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Constitutional Law: Privacy's Strength in the Battleground of Doctrines

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CONSTITUTIONAL LAW: PRIVACY'S STRENGTH IN THE BATTLEGROUND OF DOCTRINES

In the Interest of D.A.W., 178 So. 2d 745 (2d D.C.A. Fla. 1965)

The parents of a dependent child[1] were ordered to undergo psychiatric examination by the Orange County Juvenile Court in order to regain custody of their child, D.A.W. The appellant parents urged the Second District Court of Appeal to reverse the order that would grant full custody to the department of welfare unless psychiatric analysis proved appellants competent to have their child. The district court, while noting the wide discretion given juvenile court judges and the freedom granted to that court to override technicalities,[2] HELD, the juvenile court could not compel the parents to undergo psychiatric examination because there was no statutory authority to do so. The order was quashed and remanded. The Juvenile Court Act specifically allows psychiatric examination of a child in juvenile court proceedings, but there is no specific authority to compel parents to be examined.

About one-third of the states[3] are similar to Florida in this respect although litigation around the question is scarce to nonexistent. In some states,[4] both the child and the parents seem to be subject to mental and physical examination. Usually the court is given jurisdiction over parents for "contributing" to the delinquency or dependency of any child and is also given the power to cause any person who may come within its jurisdiction to undergo mental or physical examination.[5] There would seem to be nothing to stop the Florida Legislature from granting this power to juvenile courts. The right of the state as *parens patriae* has been held to be paramount[6] and,

1. FLA. STAT. §39.01 (10) (1965).

2. In the Interest of D.A.W. 178 So. 2d 745 (2d D.C.A. Fla. 1965).

3. ALA. CODE tit. 13, §358 (1958); ARIZ. REV. STAT. ANN. §8-232 (1956); CONN. GEN. STAT. REV. §17-62 (b) (1959); FLA. STAT. §39.08 (1965); GA. CODE ANN. §24-2412 (1959); IDAHO CODE ANN. §16-1814 (4) (Supp. 1965); IND. ANN. STAT. §9-3220 (1956); KY. REV. STAT. ANN. §208.150 (1963); MISS. CODE ANN. §7187-11 (Supp. 1964); MO. ANN. STAT. §211.491 (1959); NEB. REV. STAT. §43-224 (1960); N.C. GEN. STAT. §110-38 (Supp. 1965); S.C. CODE ANN. §15-1191 (1962); TENN. CODE ANN. §37-257 (Supp. 1965); VT. STAT. ANN. tit. 33, §611 (1959).

4. DEL. CODE ANN. tit. 10, §1179 (Supp. 1962); MD. ANN. CODE art. 26, §63 (1957); MONT. REV. CODES ANN. §10-625 (1947); N.J. STAT. ANN. §2A:4-18 (1952); OHIO REV. CODE ANN. §2151.53 (Page 1953); OKLA. STAT. ANN. tit. 20, §841 (1962); R.I. GEN. LAWS ANN. §14-1-51 (1956); WIS. STAT. ANN. §48.24 (Supp. 1966).

5. Utah has made specific provision for parents seeking to regain their child after an adjudication of dependency, but no provision for psychiatric examination is made. UTAH CODE §55-10-41 (1953).

6. Hancock v. Dupree, 100 Fla. 617, 129 So. 822, 823 (1930).

by comparison, other states have given juvenile courts the power to psychiatrically examine parents. Under such legislation, if similar to that in other states, the juvenile judge could subject parents of any child in question to any mental examination or investigation he felt proper. The "discretion" of the judge would necessarily be given great latitude under the panoramic phraseology of *parens patriae*.

But what of the need to protect family privacy? If the judge is given this power to pry, how shall it be controlled? If it is granted, subject only to the judge's discretion, can it be controlled? Further, the purpose for gathering this questionably accurate information is even more frightening than the power to compel its disclosure, for the "results" of examinations of the parents are to be qualitative factors in deciding whether the child is adjudged dependent or delinquent. What if the examination shows no belief in God? Or belief in no God? Or a philosophy that some would label Communist? Socialist? Integrationist? Once the door to family privacy is opened, there is little to contain the court's rambling therein. In a recent Iowa case[7] the court granted custody of the child, age seven, on the basis of a psychologist's opinion and its own belief that the "stable, dependable, conventional"[8] atmosphere in the grandparents' home was to be preferred to the natural father's home, which was more "romantic, impractical and unstable,"[9] though probably providing more of "an opportunity to develop [the child's] individual talents."[10] Whether any such result is really determinative of a parent's competence to be a parent raises serious doubts. The more basic and particularly dangerous question, however, is whether the state has the power to enter the sanctity of the home in the first place.

The United States Supreme Court has shown its concern that the privacy of the family relationship be not only preserved, but given recognition as a fundamental right. *Griswold v. Connecticut*[11] held that the Connecticut criminal statute forbidding the use of contraceptives by married couples was unconstitutional under the fourteenth amendment. The Court made the right to privacy in the family relationship one of constitutional stature. Indeed, the right was recognized as older than the Bill of Rights itself.

Justice Goldberg, concurring, stated that the Constitution and the purposes behind its specific guaranties clearly show that the right to marry and rear a family are of equal magnitude with the enumerated

7. Painter v. Bannister, 140 N.W.2d 152 (Iowa 1966).
8. *Id.* at 154.
9. *Id.* at 154.
10. *Id.* at 154.
11. 381 U.S. 479 (1965).

rights. The fact that the Constitution does not specifically forbid state interference with the family relationship does not mean the state was meant to have the power to do so. The ninth amendment expressly states that "enumeration in the Constitution, of certain rights, shall not be construed to deny . . . others retained by the people." In the light of *Griswold*, the right of D.A.W.'s parents to refuse to undergo psychiatric examination may be constitutionally protected even if a state statute authorizes such examination.

But what is to be done with the inevitable question of the best interest of the child? If *parens patriae* gives authority for psychiatric examination of those it must deal with, does the right to privacy give way to that extent, or does it forbid exercise of the *parens patriae* doctrine? The scope of the term "privacy" must be defined, hypothetically at least, to determine its relation to the other judicial concept of *parens patriae*.

Privacy is in the unhappy predicament of existing in society as a basically antisocial interest. To talk of an absolute right to be let alone repudiates the society and defies judicial protection. Indeed the right itself is threatened, paradoxically, by the possibility of judicial protection, for with protection may come a certain amount of social control, the very antithesis of privacy. What is the justification for a right to privacy? Does society tolerate this antisocial behavior because it stands to reap the benefits of personal creativity and differentiation? Or is privacy an end in itself, needing no social justification and in fact incompatible with social restraints or welfare by its nature?[12] Whether D.A.W.'s parents have to undergo examination, assuming there was enabling legislation, would depend on which premise our constitutional concepts of privacy should be based.

If the basic premise is social control, then privacy must prove its social utility. In practice this position will make privacy's burden and the burden of D.A.W.'s parents difficult, if not impossible, to meet. Privacy must come forward and do battle, the one thing it cannot do and retain its identity. If the basic premise is privacy as an end in itself, then it must be clothed with the presumption of control in the area to protect itself while maintaining its passive nature. This must be so even when the privacy value is uncertain and the goal of social control is obviously "good." This position more nearly allows privacy to maintain its existence and by doing so, effectively battle with social control. D.A.W.'s parents would then have a chance to resist psychiatric examination without automatically incurring the loss of their child as the price.

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12. Dixon, *The Griswold Penumbra: Constitutional Charter for an Expanded Law of Privacy?*, 64 MICH. L. REV. 197 (1965).

Basically, then, the sanctity of certain relationships such as husband-wife, parent-child, if they are to be protected, must be given a certain amount of judicial armor to withstand the attack of conflicting doctrines, such as *parens patriae*. When the framers of of the Constitution sought to protect the sanctity of the individual, they provided for the right not to testify against oneself. The problem was to provide barricades against other active doctrines, for example conviction of criminals, in order to preserve a basic passive right, namely sanctity of the person. Likewise the sanctity of the home has been preserved by the prohibition against illegal searches and seizures through the fourth amendment and bolstered by the judicial exclusion-of-evidence rule to make certain that any doubt is resolved in favor of protection of the right. The sanctity of the family relationship is not enumerated in the Constitution, but it is preserved to the people by the ninth amendment. If it is to be protected, it must be given similar armor. There must be protection from the invasion of privacy, not a naked and ineffectual "right to privacy." Judicial action, as was taken in promulgating the exclusionary evidence rule, is necessary. The family relationship in the principal case is in point. The parents should be protected from invasion of their family privacy. As a practical matter, this can be accomplished only by allowing privacy to remain passive without losing a child as a result. Judicial control can be exercised in determining what relationships are or are not to be protected. But once this is done, the right to protection must prevail against conflicting doctrines. D.A.W.'s parents must not be forced to give up that right to regain their child just as they must not be forced to testify in any manner to meet a criminal charge. The right in the respective cases would be destroyed. Where the penumbra of family privacy must be stripped of its protection to accomplish what the state considers "good," *parens patriae* must give way to the fundamental right to be protected against invasion of privacy, and the door to the home must be closed.

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