsin's compulsory school attendance law. Even "hippies" had their day when the Court (in *U.S. Department of Agriculture* v. *Moreno,* 1973) invalidated Congress's exclusion from the food stamp program of households containing persons who were not related, an exclusion which the Court majority saw as aimed at preventing "hippies" and "hippie communes" from getting help under the federal program.

Undeleted Expletives

Modern modes in speech—including expressions that others find offensive or tasteless—have been given constitutional protection, though not without dissent from some of the Justices. When Paul Robert Cohen, an opponent of the Vietnam War, entered the Los Angeles Courthouse wearing a jacket bearing the words "Fuck the Draft," he was arrested and charged with disturbing the peace. Reversing Cohen's conviction, Justice John Marshall Harlan observed (in *Cohen* v. *California,* 1971) that "one man's vulgarity is another's lyric." In another case (*Eaton* v. *City of Tulsa,* 1974)—in which a defendant had been cited for contempt when he referred in his testimony to another person as "chicken shit"—Justice Powell commented, "Language likely to offend the sensibility of some listeners is now fairly commonplace in many social gatherings as well as in public performances."

Such decisions—some resting on due process of law, others on the First Amendment, still others on other provisions of the Constitution—give individuals greater freedom to behave in ways that society at large may find unconventional or distasteful. In some of these opinions, the supposedly "conservative" Burger Court takes personal autonomy and the protection of unconventional lifestyles beyond even the "liberal" Warren

Court. On reading such opinions, a little more than a hundred years after John Stuart Mill wrote *On Liberty,* one may readily suppose that the Justices of the U.S. Supreme Court have become Mill's disciples.

In fact, the Court has not gone as far as Mill. There are limits to the majority's willingness to find new applications of a right to privacy or otherwise to create zones of autonomy for the individual and his self-expression. Some critics argue that personal appearance—wearing one's hair or dressing as one pleases—ought to fall within the protected zone of personal autonomy. But the Court has had no difficulty upholding regulations limiting the length of policemen's and firemen's hair in the interest of discipline, appearance, and safety on the job. And the Court has steadfastly refused even to hear cases involving the length of students' hair. Some lower courts have upheld challenges to school hair regulations, but the Justices of the Supreme Court seem to agree with the late Justice Black, who once observed that "surely few policies can be thought of that States are more capable of deciding than the length of the hair of school boys."

Homosexuals have sought to have the Court bring their sexual preferences within the ambit of constitutional protection but have gotten short shrift. Some homosexuals attacked Virginia's antisodomy statute on the ground that, as applied to the private sexual conduct of consenting adults, the law violated their constitutional right of privacy. In 1975, in the federal district court, one judge, agreeing with the plaintiffs, read *Griswold* and *Roe* as establishing that "every individual has the right to be free from unwarranted governmental intrusion into one's decisions on private matters of individual concern." But that judge was outvoted by his brethren, who concluded that if Virginia, in the name of "morality and decency," saw fit to forbid homosexual acts even when committed in the home, it was not for the courts to say that the state lacked that power.

When the Virginia case was appealed, the Supreme Court (*Doe* v. *Commonwealth's Attorney,* 1976) summarily affirmed the lower court ruling, not even troubling to write an opinion. Nor have other homosexuals—such as a Washington State high school teacher who was dismissed for being a homosexual (he had not been accused of engaging in improper conduct)—had any success in enlisting the Court's sympathies.

The lifestyle and personal autonomy cases have important implications. In the first place, no general theory of autonomy has emerged from the decisions of the Burger Court. The cases

have an *ad hoc* quality about them. Certain specific areas—marriage, contraception, abortion, child rearing, and family life in particular—receive judicial protection as "fundamental rights." But the Justices have not generalized from these specifics nor tried to weave them into an overall theory of privacy or autonomy.

Strong arguments can be made for judicial protection of personal lifestyles. Choices about personal appearance, manner, sexual behavior, and other aspects of "personhood" can reflect one's individuality and aspirations, much as do free speech and free exercise of religion—activities expressly protected by the Constitution. As University of Virginia law professors J. Harvie Wilkinson III and G. Edward White have commented, "A compelling mission of the Constitution has been to protect sanctuaries of individual behavior from the hand of the state." In particular, where there is good reason to think that the state is using its power to impose conformity, the case for constitutional protection becomes even stronger.

The Decent Society

Lifestyle and autonomy claims invite attention to the social interest alleged to be served by the challenged law. Where school hair regulations have been upheld, it has commonly been on the finding that they are reasonably related to the school's need for discipline and an environment in which education can flourish. When homosexuals seek constitutional protection, it is easier to understand the state's interest in deciding who shall teach young children in the classroom than it is to articulate the state's interest in what individuals in the privacy of their own home do with other consenting adults.

Personal autonomy cases illustrate the interplay between law and morality. Lord Devlin, a distinguished British jurist, has argued (in *The Enforcement of Morals,* 1965) that society is entitled to use law to enforce its "common morality"—his answer to those who hope to see "victimless" crimes such as homosexuality and prostitution decriminalized. Lord Devlin appears to have his followers on the Supreme Court. When the Court ruled (*Paris Adult Theatre I* v. *Slaton,* 1973) that states may regulate the exhibition of obscene materials in "adult" theaters, Chief Justice Burger emphasized the public's interest in the "quality of life" and its right to "maintain a decent society."

Sketching the contours of personal autonomy is not merely a philosophical exercise. When claims to lifestyle are poured into constitutional vessels, decisions such as *Griswold* and *Roe*

WHAT THE CONSTITUTION SAYS

The constitutional language on which Supreme Court Justices have based many of their important decisions affecting personal autonomy and lifestyles is rarely self-revealing:

First Amendment "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Fifth Amendment "No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

Ninth Amendment "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Fourteenth Amendment "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

raise serious questions about the proper role of courts as arbiters of contemporary standards. Sometimes the Supreme Court is explicit about its role in charting changing social values. In capital punishment cases, for example, there has been near unanimity on the proposition that deciding what constitutes "cruel and unusual" punishment requires looking at society's evolving standards. Less obviously, but still inevitably, people with claims involving lifestyles and autonomy ask the Court, in effect, to declare as constitutional law the Justices' notions of contemporary morality and fundamental right.

What we have witnessed is a rebirth of "substantive due process." Once used by conservative judges to defend property and the right of contract, this judicial technique is now used to create new zones of privacy. Some scholars welcome such activism. Stanford University Law Professor Thomas C. Grey sees the courts as "the expounders of basic national ideals of in-

dividual liberty and fair treatment, even when the content of these ideals is not expressed as a matter of positive law in the written Constitution." Others are more dubious of the legitimacy of the courts' translating judges' notions of morality into constitutional norms. Objecting to the Court's failure in *Roe* to ground its abortion decision somewhere in the Constitution, Harvard's John Hart Ely concluded in 1973 that, whatever the other merits of a principle, if it "lacks connection with any value the Constitution marks as special, it is not a constitutional principle and the Court has no business imposing it."

Justice Black once took strong exception to the notion that judges have a "natural law" power "to expand and contract constitutional standards to conform to the Court's conception of what at a particular time constitutes 'civilized decency' and 'fundamental liberty and justice.'" Such warnings have fallen on deaf ears in *Griswold* and *Roe* and other "privacy" cases. The process of adding to the catalogue of protected "lifestyle rights" continues. In 1977, for example, the Court ruled (*Moore* v. *City of East Cleveland*) that due process protected the right of an "extended family"—a grandmother and her two grandsons (who were first cousins)—to live together, notwithstanding a municipal zoning ordinance designed to maintain "single family" neighborhoods. The Court, following the path of the late Justice Harlan, declared that "liberty" as protected by due process cannot be limited to "the specific guarantees elsewhere provided in the Constitution."

Whatever the cynics say, the Court does not follow the election returns. But its decisions have a way of reflecting the temper of the times. New patterns in family life, sexual mores, and self-expression have compelled judges to determine the limits to which society, in the name of morality, can restrict individual autonomy. Many will count it a clear gain that the judges have stepped in to dismantle outdated moral codes when legislatures have refused to act. But the way in which judges, lacking relevant constitutional language, have seemed to pick and choose among the lifestyles to be protected is cause for concern. Perhaps Justice Black was right in objecting to judges translating their personal predilections into constitutional law.