AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
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Supplementary Material

Chapter 9: Liberalism Divided – Individual Rights

Ravin v. State, 537 P.2d 494 (AK 1975)

*Unlike the U.S. Constitution, the state constitution of Alaska includes an explicit "right of the people to privacy," added by the voters in 1972. The state supreme court has interpreted the provision to protect rights ranging from the length of hair of school students (*Breese v. Smith *[AK 1972]) to the "ingestion of food, beverages or other substances" (*Gray v. State *[AK 1974]). Irwin Ravin had occasion to test the application of the privacy provision to drug laws when he was arrested for possession of marijuana in 1972. Ravin moved to have the criminal charges against him dismissed on the grounds that the marijuana possession law violated his right to privacy. The trial court and appellate court denied that motion. Those decisions were vacated by the state supreme court. The supreme court found that the right to privacy precluded the arrest of an individual for possession of marijuana for personal ingestion at home but was overridden by public safety concerns in the case of possession in a car. The case was remanded to the trial court to determine where Ravin's violation had taken place.*

How did the state court's treatment of the right to privacy differ from the U.S. Supreme Court's? Why did the court adopt a sliding scale for evaluating rights claims? How would the court evaluate possession outside the home, such as at a concert? How much discretion did the legislature have in evaluating the factual relation between a drug law and a posited public harm? Would the court also strike down cocaine possession laws?

RABINOWITZ, CHIEF JUSTICE.

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. . . . Ravin's basic thesis is that there exists under the federal and Alaska constitutions a fundamental right to privacy, the scope of which is sufficiently broad to encompass and protect the possession of marijuana for personal use. Given this fundamental constitutional right, the State would then have the burden of demonstrating a compelling state interest in prohibiting possession of marijuana. . . .

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We have previously stated the tests to be applied when a claim is made that state action encroaches upon an individual's constitutional rights. In *Breese v. Smith* (AK 1972), we had before us a school hair length regulation which encroached on what we determined to be the individual's fundamental right to determine his own personal appearance. There we stated:

> "Once a fundamental right under the constitution of Alaska has been shown to be involved and it has been further shown that this constitutionally protected right has been impaired by governmental action, then the government must come forward and meet its substantial burden of establishing that the abridgement in question was justified by a compelling governmental interest."

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When, on the other hand, governmental action interferes with an individual's freedom in an area which is not characterized as fundamental, a less stringent test is ordinarily applied. In such cases our task is to determine whether the legislative enactment has a reasonable relationship to a legitimate governmental purpose. Under this latter test, which is sometimes referred to as the "rational basis" test, the State need only demonstrate the existence of facts which can serve as a rational basis for belief that the measure would properly serve the public interest.

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These Supreme Court cases indicate to us that the federal right to privacy arises only in connection with other fundamental rights, such as the grouping of rights which involve the home. And even in connection with the penumbra of home-related rights, the right of privacy in the sense of immunity from prosecution is absolute only when the private activity will not endanger or harm the general public.

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In Alaska this court has dealt with the concept of privacy on only a few occasions. One of the most significant decisions in this area is *Breese v. Smith*. . . . Noting that hairstyles are a highly personal matter in which the individual is traditionally autonomous, we concluded that governmental control of personal appearance would be antithetical to the concept of personal liberty under Alaska's constitution. . . . That right is not absolute, however; we also noted that this "liberty" must yield where it "intrude[s] upon the freedom of others."

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Assuming this court were to continue to utilize the fundamental right-compelling state interest test in resolving privacy issues under article I, section 22 of Alaska's constitution, we would conclude that there is not a fundamental constitutional right to possess or ingest marijuana in Alaska. For in our view, the right to privacy amendment to the Alaska Constitution cannot be read so as to make the possession or ingestion of marijuana itself a fundamental right. Nor can we conclude that such a fundamental right is shown by virtue of the analysis we employed in *Breese*. In that case, the student's traditional liberty pertaining to autonomy in personal appearance was threatened in such a way that his constitutionally guaranteed right to an education was jeopardized. Hairstyle, as emphasized in *Breese*, is a highly personal matter involving the individual and his body. In this sense this aspect of liberty-privacy is akin to the significantly personal areas at stake in *Griswold v. Connecticut* (1965) and *Eisenstadt v. Baird* (1972). Few would believe they have been deprived of something of critical importance if deprived of marijuana, though they would if stripped of control over their personal appearance. . . .

The foregoing does not complete our analysis of the right to privacy issues. . . . This leads us to a more detailed examination of the right to privacy and the relevancy of where the right is exercised. At one end of the scale of the scope of the right to privacy is possession or ingestion in the individual's home. If there is any area of human activity to which a right to privacy pertains more than any other, it is the home. . . .

. . . . The privacy amendment to the Alaska Constitution was intended to give recognition and protection to the home. Such a reading is consonant with the character of life in Alaska. Our territory and now state has traditionally been the home of people who prize their individuality and who have chosen to settle or to continue living here in order to achieve a measure of control over their own lifestyles which is now virtually unattainable in many of our sister states.

. . . . No one has an absolute right to do things in the privacy of his own home which will affect himself or others adversely. Indeed, one aspect of a private matter is that it is private, that is, that it does not adversely affect persons beyond the actor, and hence is none of their business. When a matter does affect the public, directly or indirectly, it loses its wholly private character, and can be made to yield when an appropriate public need is demonstrated.

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Possibly implicit in the State's catalogue of possible dangers of marijuana use is the assumption that the State has the authority to protect the individual from his own folly, that is, that the State can control activities which present no harm to anyone except those enjoying them. Although some courts have found the "public interest" to be broad enough to justify protecting the individual against himself, most have found inherent limitations on the police power of the state. . . .

We glean from these cases the general proposition that the authority of the state to exert control over the individual extends only to activities of the individual which affect others or the public at large as it relates to matters of public health or safety, or to provide for the general welfare. We believe this tenet to be basic to a free society. The state cannot impose its own notions of morality, propriety, or fashion on individuals when the public has no legitimate interest in the affairs of those individuals. The right of the individual to do as he pleases is not absolute, of course: it can be made to yield when it begins to infringe on the rights and welfare of others.

. . . . The state is under no obligation to allow otherwise "private" activity which will result in numbers of people becoming public charges or otherwise burdening the public welfare. But we do not find that such a situation exists today regarding marijuana. It appears that effects of marijuana on the individual are not serious enough to justify widespread concern, at least as compared with the far more dangerous effects of alcohol, barbiturates and amphetamines. . . .

But one way in which use of marijuana most clearly does affect the general public is in regard to its effect on driving. All of which brings us to the opposite (from the home) end of the scale of the right to privacy in the context of ingestion or possession of marijuana, namely, when the individual is operating a motor vehicle. . . .

. . . . [G]iven the relative insignificance of marijuana consumption as a health problem in our society at present, we do not believe that the potential harm generated by drivers under the influence of marijuana, standing alone, creates a close and substantial relationship between the public welfare and control of ingestion of marijuana or possession of it in the home for personal use. Thus we conclude that no adequate justification for the state's intrusion into the citizen's right to privacy by its prohibition of possession of marijuana by an adult for personal consumption in the home has been shown. . . .

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Remanded for further proceedings consistent with this opinion.

JUSTICE BOOCHEVER, joined by JUSTICE CONNOR, concurring.

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Since the citizens of Alaska, with their strong emphasis on individual liberty, enacted an amendment to the Alaska Constitution expressly providing for a right to privacy not found in the United States Constitution, it can only be concluded that that right is broader in scope than that of the Federal Constitution. As such, it includes not only activities within the home and values associated with the home, but also the right to be left alone and to do as one pleases as long as the activity does not infringe on the rights of others. . . .

. . . . With reference to laws challenged as invading the Alaskan right of privacy, I would apply a single flexible test dependent first upon the importance of the right involved. Based on the nature of that right, a greater or lesser burden would be placed on the state to show the relationship of the intrusion to a legitimate governmental interest. I agree with the majority opinion that interference with rights of privacy within one's home requires a very high level of justification. Similar considerations would apply to certain relationships, without reference to *situs* . . . . In all cases involving a right of privacy, I believe that the relationship of the intrusion to a legitimate governmental interest must be carefully examined. The court should not abandon protection of the right of an individual to decide how to conduct his life because a rational basis may be "conceived" for the legislation in question. The importance of the

governmental interest and the means utilized to accomplish this goal must be balanced against the nature of the particular right of privacy.

Applying this test to the facts in this case, assuming that the defendant was found in possession of marijuana in an automobile, I agree with the majority that a valid reason existed for the prohibition due to the proven effect of marijuana on driving, and the unavailability of practical tests for ascertaining whether one is under the influence of an hallucinogenic when balanced against the rather minor status of the right involved, to possess marijuana in public. . . .

JUSTICE CONNOR, concurring.

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It is certain that the right to privacy does not vanish when one leaves the home. There are certain aspects of personal autonomy which one carries with him even when he ventures out of the home, though the claim to privacy diminishes in proportion to the extent that one's person and one's activities impinge upon other persons. But, in order to trace the contours of the right to privacy, it will be necessary to engage in a critical analysis of the facts of each case which presents itself for decision. . . .