



1964

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Recommended Citation

John E. Good, *Constitutional Law - Civil Rights Act - Invasion of Privacy by Police Gives Rise to a Cause of Action under the Federal Civil Rights Act*, 9 Vill. L. Rev. 505 (1964).

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give full faith and credit to J-1's determination in light of other factors indicating a strong state policy such as the amount of property located in J-2 and the amount of taxes involved.

It appears that *Durfee*, rather than eliminating factor *e* of the *Restatement* formula, has merely concluded that the underlying policy favoring collateral attack was not strong enough on the facts presented. It is submitted that *Durfee*, rather than dismembering collateral attack, limits the finality of jurisdictional determinations where certain strong policy reasons exist. In so doing, it appears the Supreme Court has adopted the balance factors of the *Restatement*.

William B. Freilich

CONSTITUTIONAL LAW—CIVIL RIGHTS ACT—INVASION OF PRIVACY
BY POLICE GIVES RISE TO A CAUSE OF ACTION UNDER THE FEDERAL
CIVIL RIGHTS ACT.

York v. Story (9th Cir. 1963)

Plaintiff brought an action under the federal Civil Rights Act alleging that a city police officer caused the plaintiff, who had come to the police station to complain of an assault, to be photographed in indecent positions over her objections. She further alleged that such defendant and another officer, circulated the photographs among police personnel and in so doing were liable under the Civil Rights Act¹ for invasion of her privacy. The district court dismissed the action, but the Ninth Circuit reversed *holding* that the complaint stated a cause of action since a person's right of privacy is comprehended within the "liberty" of which one may not be deprived without due process of law and, therefore, the police officers, acting under color of law, had deprived plaintiff of a constitutionally protected right. *York v. Story*, 324 F.2d 450 (9th Cir. 1963).

A complaint states a claim under section 1979 of the Civil Rights Act if the facts alleged show that the defendant: (1) while acting under color of state or local authority, (2) deprives a person of any rights, privileges

1. The applicable provision of the Civil Rights Act was originally enacted as a part of the Civil Rights Act of 1871, § 1, 17 Stat. 13. It was later reenacted as positive law, as REV. STAT. § 1979 (1875). It appears in 42 U.S.C. as § 1983. But since Title 42 has not been enacted into positive law, it is only "prima facie evidence of the law." 1 U.S.C. § 204(a) (1958). The reference throughout this note will, therefore, be to § 1979, meaning REV. STAT. § 1979 (1875).

REV. STAT. § 1979 reads: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

or immunities secured to the individual by the Constitution and laws of the United States.² In light of *United States v. Classic*³ and *Screws v. United States*,⁴ the facts alleged in a complaint are sufficient with regard to the first of these elements if they show that defendants were clothed with state authority.⁵ It is clear that in the instant case the defendants were acting under color of state law.⁶ The second and more complex problem is whether privacy is a constitutionally protected right within the meaning of the Fourteenth Amendment.⁷ It was first suggested as being protected in a famous article by Louis D. Brandeis and Samuel D. Warren written in 1890 which remains the classic on the subject.⁸ However, since the right is not enumerated in the Constitution, if it exists as such, it must be implied from the language of the Constitution and the amendments thereto.

There are two possible sources from which the right could be implied. The first is the Fourth Amendment⁹ search and seizure provision as it applies to the states through the Fourteenth Amendment. The second is the due process clause of the Fourteenth Amendment¹⁰ which protects the rights of "life, liberty and property" against infringement. The Ninth Circuit's opinion in the instant case demonstrated no close analysis of either source. It apparently dismissed the possibility of there being a right to privacy implicit under the Fourth Amendment since it went no farther than to state that even if there were a search and seizure, that finding would not be dispositive of the case as to the defendants who had only distributed the pictures. It accepted the proposition that without a search and seizure there could be no actionable right. As to the Fourteenth Amendment, the court stated in only general terms that privacy was encompassed in "liberty" which must be protected. A closer analysis will demonstrate that the court was perhaps correct in result, but not completely correct in reasoning.

An early case, *Boyd v. United States*,¹¹ dealing with the meaning to be given to the Fourth Amendment, employed language which would seem to resolve the problem. In *Boyd*, the Supreme Court held invalid a law

2. *Marshall v. Sawyer*, 301 F.2d 639, 646 (9th Cir. 1962); *Cohen v. Norris*, 300 F.2d 24, 30 (9th Cir. 1962).

3. 313 U.S. 229, 61 S.Ct. 1031 (1941).

4. 325 U.S. 91, 65 S.Ct. 1031 (1945).

5. "Misuse of power, possessed by virtue of state law, and made possible only because the wrongdoer is clothed with the authority of state law is action taken under color of state law." *United States v. Classic*, 313 U.S. 299, 326, 61 S.Ct. 1031, 1043 (1941).

6. *Ibid.*

7. "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." U.S. CONST. amend. XIV.

8. Brandeis & Warren, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

9. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

10. See note 7 *supra*.

11. 116 U.S. 616, 6 S.Ct. 524 (1886).

requiring one to produce books, papers, and invoices in a suit for violation of the revenue laws. Though technically there was not a search and seizure, the Court reasoned that, based on the principle laid down in *Entick v. Carrington*,¹² the Fourth Amendment should not be technically and literally applied. The substance of this opinion was that the Fourth Amendment protects arbitrary intrusion upon privacy, whether of the home or the person.

It was not until 1928 that the Supreme Court retreated from this liberal interpretation of the Fourth Amendment. The famous or perhaps infamous case of *Olmstead v. United States*¹³ involved a conviction based on evidence procured by the use of wire tapping. The petitioners specifically argued that *Boyd v. United States, Ex Parte Jackson*,¹⁴ and other leading cases "uniformly hold that the Fourth and Fifth Amendments were designed primarily to protect personal rights, one of the most valuable of which is the right of privacy."¹⁵ The argument did not prevail. Chief Justice Taft, delivering the opinion of the majority, held that the wire tapping was not a search and seizure because the search referred to in the Fourth Amendment must "be of material things — the person, the house, his papers or his effects."¹⁶ The determinative element was the lack of trespass. The Chief Justice further explained that on the authority of *Carrol v. United States*¹⁷ the Fourth Amendment is only to be applied to what was deemed an unreasonable search and seizure at the time the Fourth Amendment was adopted. Brandeis and Stone were the only dissenters who would give a liberal interpretation to the amendment: "Clauses guaranteeing to the individual protection against specific abuses of power must have a similar capacity of adaptation to a changing world. . . ."¹⁸

Opinions subsequent to *Olmstead* have been sympathetic with the proponents of a liberal interpretation, but have refused to digress from the rationale of *Olmstead*. In *Goldman v. United States*¹⁹ it was held that section 605 of the Federal Communications Act of 1934²⁰ did not apply to a case where a third person overhears a conversation in an adjoining room by means of a detectaphone.²¹ Petitioners then argued that *Olmstead* should be reversed and the Fourth Amendment applied to cover such a situation. A majority of the Court refused to agree, stating that the case was the result of a ". . . prolonged consideration by this court."²² Later, in 1952, the Supreme Court decided *On Lee v. United States*.²³ The

12. 19 Howell's St. Tr. 1029 (C.P. 1765).

13. 277 U.S. 438, 48 S.Ct. 564 (1928).

14. 96 U.S. 727 (1878).

15. Brief for Petitioners Green *et al.*, p. 14; *Olmstead v. United States*, 277 U.S. 438, 48 S.Ct. 564 (1928).

16. *Id.* at 464, 48 S.Ct. at 568.

17. 267 U.S. 132, 149, 45 S.Ct. 280, 284 (1925).

18. 277 U.S. at 472, 48 S.Ct. at 570.

19. 316 U.S. 129, 62 S.Ct. 993 (1942).

20. 48 Stat. § 1103 (1934), 47 U.S.C. § 605 (1958).

21. A detectaphone is a telephonic apparatus with an attached microphone transmitter used especially for listening secretly.

22. 316 U.S. 129, 135, 62 S.Ct. 993, 996.

23. 343 U.S. 747, 72 S.Ct. 967 (1952).

conviction was based on evidence obtained through a secret transmitting device. Again with four dissents the court refused to overrule *Olmstead*. More recently in the case of *Silverman v. United States*²⁴ the Court refused to overrule or even consider *Olmstead*. Instead, the Court reasoned that since the microphone used by the police to eavesdrop was contained in a nail-like object which was driven into a heating duct, there was a technical trespass and thus a search within the Fourth Amendment sense.

These cases would seem to indicate that unless there is a physical search and seizure in conjunction with the violation of the person's privacy, the latter right is not constitutionally protected. It must be noted, however, that all the cases cited above raise the constitutional problem in the criminal context. In the civil sense, the scope of the Fourth Amendment has never been determined except in a typical search and seizure situation, although the existence of a civil cause of action for its breach is acknowledged and was the basis for refusing to hold evidence unconstitutionally obtained inadmissible in a state court.²⁵ It was not until *Mapp v. Ohio*²⁶ held that the civil action was not effective to adequately protect the right that such evidence was held inadmissible.

When the question is raised in a criminal case, the object of the argument is to have the evidence suppressed. The petitioner is rarely interested in whether his right of privacy has been invaded and is interested only in whether the evidence will be used against him or not. Once excluded, he is normally satisfied. In a civil action, on the other hand, the emphasis is totally different. The plaintiff is interested in being compensated for the injury that he has suffered. It is submitted that the substance of the right against search and seizure as contained in the Fourth Amendment, is, in the civil sense, the right of privacy, the right to be secure in house and person. If the substance of this right is violated, it should be immaterial what form the violation takes. Though there may be good reasons why a technical search and seizure may be required in a criminal case before the Fourth Amendment may be imposed to deny otherwise relevant, material and incriminating evidence to the state courts, these considerations are not present in the civil area. If the basic right protected is the right of privacy, and a plain reading of the amendment seems to support that implication, it seems that the court in the instant case was correct in applying the liberal interpretation as laid down in the cases of *Entick v. Carrington*²⁷ and *Boyd v. United States*²⁸ to this civil case, and denying the application of the interpretation as laid down in criminal cases such as *Olmstead*.

Notwithstanding these arguments, however, it must be noted that the Supreme Court has never so held. Since there is no definitive opinion

24. 365 U.S. 505, 81 S.Ct. 679 (1961).

25. *Wolf v. Colorado*, 338 U.S. 25, 69 S.Ct. 1359 (1949). The civil action would be trespass which would be based on state law as well as the constitutional right.

26. *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684 (1961).

27. *Entick v. Carrington*, 19 Howell's St. Tr. 1029 (C.P. 1765).

28. *Boyd v. United States*, 116 U.S. 616, 6 S.Ct. 524 (1886).

in this area in a civil case, the opinions handed down by the Court in the criminal area must control. Thus, unless the breach of privacy is accompanied by an unreasonable search and seizure, it would seem that there is no constitutional protection of the right. The contrary argument was specifically made in *Olmstead* and denied. However, the *Mapp* decision has severely undermined some of the basic tenets of *Olmstead*, and it is probable that this much criticized decision would not completely survive another attack. The tenor of the *Mapp* opinion was that the Fourth Amendment should be liberally interpreted. Justice Black explained most clearly the Court's feeling: "I fully agree with Mr. Justice Bradley's opinion that the two Amendments [Fourth and Fifth] upon which the *Boyd* doctrine rests are . . . both entitled to a liberal rather than a niggardly interpretation."²⁹

The second possible source of the right is the Fourteenth Amendment's requirement of due process. It can be argued that privacy is part of "life, liberty and property" protected against government interference by the Fifth and Fourteenth Amendments.

Mr. Justice Frankfurter in *On Lee v. United States*³⁰ said "To approve legally what we disapprove morally on the ground of practical inconvenience is to yield to a short-sighted view of practicality."³¹ Mr. Justice Douglas is an even stronger proponent of the right of privacy.³² Dean Roscoe Pound and Professor Charles Nutting are of the opinion that privacy should be a right protected under the Fourteenth Amendment's "liberty." Professor Nutting argues: "The way to protect privacy is to recognize the interest for what it is. . . . It is an interest which should receive protection as a 'liberty'."³³ Dean Pound is as forceful: "The right was discovered by reason, developed by reason, and is limited by reason. Thus it is within the limits of the Fourteenth Amendment. . . ."³⁴

It is submitted that while the Fourth Amendment protects the right of privacy only to the extent that a search and seizure can be found, there is no such limitation upon protection of the right under the Fourteenth Amendment. However, to date, there has not been a strong argument made to the Supreme Court that either life, liberty or property as expressed in the Fourteenth Amendment, embraces the right of privacy. It would seem ludicrous, however, to constitutionally protect one's home from arbitrary invasion, yet afford no protection for the invasion of his personal privacy, especially if the violation involves exposing a naked body.

State courts when faced with the problem have usually justified the right on the theory that it "came from Natural Law"³⁵ or it is embraced by

29. 367 U.S. 643, 666, 81 S.Ct. 1684, 1697 (1961).

30. 343 U.S. 747, 72 S.Ct. 967 (1952).

31. *Id.* at 758, 72 S.Ct. at 974 (1952).

32. See the dissenting opinion of Mr. Justice Douglas in *On Lee v. United States*, 343 U.S. 747, 762, 72 S.Ct. 967, 976 (1952).

33. Nutting, *The Fifth Amendment and Privacy*, 18 U. Prrt. L. Rev. 533, 543 (1957).

34. Pound, *The Fourteenth Amendment and the Right of Privacy*, 13 W. Res. L. Rev. 34, 54 (1961).

35. *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905).

"liberty."³⁶ The feeling expressed by the state courts is that a right to be let alone is basic and fundamental to an orderly system of law. In respect to the Fourteenth Amendment there is no direct authority to support the instant case. On the other hand, there is no reason to say the case is wrong. Such a situation has never before presented itself to a federal court. Consequently, the court of appeals has taken a bold but laudable step.

Though the right of privacy did not exist at common law,³⁷ this does not necessarily mean that the right cannot now be protected under the Fourteenth Amendment.³⁸ The Supreme Court in *Village of Euclid v. Ambler Realty Co.*³⁹ held that the amendment was couched in such broad language as to allow various applications of the terms life and liberty. In *Rochin v. California*⁴⁰ it was stated that the judicial exercise of judgment cannot be avoided by freezing due process of law at some fixed time or stage, and in *Joint Anti-Fascist Refugee Comm. v. McGrath*,⁴¹ the Court said that "due process unlike some legal rules is not a technical conception with a fixed content unrelated to time, place and circumstances."⁴² Thus the due process clause of the Fourteenth Amendment encompasses all that is "implicit in the concept of ordered liberty"⁴³ whether the right was so protected when the Constitution was written or not. The questions to be answered then are whether the "concept of ordered liberty" encompasses the right of privacy standing alone or whether it will be protected if the method of violation was of a particularly shocking nature.

It seems very doubtful that the right of privacy as such will be protected under the Fourteenth Amendment. As previously stated, the right was not protected at common law, and there is little indication that the thinking of the Court has so changed as to now include the right in the "concept of ordered liberty." However, in light of the expansion of due process, and the inclination of the Court to apply its sanction to new situations, it cannot be said that the right of privacy will never be protected in a given situation.

In *Rochin v. California*,⁴⁴ the Supreme Court was faced with what began as the typical search and seizure case. State officers forced their way into a private house on the basis of some information that the accused

36. *Melvin v. Reid*, 112 Cal. App. 285, 297 Pac. 91 (1931); *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905); *Barber v. Time, Inc.*, 348 Mo. 1153, 159 S.W.2d 291 (1942).

37. Brandeis & Warren, *The Right to Privacy*, 4 HARV. L. REV. 193, 213 (1890).

38. This view was also espoused in *Weems v. United States*, 217 U.S. 349, 373, 30 S.Ct. 544, 551 (1909): "Time works changes, brings into existence new conditions and purposes. Therefore, a principle to be vital, must be capable of wider application than the mischief which gave it birth."

39. 272 U.S. 365, 387, 47 S.Ct. 114, 118 (1926).

40. 342 U.S. 165, 72 S.Ct. 205 (1952).

41. 341 U.S. 123, 71 S.Ct. 624 (1951).

42. *Id.* at 162, 71 S.Ct. at 643.

43. *Palko v. Connecticut*, 302 U.S. 319, 325, 58 S.Ct. 149, 152 (1937): Mr. Justice Cardozo, speaking for the majority held that the Fourteenth Amendment encompasses all that is "... implicit in the concept of ordered liberty."

44. 342 U.S. 165, 72 S.Ct. 205 (1952).

was selling narcotics, in an attempt to obtain evidence and make an arrest. Had their purposes been achieved without doing more, there would have been little controversy since the case was decided before *Mapp v. Ohio*⁴⁵ rendered inadmissible evidence thus gained in a state court proceeding. However, when the accused saw the police, he swallowed the capsules which were the objects of the search. It was then necessary for the police to forcibly attempt to extract the capsules and, failing there, to have the accused's stomach pumped at a hospital. The incriminating evidence was thus obtained and was the basis of the conviction. The Supreme Court reversed the conviction on the ground that the due process clause of the Fourteenth Amendment was violated. Mr. Justice Frankfurter summarized the view the Court took of the police conduct as follows: "This is conduct that *shocks the conscience*. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents — this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities."⁴⁶ (Emphasis added.)

It is true that *Rochin* involved a search and seizure. But the right to have evidence illegally obtained by state officers held inadmissible in a state court proceeding was not then available to the defendant. The right was protected, and the evidence was excluded solely because the police conduct shocked the conscience.

In the instant case, there may have been no search and seizure.⁴⁷ But on the facts of the case it would seem that nude photographs, taken over the objections of the plaintiff, are certainly as shocking as stomach pumping. It may be that the Supreme Court would not reach the same conclusion on the facts. However, since the action cannot be dismissed "unless it appears beyond reasonable doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief,"⁴⁸ it seems that the court was correct in reversing the dismissal of the instant action. Whether the relief prayed for is for a violation of "privacy" or "integrity" or some other term, if the conduct of the police which caused the injury is "shocking" in the constitutional sense, it is cognizable under the Civil Rights Act. Since it does not appear as a matter of law that the alleged acts in the instant case fall below that standard, the Ninth Circuit was correct in reversing the dismissal.

John E. Good

45. 367 U.S. 643, 81 S.Ct. 1684 (1961).

46. 342 U.S. 165, 172, 72 S.Ct. 205, 209 (1952).

47. The issue of a search and seizure was raised in the instant case. The court treated it by saying: "The alleged act of Story in taking photographs of appellant in the nude, if proved, may or may not constitute an unreasonable search in the Fourth Amendment sense. But if we should hold that it does, this would not dispose of the whole case for the alleged subsequent acts of Story and Moreno in distributing prints of these photographs, of which appellant also complains, could hardly be characterized as unreasonable searches." *York v. Story*, 324 F.2d 450, 454 (1963).

48. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-02 (1957).