A. IN GENERAL

[F1] The Constitution does not explicitly mention any right of privacy. However, the Court has recognized that a right of personal privacy and autonomy, or a guarantee of certain areas or zones of privacy, does exist under the substantive due process protection of “liberty.”1 In varying contexts, the Court also has found the roots of that right in the First,2 Fourth,3 and Fifth4 Amendments and in the “penumbras” of the Bill of Rights.5

[F2] The constitutionally protected private sphere includes “only personal rights that can be deemed ‘fundamental’ or ‘implicit in the concept of ordered liberty.’”6 It involves at least three different kinds of interests. The first is the right of the individual to be free in his private affairs from governmental surveillance and intrusion;7 this interest is primarily protected by the Fourth Amendment. The Court also has held that,

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2 Stanley v. Georgia, 394 U.S. 557, 564 (1969) (the First Amendment prohibits making mere private possession of obscene material a crime). The Court has stated that the principle of individual liberty in the home has special resonance when the government seeks to constrain a person’s ability to speak there. See City of Ladue v. Gilleo, 512 U.S. 43, 58 (1994), involving the display of a residential anti-war sign.
3 See California v. Ciraolo, 476 U.S. 207, 211 (1986) (wherever an individual has manifested a reasonable “expectation of privacy,” he is entitled to be free from unreasonable governmental intrusion).
4 Tehan v. Shott, 382 U.S. 406, 416 (1966), citing Murphy v. Waterfront Comm’n, 378 U.S. 52, 55 (1964) (the privilege against self-incrimination reflects the Constitution’s concern for the essential values represented by the “respect for the inviolability of the human personality and of the right of each individual to a private enclave where he may lead a private life”).
7 Cf. Whalen v. Roe, 429 U.S. 589, 499, n.24 (1977). A state bar committee may reasonably inquire as to the nature and extent of the actual acquaintance between an applicant for admission to practice law and the persons who certify the applicant’s character and fitness. In that context, an affiant may be asked to state whether he has visited the applicant’s home and, if so, how often. See Law Students Civil Rights Research Council v. Wadmond, 401 U.S. 154, 160 (1971).
under the First Amendment, a state “has no business telling a man, sitting alone in his
own house, what books he may read or what films he may watch.” The second is “the
individual interest in avoiding disclosure of personal matters.” The third is “the inter-
est in independence in making certain kinds of important decisions,” such as those
relating to marriage, sexual conduct, procreation, contraception, abortion, family
relationships or living arrangements, child rearing, and education. “These matters,
involving the most intimate and personal choices a person may make in a lifetime,
choices central to personal dignity and autonomy, are central to the liberty protected
by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own
concept of existence, of meaning, of the universe, and of the mystery of human life.
Beliefs about these matters could not define the attributes of personhood were they
formed under compulsion of the State.” “[A] state interest in standardizing its chil-
dren and adults, making the ‘private realm of family life’ conform to some state-designed
ideal, is not a legitimate state interest at all.”

In the same context, the Court has recognized that “the freedom to enter into
and carry on certain intimate or private relationships is a fundamental element of ‘lib-
erty’ protected by the Bill of Rights.” “Without precisely identifying every considera-
tion that may underlie this type of constitutional protection, the Court has noted that
certain kinds of personal bonds have played a critical role in the culture and traditions of
the Nation by cultivating and transmitting shared ideals and beliefs; they thereby foster
diversity and act as critical buffers between the individual and the power of the State. . . .
The constitutional shelter afforded such relationships reflects the realization that indi-
viduals draw much of their emotional enrichment from close ties with others. Protecting
these relationships from unwarranted state interference therefore safeguards the abil-
ity independently to define one’s identity that is central to any concept of liberty.” That

8 Stanley v. Georgia, 394 U.S. 557, 565 (1969). Nevertheless, the government may crim-
Furthermore, the Court has negated the idea that some zone of constitutionally protected pri-


11 Loving v. Virginia, 388 U.S. 1, 12 (1967); Zablocki v. Redhail, 434 U.S. 374, 383–87
(1978).


15 Roe v. Wade, 410 U.S. 113, 152–154 (1973); Planned Parenthood of Se. Pennsylvania


18 Pierce v. Soc’y of Sisters, 268 U.S. 510, 535 (1925); Meyer v. Nebraska, 262 U.S. 390,
399 (1923).


