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The Privacy Plight of Public Employees

Joel Shafferman

NOTE

THE PRIVACY PLIGHT OF PUBLIC EMPLOYEES

INTRODUCTION

Police officers, as well other public employees, are confronted by a legal system that promulgates laws and renders decisions forcing them to live their personal lives according to "God-like" standards of morality, "above and beyond reproach."[1] Should authorities decide that an employee's actions violate a municipal or departmental regulation proscribing "conduct unbecoming a police officer,"[2] or that his private behavior "bring[s] dishonor upon his noble calling,"[3] these citizens may be subject to dismissal or demotion from positions of authority earned through years of dedicated service.

The Supreme Court has recognized that a fundamental right of privacy is vital to our constitutional scheme.[4] Despite this recognition of a fundamental privacy right in making certain important personal life decisions,[5] the Court's failure to describe more explicitly the exact contours of this fundamental right has resulted in a myriad of decisions involving public employees in which the lower courts have not only reached differing conclusions, but have also employed inconsistent methods of analysis.[6]

In one such case, two members of the Amarillo Police Department, a man and a woman, were forced to relinquish their respective positions as punishment for off-duty dating and cohabitation with each other. The officers filed an action in federal court claiming that their constitutional rights of privacy and due process had been violated by the police department's actions. The District Court for the

1. Cerceo v. Darby, 3 Pa. Commw. 174, 183, 281 A.2d 251, 255 (1971).
2. Fabio v. Civil Serv. Comm'n of Philadelphia, 30 Pa. Commw. 203, 205, 373 A.2d 751, 752 (1977).
3. Cerceo v. Darby, 3 Pa. Commw. 174, 183, 281 A.2d 251, 255 (1971).
4. *See infra* notes 24-60 and accompanying text.
5. Whalen v. Roe, 429 U.S. 589, 599-600 (1977).
6. *See infra* notes 69-199 and accompanying text.

Northern District of Texas, in *Shawgo v. Spradlin*,[7] dismissed these plaintiffs' claims without making any finding that their relationship diminished their abilities to function as officers.[8] In affirming the lower court's decision, the Court of Appeals for the Fifth Circuit held that the officers' constitutional right of privacy had not been violated.[9] The Supreme Court denied the former officers' petition for certiorari,[10] but three Justices joined a dissenting opinion in which they maintained that the police officers' conduct should have been afforded a heightened level of protection by virtue of their fundamental right to privacy.[11]

In a second case, *Hollenbaugh v. Carnegie Free Library*,[12] two employees of a public library were dismissed because they were living together without having taken marriage vows.[13] The District Court for the Western District of Pennsylvania[14] and the Court of Appeals for the Third Circuit affirmed the validity of the library's action,[15] and the Supreme Court denied certiorari.[16]

Part I of this Note briefly discusses the evolution of the privacy right by reviewing the major doctrines that have emerged from several Supreme Court cases. An analysis of these precedents demonstrates that the privacy right is fundamental and may be abridged only by state action that serves a compelling or, at minimum, a substantial state interest; even then, the statute in question must be narrowly drawn to fulfill only that legitimate state interest.[17] Part II examines the various approaches taken by lower courts in deciding public employee privacy claims and demonstrates that many of these

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7. Shawgo v. Spradlin, No. CA-2-78-90 (N.D. Tex. Feb. 11, 1982).

8. *Id.*

9. Shawgo v. Spradlin, 701 F.2d 470, 482-83 (5th Cir.), *cert. denied sub nom.* Whisenhunt v. Spradlin, 104 S. Ct. 404 (1983). The name of the case was changed to *Whisenhunt v. Spradlin* when Miss Shawgo married Mr. Whisenhunt.

10. 104 S. Ct. 404 (1983).

11. *Id.* at 409. (Brennan, J., dissenting). The three dissenters did not conclude whether they believed that the department's action was justified under the standard they proposed.

12. 405 F. Supp. 629 (W.D. Pa. 1975), *rev'd and remanded in part*, 545 F.2d 382 (3d Cir. 1976), *on remand*, 436 F. Supp. 1328 (W.D. Pa. 1977), *aff'd mem*, 578 F.2d 1374 (3d Cir.), *cert. denied*, 439 U.S. 1052 (1978).

13. 436 F. Supp. at 1331.

14. *Id.* at 1334.

15. 578 F.2d 1374 (3d Cir. 1978).

16. 439 U.S. 1052 (1978).

17. Roe v. Wade, 410 U.S. 113, 155 (1973); *cf.* Shapiro v. Thompson, 394 U.S. 618, 638 (1969) (holding in part that any state classification that penalizes the exercise of the fundamental right of interstate travel is unconstitutional unless such action is shown to be necessary in promoting a compelling governmental interest).

courts have improperly interpreted the Supreme Court's privacy doctrine. This Note concludes that premarital intimate association is part of the fundamental right to privacy, urges the Court to explicitly recognize it as such, and recommends that the Court implement a strict scrutiny standard, or at least a heightened scrutiny standard, for determining whether state action has abridged that right.

I. EVOLUTION AND ANALYSIS OF SUPREME COURT DOCTRINE

Early development of the privacy right is reflected in *Semayne's Case*,[18] where the issue was whether a sheriff's forced entry into a person's home constituted an unlawful invasion of privacy. The court held that in order for a sheriff to enter one's home to execute civil process "if the doors be not open," the sheriff had to first request permission to enter.[19] *Semayne's Case* is important to this discussion because it represents the common law tenet that a man's home is his castle. This early acknowledgement that the home deserves special protection from unwarranted intrusion by the state eventually became an important part of the American jurisprudential framework.[20]

An analysis of several privacy decisions in which the Supreme Court has considered the nature of the constitutional privacy right demonstrates that the Court has gradually come to recognize this right as fundamental. One of the early acknowledgements of this "autonomy interest" appeared in a seminal article by Samuel Warren and Louis Brandeis analyzing the common law underpinnings of the privacy right.[21] Although the thrust of their article was primarily directed at the protection of privacy and expression,[22] Warren and Brandeis recognized that "the right to privacy . . . extends [its] protection to the personal appearance, sayings, acts, and to personal relation, domestic or otherwise."[23]

Thirty-three years later the Supreme Court acknowledged that

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18. 77 Eng. Rep. 194 (K.B. 1603).

19. *Id.* at 195.

20. *E.g.*, Miller v. United States, 357 U.S. 301, 308-09 (1958) (a person cannot lawfully be arrested in his home by officers attempting to break in until they give notice of their authority and purpose).

21. Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). For an interesting analysis of this important article see Glancy, *The Invention of The Right to Privacy*, 21 ARIZ. L. REV. 1 (1979).

22. *See* Warren and Brandeis, *supra* note 21, at 213.

23. *Id.* (footnote omitted).

there was a privacy guarantee embraced by the term "liberty" found in the fourteenth amendment.[24] Justice Brandeis, in his dissenting opinion in *Olmstead v. United States*,[25] foreshadowed the eventual expansion of the right to privacy into a general right to be free from governmental interference[26] when he noted that "the right to be let alone is the right most valued by civilized men."[27]

Justice William O. Douglas, greatly influenced by the legal views of Brandeis,[28] emerged as a leading proponent of a constitutional privacy right.[29] His conviction that privacy was a natural right of man[30] reached fruition in *Griswold v. Connecticut*,[31] which invalidated a state criminal statute proscribing the use of contraceptives even by married couples.[32] In a plurality decision Justice Douglas wrote that the law was unconstitutional because it invaded rights, inherent in the marital relationship, that fall within the zone of privacy.[33] According to Douglas, guarantees in the Bill of Rights project emanations or "penumbras" which join together to form an umbrella protecting a "zone of privacy" from certain kinds of

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24. Meyer v. Nebraska, 262 U.S. 390 (1923) (statute prohibiting the teaching of any subject in a language other than English or the teaching of languages other than English below the 8th grade unconstitutional because it invades the liberty guaranteed by the fourteenth amendment and exceeds the state's power). The court asserted that the term liberty

> denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children . . . and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Id. at 399.

25. 277 U.S. 438 (1928) (Brandeis, J., dissenting).

26. *See* Posner, *The Uncertain Protection of Privacy By The Supreme Court*, 1979 SUP. CT. REV. 173, 181-82.

27. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). The majority opinion held in part that the use of electronic wiretaps to record telephone conversations for future use as evidence in a criminal trial did not violate the fourth amendment. In his dissent Justice Brandeis asserted that "[p]rotection against . . . invasions of the sanctities of a man's home and privacies of life was provided in the Fourth and Fifth Amendments by specific language." *Id.* at 473 (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)).

28. Note, *Towards a Constitutional Theory of Individuality: The Privacy Opinions of Justice Douglas*, 87 YALE L.J. 1579, 1584 (1978).

29. *See* Abel v. United States, 362 U.S. 217, 245 (1960) (Douglas, J. dissenting); On Lee v. United States, 343 U.S. 747, 762-64 (1952) (Douglas, J. dissenting); Automatic Radio Mfg. Co. v. Hazeltine Research, Inc., 339 U.S. 827, 837 (1950) (Douglas, J. dissenting).

30. Note, *supra* note 28, at 1585.

31. 381 U.S. 479 (1965).

32. *Id.* at 480.

33. *Id.* at 484-86. Justice Douglas stated that the right of privacy was "older than the Bill of Rights—older than our political parties, [and] older than our school system." *Id.* at 486.

governmental intrusion.[34]

The highly theoretical nature of the opinions that comprise the *Griswold* decision has unfortunately blurred the critical fact that five Justices explicitly stated that there is a fundamental right to privacy within the ambit of the marital relationship.[35] *Griswold* thus opened the door for further recognition of a constitutional protection of personal conduct.[36]

The Supreme Court clarified and expanded the privacy right in *Stanley v. Georgia*[37] and *Eisenstadt v. Baird*.[38] In *Stanley*, the Court discussed the required threshold of harm that the state must establish in order to justify an intrusion upon an aspect of "personhood," explaining that the burden is significantly higher when the threatened conduct occurs in a place that one regards as his private domain than it would be if the same actions occured in the public realm.[39] In *Eisenstadt* the Court expanded the *Griswold* concept of "marital privacy" to protect an individual's right to make certain specific life decisions. In the course of its decision the Court pointed out that "the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals"; it noted, too, that "[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[40]

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34. *Id.* at 484. According to one commentator, Douglas believed that "those rights associated with individual choices about marriage, sex and the family" were virtually inviolate. Glancy, *Getting Government Off The Backs of People: The Right of Privacy and Freedom of Expression In The Opinions of Justice William O. Douglas*, 21 SANTA CLARA L. REV. 1047, 1061 (1981). *See also* W.O. DOUGLAS, THE RIGHT OF THE PEOPLE 87-90 (1958) for one of Douglas' earliest explanations about his views on privacy as a right of man.

35. 381 U.S. 479. Justices Douglas, Clark, Goldberg, Brennan, Harlan and Chief Justice Warren all reached this conclusion although their methods of analysis differed. The number of Justices who believed that there is fundamental right of marital privacy might actually be seven because Justice White's concurrence is unclear as to the existence of a fundamental right to privacy. *Id.* at 502-07.

36. Note, *Privacy After Griswold: Constitutional Law Or Natural Law Right?*, 60 NW. U.L. REV. 813, 828 (1966).

37. 394 U.S. 557 (1969).

38. 405 U.S. 438 (1972).

39. 394 U.S. at 565. In *Stanley*, the defendant challenged his conviction for knowingly having possession of obscene matter in his home. *Id.* at 558. The Supreme Court reversed, asserting that "[w]hatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home." *Id.* at 565. Although "the States retain broad power to regulate obscenity," the Court concluded that this "power simply does not extend to mere possession by the individual in the privacy of his own home." *Id.* at 568.

40. *Id.* at 453 (emphasis in original). In the context of this equal protection case the

According to one commentator, "[t]he Court's opinion in *Eisenstadt v. Baird* effectively gives unmarried couples the same power to govern the intimacies of their association" as married couples enjoy.[41] Seen in its proper light, this scholar argues, *Griswold* and its successors protect the autonomy of any couple's "intimate associations," and the Court, in *Eisenstadt*, broadened the scope of the privacy right to cover intimate heterosexual actions between individuals who are married, dating or cohabitating.[42]

One year after *Eisenstadt*, in *Roe v. Wade*,[43] the Court explicitly characterized the privacy right as a fundamental right that could be limited only by a compelling state interest that is furthered by legislation "narrowly drawn to express only the legitimate state interests at stake."[44] The significance of the Court's declaration, however, was impaired by its failure to clarify the precise nature of the privacy right.[45] The Court equated interests in personal privacy with interests in individual liberty,[46] and concluded that one aspect of the liberty protected by the fourteenth amendment due process clause is "a right of personal privacy, or a guarantee of certain areas or zones of privacy."[47] The *Roe* Court could have simply invalidated the abortion prohibition statute as an abridgment of due process and a deprivation of individual liberty under the fourteenth amendment.[48] The fact that the Court had the decision turn on the privacy right violation[49] underscores the importance that the Court attached to the fundamental right to privacy.[50]

Court seemed to observe that the function of the zone of privacy is to protect decision-making of an intimate or fundamental nature regardless of whether the decision is within a marital relationship. *See id.*

41. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 641 (1980).

42. *Id.*

43. 410 U.S. 113 (1973) (the right to privacy encompasses a woman's decision to terminate her pregnancy prior to the end of the first trimester).

44. *Id.* at 155.

45. *See id.; see also* D. O'BRIEN, PRIVACY, LAW, AND PUBLIC POLICY, 189 (1979).

46. 410 U.S. at 152-53.

47. *Id.* at 152.

48. D. O'BRIEN, *supra* note 45, at 191-92.

49. 410 U.S. at 152-56.

50. In addition to Supreme Court decisions characterizing the privacy right as fundamental, several states have explicitly included this right in their constitutions. For example, the Alaska Constitution provides that "[t]he right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section." ALASKA CONST. art I, § 22. The Arizona state constitution provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." ARIZ. CONST. art. II, § 8. In Illinois there is a "direct right to freedom from such invasions of privacy by government or public officials." Helman & Whalen, *Constitutional Commentary*, ILL. ANN. STAT. CONST. art. I, § 6

The notion that there is a fundamental right to marry in our constitutional scheme is an important corollary to the analysis of the Court's privacy doctrine. In *Zablocki v. Redhail*,[51] the Supreme Court invalidated a statute which provided that any Wisconsin resident under court order or judgment to support his minor issue not in his custody would be prohibited from marrying within the state, or elsewhere, without first obtaining a court order giving him permission to marry.[52] Justice Marshall, writing for the majority, reasoned that since the "right to marry is of fundamental importance, and since the classification at issue here significantly interferes with the exercise of that right . . . a 'critical examination' of the state interests advanced in support of the classification is required."[53] Citing *Griswold v. Connecticut*[54] and *Roe v. Wade*,[55] the Court concluded that the fundamental right of privacy, which was implicit in the due process clause of the fourteenth amendment, protected the decision to marry.[56] Marshall explained that "it would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society."[57]

Viewed collectively, these decisions provide citizens with a "constitutional freedom of intimate association," according to constitu-

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(Smith-Hurd 1971). In Montana "the right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest." MONT. CONST. art. 2, § 10.

51. 434 U.S. 374 (1978).

52. *Id.* at 375. The statute was challenged by a Wisconsin resident who was unable to marry as long as he maintained his residency in the state. *Id.* at 377. A paternity suit had been instituted against Redhail, a minor, alleging that he was the father of an infant born out of wedlock. Shortly thereafter he admitted that this allegation was true. *Id.* at 375-78. Less than two years later he submitted an application for a marriage license which was denied because he did not satisfy the requirements of the statute. *Id.* In the class action suit subsequently filed in federal court, it was alleged that the statute violated the plaintiffs' equal protection and due process rights secured by the first, fifth, ninth, and fourteenth amendments. *Id.* at 379.

53. *Id.* at 383.

54. 381 U.S. 479 (1965).

55. 410 U.S. 113 (1973). The Court also cited Loving v. Virginia, 388 U.S. 1 (1967), in which an interracial couple, convicted of violating Virginia's miscegenation laws, challenged the statutory scheme on constitutional grounds. The Court there held that "restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause." *Id.* at 12. The Court went on to explain that "[t]hese statutes also deprive the [plaintiffs] of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment. The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Id.*

56. 434 U.S. at 383-87.

57. *Id.* at 386.

tional law scholar Kenneth Karst.[58] Karst also argues that a constitutionally protected freedom of intimate association is not a novel or radical legal concept because the common law has long considered society's interest in intimate association as basic.[59] The *Zablocki* decision is significant because it does not limit constitutional protection to an individual's decision to marry: "Properly understood, *Zablocki* implies a thoroughgoing reassessment of the constitutionality of a wide range of state laws limiting the right to marry and restricting other nonmarital forms of intimate association."[60]

Review of the cases that preserve "the right of privacy in sexual matters"[61] supports the notion that the right to privacy in sexual conduct between consenting adults is not fundamental merely because the individuals involved had previously entered into a formal marriage contract.[62] The marriage arrangement exists in part to facilitate the expression of emotional and sexual intimacy. This expression of intimacy is so fundamental to individual liberty that it demands constitutional protection. There is little difference between the psychological and emotional needs of married couples and the needs of cohabitating men and women. It follows that the privacy right is applicable to "informal marriage" or cohabitation because "informal marriage" is based upon "a relationship characterized by intimacy, voluntary commitment, stability, psychological involvement, and in the heterosexual context, procreative potential,"[63] which is itself fundamentally important to the continuity of any civilized society. Cohabitation, therefore, serves most of the same functions as formal marriage.

The importance of the cohabitation relationship is also apparent when it is viewed as an integral part of the courtship pattern leading to marriage. Noted anthropologist Margaret Mead believed so

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58. Karst, *supra* note 41, at 626-28. Karst defines intimate association as "a close and familiar personal relationship with another that is in some significant way comparable to a marriage or family relationship." *Id.* at 629. He argues that "[t]he simplest and most obvious value embraced in the idea of intimate association is the opportunity to enjoy the society of certain other people." *Id.* at 630.

59. *Id.* at 631.

60. *Id.* at 671.

61. Note, *Fornication, Cohabitation, and the Constitution* 77 MICH. L. REV. 252, 290 (1978).

62. *Id. See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972).

63. Briggs v. North Muskegon Police Dept., 563 F. Supp. 585, 589 (W.D. Mich. 1983), *aff'd*, 746 F.2d 1475 (6th Cir. 1984) (citing Note, *Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1156, 1289-96 (1980)).

strongly in the importance of cohabitation as a trial marriage that she proposed a two-step marriage process.[64] The first step, which she termed "individual marriage," had many of the characteristics and institutional advantages of present day cohabitation.[65] Even those who do not view cohabitation as a trial marriage may concede that living together often "seems to be a natural component of a strong, affectionate 'dating' relationship — a living out of 'going steady' — which may grow in time to be something more."[66] One researcher has concluded that many people live together in order to establish a stable marriage and thus increase the chances for a "more stable, permanent wedlock."[67] Viewed in that light, cohabitation can be seen as an important part of the courtship process.[68]

Since cohabitation is a form of intimate association and is often an important stage of premarital courtship, laws that interfere with this relationship also interfere with the fundamental right to marry and should be subject to heightened levels of scrutiny. The Supreme Court has expanded the *Griswold* notion of a fundamental right of marital privacy to include non-traditional forms of heterosexual intimate association existing outside the institution of marriage. Unfortunately, some courts have failed to accord public employees the required constitutional protection.

II. PRIVACY AND PUBLIC EMPLOYMENT

Despite the Supreme Court's characterization of privacy as a fundamental right,[69] public sector employees have been subject to suspension or termination from their jobs as a punishment for their off-duty behavior. Public sector employers have traditionally been granted considerable latitude in disciplining or firing employees who do not adhere to the requisite standard of morality set forth in so-called "good conduct" statutes.[70]

Several lower courts have failed to analyze the privacy right in

64. Mead, *Marriage in Two Steps*, REDBOOK, July 1966, at 48.

65. *Id.* at 84. The second marriage step, "parental marriage," would involve a lifetime relationship "explicitly directed toward the founding of a family." *Id.*

66. Macklin, *Heterosexual Cohabitation Among College Students*, in INTIMACY, FAMILY & SOCIETY 301 (1974).

67. C. Danziniger, Unmarried Heterosexual Cohabitation 80 (1978) (dissertation published by R & E Research Associates, Inc.).

68. *Id.*

69. *See supra* notes 24-60 and accompanying text.

70. Note, *Application of the Constitutional Privacy Right to Exclusions and Dismissals from Public Employment*, 1973 DUKE L.J. 1037.

accordance with the views set forth by the Supreme Court. Although a number of lower courts have examined such claims in a manner consistent with Supreme Court precedent,[71] *Shawgo v. Spradlin*[72] and other cases involving the privacy claims of public employees illustrate the extent to which the lower courts are in conflict over the fundamental nature of the right to privacy and whether it protects a public employee's intimate associations.[73]

A. *Interpreting the Scope of the Privacy Right: An Area of Judicial Confusion*

The lower courts have had differing perceptions of the precise scope and nature of the privacy right. In *Shawgo v. Spradlin*[74] two former police officers of the Amarillo Police Department sought reinstatement and monetary damages, claiming that the defendants' ac-

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71. *See, e.g.*, Smith v. Price, 446 F. Supp. 828 (M.D. Ga. 1977), *rev'd on other grounds*, 616 F.2d 1371 (5th Cir. 1980); Briggs v. North Muskegon Police Dept., 563 F. Supp. 585 (W.D. Mich. 1983), *aff'd*, 746 F.2d 1475 (6th Cir. 1984).

72. 701 F.2d 470 (5th Cir.), *cert. denied*, 104 S. Ct. 404 (1983).

73. *See infra* notes 74-189 and accompanying text. *Compare* Baron v. Meloni, 556 F. Supp. 796 (W.D.N.Y. 1983) (deputy sheriff's termination from his position due to his personal relationship with the wife of reputed mobster did not violate his privacy right); Suddarth v. Slane, 539 F. Supp. 612 (W.D. Va. 1982) (state trooper fired for involvement in extra-marital affair was not protected by the first or fourteenth amendments); Johnson v. San Jacinto Junior College, 498 F. Supp. 555 (S.D. Tex. 1980) (junior college registrar, subject to discipline for engaging in an extra-marital affair, not protected by the constitutional privacy right); *with* Swope v. Bratton, 541 F. Supp. 99 (W.D. Ark. 1982) (police officer cannot be fired for living with a woman not his wife because such a relationship falls within a protected zone of privacy); Thompson v. Southwest School District, 483 F. Supp. 1170 (W.D. Mo. 1980) (pursuant to the fourteenth amendment, school teacher allegedly engaged in pre-marital cohabitation could not be disciplined without evidence that the conduct adversely affected her professional performance).

A separate issue that is an important element of these cases is whether the content of such general behavior statutes and the manner in which they are applied violates employee due process rights. Employees may not be aware that they are subject to a given standard of conduct where the statutes are selectively enforced by the agency. For example, in *Shawgo* the petitioners claimed that since other officers in the force commonly engaged in the same activities for which they were being punished, they could not have been expected to know that their cohabitation was prohibited by department and city regulations. *Id.* at 474. The court refers to Shawgo's activity as cohabitation even though the record indicates that Shawgo was maintaining a separate residence. *Id.* at 472. While conceding that the plaintiff's due process arguments were valid ones, the Fifth Circuit, citing an overriding interest in federalism, refused to "exact detailed conditions of notice that the state must provide to its employees before taking [such] disciplinary action." *Id.* at 479. The court issued this ruling in spite of the Supreme Court's statement in Cox v. Louisiana, 379 U.S. 559 (1965), that a departmental regulation is unconstitutional if applied against one who is given the impression that such conduct is permissible. *Id.* at 571.

74. 701 F.2d 470 (5th Cir.), *cert. denied*, 104 S. Ct. 404 (1983).

tion in disciplining them for dating and cohabitating, pursuant to departmental and city rules, violated their right to privacy.[75] A Civil Service Commission hearing sustained the joint suspensions and one officer's demotion.[76] The federal district court found no constitutional violations in the department's action and upheld the suspensions.[77] Neither forum heard any evidence that the plaintiffs' on-the-job performance suffered because of the off-duty relationship.[78] The Court of Appeals for the Fifth Circuit affirmed the district court's decision, finding "a rational connection between the exigencies of Department discipline and forbidding members of quasi-military unit[s] . . . to cohabit."[79]

The court's failure to classify the privacy right as a fundamental right demonstrates its misunderstanding of the prior Supreme Court opinions. In commencing its discussion of the nature and scope of the privacy right, the circuit court was correct when it cited *Roe v. Wade* as authority for the notion that "[t]he fourteenth amendment 'protects substantive aspects of liberty' — including freedom of choice with respect to certain basic matters of procreation, marriage, and family life."[80] The confusion in the court's analysis becomes apparent, however, when it goes on to state that "[t]he first amendment additionally imbues the right to privacy to include protected forms of 'association' for social as well as political reasons."[81] It seems rather anomalous that this court should view the privacy right as bolstered by the first amendment, and yet minimize the fundamental importance of such a right.

Although the Supreme Court refused to grant certiorari,[82] Justices Brennan, Marshall, and Blackmun wrote in dissent, asserting that the "petitioners' lawful, off-duty sexual conduct clearly implicates the 'fundamental . . . right to be free, except in very limited circumstances, from unwanted governmental intrusion into one's privacy.' "[83] Citing numerous privacy precedents, the Justices argued that the Supreme Court has recognized that this right "includes a

75. 701 F.2d at 472.
76. *Id.* at 473.
77. Shawgo v. Spradlin, No. CA-2-78-90 (N.D. Tex. Feb. 11, 1982).
78. 701 F.2d at 473.
79. *Id.* at 483.
80. *Id.* at 482 (citations omitted).
81. *Id.* (citation omitted).
82. 104 S. Ct. 404 (1983).
83. *Id.* at 404, 408 (Brennan, J., dissenting) (quoting Stanley v. Georgia, 394 U.S. 557, 564 (1969)).

broad range of private choices involving family life and personal autonomy."[84] These Justices concluded that "[t]he intimate, consensual, and private relationship between petitioners involved both the 'interest in avoiding disclosure of personal matters [and] the interest in independence in making certain kinds of important decisions' . . . that our cases have recognized as fundamental."[85]

Hollenbaugh v. Carnegie Free Library[86] is an earlier illustration of the way in which lower courts have misinterpreted the scope and nature of the privacy right. In *Hollenbaugh*, a librarian and a custodian, both employed by a public library, met during their employment and began seeing each other on a social basis. Mr. Philburn, the custodian, was married at the time, but Ms. Hollenbaugh was divorced.[87] When Ms. Hollenbaugh became pregnant with Philburn's child, Philburn left his wife and began living with Ms. Hollenbaugh.[88] Despite requests by individual members of the library's Board of Trustees, the plaintiffs refused to alter their living situation. This refusal resulted in the Board's decision to terminate their employment.[89] The plaintiffs, claiming that the discharges violated the equal protection clause and their constitutional right to privacy, filed suit in federal court seeking reinstatement and back pay.[90] The district court's finding that the Board's action had not violated any constitutional guarantee[91] was summarily affirmed by the Court of Appeals for the Third Circuit.[92] The Supreme Court denied certiorari, but Justice Marshall wrote an incisive dissent in which he argued that the district and circuit courts had departed from Supreme Court precedents.[93]

The *Hollenbaugh* court conceded that the scope of the privacy right "encompasses and protects the personal intimacies of the home,

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84. *Id.* (citing 14 previous Supreme Court decisions).

85. 104 S. Ct. at 409 (Brennan, J., dissenting) (quoting Whalen v. Roe, 429 U.S. 598, 599-600 (1977)).

86. 405 F. Supp. 629 (W.D. Pa. 1975), *rev'd and remanded in part*, 545 F.2d 382 (3d Cir. 1976), *on remand*, 436 F. Supp. 1328 (W.D. Pa. 1977), *aff'd mem.*, 578 F.2d 1374 (3d Cir.) *cert denied*, 439 U.S. 1052 (1978).

87. 436 F. Supp. at 1331.

88. *Id.* The community was well aware of their living arrangement and complaints regarding this situation were received by the library Board of Trustees.

89. *Id.* The facts show that the only reason for their termination was that they were living together in what the court called "open adultery." *Id.*

90. *Id.* at 1330-31.

91. *Id.* at 1333-34.

92. 578 F.2d 1374 (3d Cir. 1978).

93. *See* 439 U.S. 1052 (1978) (Marshall, J., dissenting).

the family, motherhood, procreation and child rearing."[94] It concluded, nonetheless, that there was no "fundamental" privacy right that was applicable to the circumstances of this case.[95] It is quite possible that the *Hollenbaugh* court was influenced by the state's legitimate interest in protecting and preserving the institution of marriage. The preservation of Mr. Philburn's faltering marriage, however, was not the paramount issue in *Hollenbaugh*. The critical issue was whether the library had the right to terminate the plaintiffs' employment because it disapproved of their private intimate associations, where such activities apparently had no adverse effect on their ability to perform their jobs.[96]

Justice Marshall, writing in dissent to the Court's denial of certiorari, explicitly disagreed with the lower courts' interpretation of the scope and nature of the privacy right.[97] He asserted that a serious right implicated by the petitioners' discharge was " 'the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy.' "[98] He reasoned that the plaintiffs' "rights to pursue an open rather than a clandestine personal relationship and to rear their child together in this environment closely resemble the other aspects of personal privacy to which we have extended constitutional protection."[99]

The *Hollenbaugh* court gave little deference to Supreme Court opinions that suggest that there are fundamental rights of sexual privacy,[100] intimate association,[101] and personal autonomy,[102] holding that none of these rights were violated by the library Board's actions.[103] The court was engaged in an after-the-fact rationalization of a moral judgment, rather than any meaningful legal analysis; the court should have found that the right of personal choice had been unduly restricted, resulting in an unconstitutional invasion of the right to privacy.

There have been lower court decisions more sympathetic toward

94. 436 F. Supp. at 1333.
95. *Id.* at 1334.
96. 439 U.S. at 1057 (Marshall, J., dissenting).
97. 439 U.S. at 1052 (Marshall, J., dissenting).
98. *Id.* at 1055 (quoting Stanley v. Georgia, 394 U.S. 557, 564 (1969)).
99. *Id.*
100. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438, 443 (1972); Griswold v. Connecticut, 381 U.S. 479, 486 (1965).
101. *See supra* notes 58-63.
102. *See supra* note 84.
103. 436 F. Supp. at 1333-34.

the right to privacy than either *Shawgo* or *Hollenbaugh*. One such decision is *Smith v. Price*.[104] In *Smith*, a married police officer, off-duty and not in uniform, was shot and wounded by the former lover of a woman with whom he was having an affair.[105] Following an investigation, the officer was suspended for ten days by the Chief of Police. About four months later the Chief received a phone call from the officer's paramour, informing him that the affair had not ended. He ordered a new investigation, which resulted in a decision to discharge the officer.[106] The Chief concluded that since Smith's actions violated department regulations proscribing "conduct unbecoming an officer," this sanction was appropriate.[107]

Smith filed an action in federal court. The district court found that the sole reason for the officer's dismissal was his refusal to comply with Chief Price's orders to terminate the affair,[108] and held that his privacy rights were violated by the actions of the department.[109] The court relied very heavily on *Griswold* to justify the heightened protection accorded to what the court viewed as a right of associational privacy.[110] From this analysis, the court concluded that the scope of the privacy right was broad enough to protect Smith from departmental sanctions.[111] Although the court gave a comprehensive survey of the underlying constitutional basis of the privacy right,[112] its initial emphasis on the first amendment as a source of the right is illustrative of judicial confusion in distinguishing the privacy right from the first amendment association right.[113]

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104. 446 F. Supp. 828 (M.D. Ga. 1977), *rev'd on other grounds*, 616 F.2d 1371 (5th Cir. 1980).

105. 446 F. Supp. at 829.

106. *Id.* at 829-33.

107. *Id.* at 829. For a list of the proscribed activities see *id.* at 831-32.

108. *Id.* at 833.

109. *Id.* at 833-35.

110. *Id.* at 833-34. *See also* Shuman v. City of Philadelphia, 470 F. Supp. 449 (E.D. Pa. 1979). In order to justify its expansive interpretation of the privacy right, the *Shuman* court cited the famous Brandeis dissent in Olmstead v. United States, 277 U.S. 438 (1928), and stated that "there are . . . matters which fall within a protected zone of privacy simply because they are private; 'that is, that [do] not adversely affect persons beyond the actor, and hence [are] none of their business'. . . . These private matters . . . may simply constitute areas of one's life where the government simply has no legitimate interest. We conclude that a party's private sexual activities are within the 'zone of privacy' . . . protected from unwarranted government intrusions." 470 F. Supp. at 458-59 (quoting Ravin v. State, 537 P.2d 494 (Alaska 1976)) (citation omitted).

111. 446 F. Supp. at 834-35; Note, *supra* note 70, at 1051 (citing Elfbrandt v. Russell, 384 U.S. 11 (1966); Keyishian v. Board of Regents, 385 U.S. 589 (1967)).

112. 446 F. Supp. at 833-35.

113. *See id. See also* Shawgo v. Spradlin, 701 F.2d 470, 482 (5th Cir.), *cert. denied*,

The case most consistent with the Supreme Court's rulings on the right to privacy is *Briggs v. North Muskegon Police Department*.[114] In *Briggs*, a police officer had been cohabiting with a woman after having separated from his wife.[115] Briggs told his Chief about this relationship which included sexual intimacies.[116] The Police Chief subsequently suspended him from the force "until such time it is decided [that] his actions are not unbecoming a police officer."[117] Following a city council hearing in which Briggs was informed that his actions were in violation of state law,[118] and in which he responded that he would not change his lifestyle, the officer's request for reinstatement was denied.[119] Officer Briggs then filed an action in federal court asserting that the department's actions violated his constitutionally guaranteed rights of privacy and association.[120] The court held that the discharge of Officer Briggs violated his constitutional associational and privacy rights.[121]

The *Briggs* court cited several Supreme Court privacy precedents[122] as forming "the foundation for arguments that the constitutional right to privacy extends to sexual conduct in intimate relationships between unmarried individuals."[123] The court reasoned that the "right of sexual privacy would afford protection to an informal marriage which serves the same function as a formal marriage in being founded on a relationship characterized by intimacy, voluntary commitment, stability, psychological involvement, and in the heterosex-

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104 S. Ct. 404 (1983).

114. 563 F. Supp. 585 (W.D. Mich. 1983), *aff'd*, 746 F.2d 1475 (6th Cir. 1984).

115. 563 F. Supp. at 586.

116. *Id.* at 587.

117. *Id.* (quoting from the Superintendent's memo to the Chief).

118. MICH. COMP. LAWS ANN. § 750.335 (West 1968), provides, in part:

"Any man or woman, not being married to each other, who shall lewdly and lasciviously associate and cohabit together, and any man or woman, married or unmarried, who shall be guilty of open and gross lewdness and lascivious behavior, shall be guilty of a misdemeanor . . . ."

Although the plaintiff did not challenge the constitutionality of the statute, the court noted that "a serious argument could be made that the statute is unconstitutionally vague." 563 F. Supp. at 591. In addition, the court found that there was nothing in the record to suggest that the cohabitation at issue was either lewd or lascivious or otherwise violated the statute. 563 F. Supp. at 592.

119. *Id.* at 587.

120. *Id.*

121. *Id.* at 592.

122. *Id.* at 587-88 (citing Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972)).

123. 563 F. Supp. at 588.

ual context, procreative potential."[124] Emphasizing the importance of allowing individuals to have the opportunity to develop meaningful relationships that could possibly lead to marriage, the court concluded that "better logic supports the view which upholds the constitutional right of sexual privacy."[125]

As the preceding discussion illustrates, lower courts have had difficulty in interpreting the scope of the privacy right mandated by Supreme Court precedent. While some courts have held that the right to privacy is not broad enough to protect public employees from disciplinary proceedings,[126] other courts have recognized that the constitutional privacy right is broad enough to protect officers from departmental sanctions.[127] What is needed is a clear judicial test, applying a heightened level of scrutiny to protect employees' fundamental rights.

B. *Formulating an Appropriate Judicial Test*

The courts have struggled to define the scope of the constitutional privacy right, and to formulate a judicial test that is consistent with Supreme Court guidelines. Since the right to privacy is not absolute, courts must determine when state action will be permitted to infringe upon this right. The Supreme Court has described the privacy right as fundamental;[128] to justify infringement of that right, a state must show that it has a "compelling governmental interest" which is furthered by a statute that is sufficiently narrow in its scope that it fulfills only that legitimate state interest.[129] The Supreme Court has not yet decided a case involving a public employee's privacy claims. However, Justice Marshall's dissent to the denial of certiorari in *Hollenbaugh v. Carnegie Free Library*,[130] and the later dissent by Justices Brennan, Blackmun and Marshall to the Court's refusal to review *Shawgo v. Spradlin*,[131] underscore the need for the Court to formulate a clear test that would prevent states from depriving public employees of their right to privacy without sufficient justification.

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124. *Id.* at 589.
125. *Id.* at 590.
126. *Shawgo*, 701 F.2d at 482; *Hollenbaugh*, 436 F. Supp. at 1333-34.
127. *Smith*, 446 F. Supp. at 834-35; *Briggs*, 563 F. Supp. at 590.
128. *See supra* notes 24-60 and accompanying text.
129. Shapiro v. Thompson, 394 U.S. 618, 634 (1969).
130. 439 U.S. 1052 (1978) (Marshall, J., dissenting).
131. 104 S. Ct. 404 (1983) (Brennan, J., dissenting).

The Fifth Circuit decision in *Shawgo v. Spradlin*[132] highlights the need for a test that will adequately protect public employees' privacy rights. As a result of the court's failure to recognize the plaintiffs' fundamental right to privacy in their "choices involving family life and personal autonomy,"[133] the court placed the burden of proof on the plaintiffs to "demonstrate that there [was] no rational connection between the regulation . . . and the promotion of safety of persons and property."[134] The court concluded, without providing any clear explanation of the basis for its holding, that it could "ascertain a rational connection between the exigencies of Department discipline and forbidding members of a quasi-military unit, especially those different in rank, to share an apartment or to cohabit."[135] Not only did the *Shawgo* court err by applying a minimum level of scrutiny to a regulation that infringed upon this important right, its decision also failed to explain why it concluded that the regulation was rationally related to promoting department discipline.[136]

In *Hollenbaugh v. Carnegie Free Library*,[137] too, the court's narrow view of the scope of the privacy right clouded its ability to formulate a judicial test that would adequately protect one's private activities from unjustified state infringement. The court, in its disposition of the plaintiffs' equal protection claim, balanced the couple's right to live together against the public library's interest "in being able to properly perform its function in the community" and concluded that the Board's discharge of the plaintiffs was justified.[138] Yet even assuming that the library was an important presence in the community, there was no credible evidence that the employees' cohabitation impaired the library's ability to provide services.[139] Moreover, when the court addressed the plaintiffs' privacy claim it simply concluded that there was no fundamental right to privacy that would protect the plaintiffs,[140] and did not subject the agency's action to a

132. 701 F.2d 470 (5th Cir. 1983).

133. 104 S. Ct. at 408 (1983) (Brennan, J., dissenting).

134. 701 F.2d at 483.

135. *Id.*

136. *See id.*

137. 405 F. Supp. 629 (W.D. Pa.), *rev'd and remanded in part*, 545 F.2d 382 (3d Cir. 1976), *on remand*, 436 F. Supp. 1328 (W.D. Pa. 1977), *aff'd*, 578 F.2d 1374 (3d Cir.), *cert. denied*, 439 U.S. 1052 (1978).

138. 436 F. Supp. at 1333. One might assume after reading this opinion that the court believed that the function of the library is to uphold morality.

139. 439 U.S. at 1057 (Marshall, J., dissenting).

140. 436 F. Supp. at 1334.

heightened level of scrutiny.

Justice Marshall, dissenting to the Court's denial of certiorari in *Hollenbaugh*, took issue with the standard of review that the lower courts used in reaching their conclusions. He urged the Supreme Court to adopt a standard of review that, while not exactly akin to the traditional strict scrutiny formulation,[141] would nonetheless serve as a standard sufficient to protect public employees from unjustifiable infringements on their privacy rights. Under Marshall's test, a public employer would be required at least "to show that [the] discharge serves a substantial state interest."[142] In light of the record in *Hollenbaugh*, which was devoid of any evidence "suggesting that [the plaintiffs' living] status impaired the library's performance of its public function,"[143] Marshall believed that the firings would not serve any substantial state interest.[144] Marshall's heightened scrutiny test reflects a conviction that "individuals' choices concerning their private lives deserve more than token protection from [the Supreme] Court, regardless of whether we approve of those choices."[145]

The test applied by the court in *Smith v. Price*,[146] used to determine whether the governmental body was justified in regulating an employee's private off-duty conduct, differs from both the traditional strict scrutiny model and Justice Marshall's test.[147] According to the *Smith* court, the burden of proof should be placed on the governmental body to "show that the employee's usefulness as a police officer would be substantially and materially impaired by the conduct in question."[148] Applying this test to the facts in the case, the *Smith* court concluded that the officer's off-duty activities were "constitutionally protected."[149] This test is appropriate because it implicitly acknowledges that since privacy is a fundamental right, any state action that infringes upon that right should be judged under a heightened level of scrutiny.

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141. *See e.g.*, Roe v. Wade, 410 U.S. 113, 115 (1973); Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

142. 439 U.S. at 1056 (Marshall, J., dissenting).

143. *Id.* at 1057.

144. *See id.* at 1057-58.

145. *Id.* at 1058.

146. 446 F. Supp. 828, (M.D. Ga. 1977), *rev'd on other grounds*, 616 F.2d 1371 (5th Cir. 1980).

147. *See supra* notes 11, 53-57, 141-145 and accompanying text. *See also infra* note 167 and accompanying text.

148. 446 F. Supp. at 834.

149. *Id.* at 838.

The court in *Briggs v. North Muskegon Police Department*[150] set forth its own standard for reviewing the police department's action, concluding that "the privacy and associational interests implicated here are sufficiently fundamental to warrant scrutiny of the defendant's acts on more than a minimal rationality basis."[151] Rejecting "the notion that an infringement of an important constitutionally protected right is justified simply because of general community disapproval of the protected conduct,"[152] the court concluded that "from the evidence . . . the effectiveness of [Brigg's job performance] had not been impaired [by his off-duty conduct] at the time of his suspension and subsequent discharge."[153] The department's action therefore violated Brigg's right to privacy.[154]

The test used by the *Briggs* court is a good example of an intermediate level of scrutiny that is more protective of the privacy right than is a mere rationality standard, but which still does not provide the protection generally afforded fundamental rights under a classic strict scrutiny formulation.[155] The *Briggs* court reasoned that the privacy right is fundamental and also broad enough in scope to protect extra-marital sexual relations.[156] But without an explicit Supreme Court statement defining the scope of the privacy right, the *Briggs* court apparently was reluctant to apply the traditional strict scrutiny test.

Justices Brennan, Marshall and Blackmun, writing in dissent to the Court's refusal to review *Shawgo v. Spradlin*,[157] argued that a state agency, or specifically in that case, a police department, cannot infringe upon a public employee's fundamental privacy right without showing that such abridgment is "necessary to achieve strong, clearly articulated state interests."[158] In light of the fundamental nature of the constitutional privacy right and the dilution of that right in the lower courts, the Supreme Court should affirm the view expressed by these Justices.

An appropriate standard would require public employers to demonstrate that a compelling interest or, at minimum, an important

150. 563 F. Supp. 585 (W.D. Mich. 1983), *aff'd*, 746 F.2d 1475 (6th Cir. 1984).
151. 563 F. Supp. at 590.
152. *Id.*
153. *Id.* at 591.
154. *Id.* at 591-92.
155. *E.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969).
156. *See* 563 F. Supp. at 590.
157. 104 S. Ct. 404 (Brennan, J., dissenting).
158. *Id.* at 409.

state interest, justifies disciplinary action against employees when sanctions are imposed for off-duty private conduct. In general, states have argued that anti-cohabitation statutes are justified by the state's interest in preservation of the family, the preservation of public health, and the promotion of morality.[159] Additionally, in the public employment context, states have asserted interests in the promotion of order and discipline[160] and concern for community disapproval of employees' private conduct.[161] Analysis of these interests demonstrates, however, that while they may be sufficient to pass constitutional muster under a rational relationship test, they would be unlikely to meet the burden of strict or heightened scrutiny.

The state goal of preserving the institution of marriage is often justified as complementing the more fundamental interest in preserving the traditional family unit. By making trial marriages[162] impossible, however, the state actually interferes with the decision-making processes of many people who respect the institution of marriage and prefer not to rush into it.[163] Such meddling does not serve the state interest of sustaining the family, and in fact may preclude some relationships from progressing into marriage. Consequently, this state interest would probably fail to justify disciplinary actions if examined under a heightened level of scrutiny.

While the state interest in preserving public health is a valid one, it is difficult to find any legitimate health interest furthered by prohibiting heterosexual cohabitation.[164] In fact, the Supreme Court has indicated that when the state asserts a health interest in the sexual privacy area, the Court will carefully examine the facts to ensure that the state is not attempting to legislate morality in the guise of protecting the health of the community.[165]

The argument that the state is acting to preserve a subjective standard of morality similarly fails a careful analysis under a height-

159. Note, *supra* note 61, at 299-301.

160. Shawgo v. Spradlin, No. CA-2-78-90, slip op. at A10-A11 (N.D. Tex. Feb. 11, 1982).

161. *Briggs*, 563 F. Supp. at 590-91.

162. *See supra* notes 64-65 and accompanying text.

163. Note, *supra* note 61, at 302.

164. Indeed, a careful reading of *Shawgo*, 701 F.2d 470 (5th Cir. 1983); *Hollenbaugh*, 436 F. Supp. 1328 (W.D. Pa. 1977); *Smith*, 446 F. Supp. 828 (M.D. Ga. 1977) and *Briggs*, 563 F. Supp. 585 (W.D. Mich. 1983), indicates that there was no significant argument advanced by the state that health considerations were a reason the disciplinary actions were taken.

165. Eisenstadt v. Baird, 405 U.S. 438, 452 (1972).

ened level of scrutiny. In light of *Eisenstadt v. Baird*,[166] any state interest in preserving some vague notion of morality should not be able to withstand a constitutional challenge. Implicit in the Court's analysis is the notion that a locality's perception of morality cannot prevent an individual from selling or using contraceptives in private.[167] It follows that the Court should reach the same conclusion if asked to determine whether a community's view of morality is sufficient to justify the privacy constraints of statutes that effectively prohibit cohabitation.

Asserted state interests unique to the public employment context are also insufficient to withstand heightened scrutiny. In *Shawgo*,[168] for example, the asserted state interest was the promotion of good order in the police force.[169] The court held that depriving the plaintiffs of their livelihood was somehow rationally related to serving some amorphous state interests.[170] This determination was made with a disturbing paucity of evidence to indicate that these employees were unable to adequately perform their jobs. The failure of the court to recognize a fundamental right to privacy led it to utilize an intolerably low judicial standard in reviewing the state action restricting that right. To meet a strict or heightened scrutiny test, the police department would have had to present strong evidence that the disciplinary measures taken against the employees served a compelling or important state interest. Had a strict, or even heightened, scrutiny standard been applied in these cases, it is unlikely that a court would have considered the state interest compelling or substantial enough to justify an infringement upon the fundamental right to privacy. Police department discipline is indeed an important factor in maintaining a stable community. Nonetheless, forcing employees to surrender their hard-earned positions under the guise of insuring discipline is reprehensible, and violates employees' right to privacy.

A public employer may also claim that community disapproval of an individual's off-duty activities has impaired his ability to function as an effective officer or employee. In *Briggs v. North Mus-*

166. 405 U.S. 438 (1972).

167. *Id.* at 452-53.

168. Shawgo v. Spradlin, No. CA-2-78-90 (N.D. Tex. Feb. 11, 1982).

169. *Id.* at A11.

170. 701 F.2d at 483. The court remarked that "[t]here was no evidence at the commission hearing or at the district court that the plaintiffs did not adequately perform their duties while they were dating, that their conduct distracted from service to the public, or that they violated any state law." *Id.* at 473. *See also Hollenbaugh*, 436 F. Supp. at 1330-31.

kegon Police Department,[171] the defendants contended "that plaintiff's suspension and dismissal were justified because plaintiff's off-duty conduct adversely affected his ability to perform his job" since the community's knowledge of Brigg's conduct "was likely to [result in] a loss of credibility with the citizens."[172] The department feared that in the "small community [Brigg's] conduct was or soon would be public knowledge, and that citizens would therefore lose respect for [him] in particular and the police force in general."[173] In evaluating this state interest under a heightened scrutiny standard, the court properly held that "infringement of an important constitutionally protected right is [not] justified simply because of general community disapproval of the protected conduct."[174]

The standard of scrutiny utilized by reviewing courts is a critical factor in determining whether public employees will be subject to disciplinary action for their private off-duty conduct. State interests in morality, the family, and public health, and more specific interests in public employee discipline and public respect, may be legitimate concerns, but cannot withstand heightened judicial scrutiny when balanced against the public employee's right to engage in private, off-duty behavior. Because privacy is a fundamental right, nothing less than a strict or, at minimum, heightened level of scrutiny is acceptable.

C. *Conditioning Public Employment on a Waiver of the Privacy Right: Not a Valid Escape Route*

Public employers faced with the prospect of justifying disciplinary action against employees may attempt to condition employment upon a waiver of the privacy right as an alternative to utilizing general behavior statutes to regulate public employees' off-duty activities. Such attempts are likely to be unsuccessful, since the Supreme Court has strictly scrutinized state action that conditions public employment on a waiver of the employee's constitutional rights.

In *Elfbrandt v. Russell*[175] and *Keyishian v. Board of Re-*

171. 563 F. Supp. 585 (W.D. Mich. 1983), *aff'd*, 746 F.2d 1475 (6th Cir. 1984).

172. 563 F. Supp. at 590.

173. *Id.* at 591.

174. *Id. See also* Smith v. Price, 446 F. Supp. 828 (M.D. Ga. 1977), where the court held that "[g]iven the opportunity to do so, the defendant police and city officials offered *no evidence* that shows marital misconduct engaged in privately and while off-duty has any effect upon a police officer's duty performance." *Id.* at 834 (emphasis in original).

175. 384 U.S. 11 (1966).

gents,[176] both involving the abridgment of public school teachers' first amendment rights, the Court found no justification for the view that "public employment . . . may be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action."[177] A year later, in *Pickering v. Board of Education*,[178] the Supreme Court reaffirmed the *Elfbrant* and *Keyishian* rule, but retreated from the absolutist position and instead implemented a balancing test.[179] The Court balanced the teacher's first amendment rights against the need for orderly school administration[180] and concluded that the "interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public."[181] To condition a teacher's employment upon his waiver of first amendment rights would apparently require the state to show that this condition to employment is justified by a significantly greater state interest.[182]

While this line of cases protects first amendment rights, the right to sexual privacy is substantially akin to these fundamental rights. It logically follows that state agencies should not be permitted to condition employment in the public sector upon a surrender of this constitutional right without showing that such conditional employment is justified by a compelling, or at a minimum, a sufficiently important state interest.

The court in *Smith v. Price*[183] appropriately began its discussion of privacy by recognizing that police officers, as well as other city employees, do not automatically waive their constitutional rights by embarking upon a career of public employment.[184] The court went on to qualify this assertion by explaining that state agencies may not

176. 385 U.S. 589 (1967).

177. *Id.* at 605.

178. 391 U.S. 563 (1968).

179. *Id.* at 568. The Court explained that "[t]he problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the [s]tate, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.*

180. *Id.* at 569.

181. *Id.* at 573.

182. *See id.* at 574.

183. 446 F. Supp. 828 (M.D. Ga. 1977), *rev'd on other grounds*, 616 F.2d 1371 (5th Cir. 1980). For a brief discussion of this case, see *supra* text accompanying notes 104-09.

184. 446 F. Supp. at 834. The court stressed that "[p]olice officers of the City of Athens and all other city employees are possessed of and entitled to enjoy the same constitutional rights and privileges that all other persons in these United States possess and enjoy." *Id.* at 833.

condition employment upon a waiver of constitutional rights "unless there is a justification for doing so,"[185] and found that in the case before it there was no such justification.[186]

The *Briggs* court[187] also recognized the problem of conditioning public employment upon a waiver of the privacy right, but was ambivalent in its treatment of this issue. At the outset, the court properly cited *Pickering* as authority for the notion that "[w]hen the state acts as an employer, it may not without substantial justification condition employment on the relinquishment of constitutional rights."[188] The court apparently recognized that public employment could not be conditioned upon a waiver of the privacy right unless the state was able to demonstrate a very important reason for doing so, and implicitly acknowledged that a determination of this issue requires a thoughtful evaluation of both the individual's rights and the state's interests.[189]

The *Briggs* court was searching for a judicial test that would adequately balance these competing considerations, pointing out the need for clarification of the extent to which public employment may be conditioned upon an employee's waiver of his right to privacy. Just as direct infringement of that right should be subject to heightened scrutiny, so too must waiver provisions be carefully examined.

CONCLUSION

Shawgo v. Spradlin,[190] *Hollenbaugh v. Carnegie Free Library*,[191] *Smith v. Price*[192] and *Briggs v. North Muskegon Police Department*[193] demonstrate that there is a serious conflict among the circuits over the issue of the personal autonomy rights of public employees.[194] Published opinions do not reflect the true extent of the problem, because when dismissal is caused by state disapproval of an

185. *Id.* at 834.
186. *Id.* at 834-35.
187. 563 F. Supp. 585 (W.D. Mich. 1983), *aff'd*, 746 F.2d 1475 (6th Cir. 1984).
188. 563 F. Supp. at 587. The court, however, also maintained that the state "has greater latitude in restricting the activities of its employees than of its citizens in general." *Id.*
189. *Id.*
190. 701 F.2d 470 (5th Cir.), *cert. denied*, 104 S. Ct. 404 (1983).
191. 405 F. Supp. 629 (W.D. Pa. 1975), *rev'd and remanded in part*, 545 F.2d 382 (3d Cir. 1976), *on remand*, 436 F. Supp. 1328 (W.D. Pa. 1977), *aff'd mem*, 578 F.2d 1374 (3d Cir.), *cert. denied*, 439 U.S. 1052 (1978).
192. 446 F. Supp. 828 (M.D. Ga. 1977), *rev'd on other grounds*, 616 F.2d 1371 (5th Cir. 1980).
193. 563 F. Supp. 585 (W.D. Mich. 1983), *aff'd*, 746 F.2d 1475 (6th Cir. 1984).
194. Note, *supra* note 70, at 1055.

employee's private life, a brave spirit is required to go into court and face the psychological stress of revealing one's private activities.

The lack of clear Supreme Court guidance on this issue has led to a kind of judicial "value sculpting"[195] among the lower courts, elevating the community's idealized notion of morality and imposing it on the public employee.[196] Courts should also be cognizant of the danger that a supervisor may use a general conduct statute to settle an unrelated grievance with an employee, or even as a way of eliminating a potential rival.[197] This potential for abuse may well account for the selective enforcement of these types of regulations.[198]

There is, therefore, a compelling need for the Supreme Court to explicitly acknowledge that privacy is a fundamental right based upon personal autonomy, and that its scope covers private sexual activities. Significantly, three Justices of the Supreme Court have already indicated their willingness to hand down a decision that makes this explicit assertion.[199]

The confusion among the circuits underscores the need for the Supreme Court to clearly explain that the privacy right naturally extends to protect a public employee's choice to make certain decisions regarding his intimate associations without the nagging fear of censure by the state. The Supreme Court, in the near future, should review a case involving the restriction of a public employee's privacy rights and act decisively to prevent lower courts from issuing decisions that deprive public employees of their constitutional right to privacy.

Joel Shafferman

195. *Id.* at 1045.
196. *See id.* at 1053.
197. Swope v. Bratton, 541 F. Supp. 99, 107 (W.D. Ark. 1982).
198. *Id.*
199. Whisenhunt v. Spradlin, 104 S. Ct. 404 (1983) (Brennan, J. dissenting).