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City of Sherman v. Henry: Is The Texas Constitutional Right of Privacy Still a Source of Protection for Texas Citizens?

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CITY OF SHERMAN v. HENRY: IS THE TEXAS CONSTITUTIONAL RIGHT OF PRIVACY STILL A SOURCE OF PROTECTION FOR TEXAS CITIZENS?

INTRODUCTION

The Texas Supreme Court first recognized a constitutional right of privacy under the Texas Constitution in *Texas State Employees Union v. Texas Department of Mental Health & Retardation*[1] ("*TSEU*"). A unanimous court held:

> [T]he Texas Constitution protects personal privacy from unreasonable intrusion. This right to privacy should yield only when the government can demonstrate that an intrusion is reasonably warranted for the achievement of a compelling governmental objective that can be achieved by no less intrusive, more reasonable means.[2]

Although the supreme court recognized an implicit right of privacy guaranteed by the Texas Constitution in *TSEU*, the court did not clarify the full extent of this right or specifically delineate the situations in which it would apply.

Nine years later, in *City of Sherman v. Henry*,[3] the supreme court again analyzed the Texas Constitutional Right of Privacy in the context of a police department.[4] The court significantly narrowed this

1. 746 S.W.2d 203 (Tex. 1987) (evaluating the validity of the department's mandatory polygraph policy).

2. *Id.* at 205.

3. 928 S.W.2d 464 (Tex. 1996), *cert. denied*, 117 S. Ct. 1098 (1997).

4. Most of the federal cases involving the federal right of privacy with facts similar to *Henry* were decided before *Bowers v. Hardwick*, 478 U.S. 186 (1986). In *Bowers*, the United States Supreme Court refused to recognize a fundamental right to engage in homosexual sodomy.

The results of those early cases are mixed. *See* Wilson v. Taylor, 733 F.2d 1539, 1544 (11th Cir. 1984) (holding that a police officer's dating a daughter of an organized crime figure was protected by the First Amendment's Freedom of Association Clause); Thorne v. City of El Segundo, 726 F.2d 459, 471 (9th Cir. 1983) (holding that the questioning of Thorne regarding her sex life and reliance on information obtained about her sex life to deny her employment with the police force violated her constitutional right of privacy); Briggs v. North Muskegon Police Dep't, 563 F. Supp. 585, 590 (W.D. Mich. 1983) (holding that the discharge of a police officer because he was cohabitating with a woman other than his wife violated the officer's right of privacy), *aff'd*, 746 F.2d 1475 (6th Cir. 1984); Swope v. Bratton, 541 F. Supp. 99, 108 (W.D. Ark. 1982) (recognizing that a police officer's off-duty sexual activities are within the zone of privacy and are protected from unwarranted governmental intrusion); Shuman v. City of Philadelphia, 470 F. Supp. 449, 459 (E.D. Pa. 1979) (holding that regulations permitting inquiry into off-duty relationships of its police officers exceeded the scope of the state's legitimate interests and violated the officers' constitutional right of privacy). *But see* Fugate v. Phoenix Civil Serv. Bd., 791 F.2d 736, 737, 742 (9th Cir. 1986) (holding that police officers' right of privacy was not violated when there was intimate contact while on-duty, the behavior was carried on openly and publicly, it compro-

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fundamental right that all Texans have enjoyed for almost a decade when it affirmed a lower court's ruling that a police officer could be denied a promotion based on off-duty behavior. In its analysis, the court chose not to examine the police department's inquiry and intrusion into the officer's private life but instead focused on the scrupulousness of his conduct while off-duty. The *Henry* decision diminished the broad right of privacy guaranteed by the Texas Constitution and recognized in *TSEU* because (1) the court failed to examine the Texas Constitution and apply the *TSEU* test to the facts in *Henry*; (2) the court adopted the United States Supreme Court's approach in *Bowers v. Hardwick*,[5] which analyzed the right of privacy guaranteed under the Federal Constitution rather than the right of privacy granted by the Texas Constitution; (3) the Texas Supreme Court chose to analyze the case under the Federal Constitution; and (4) based on federal constitutional analysis, the court applied the wrong test. The court should have applied the test set forth in *Fleisher v. City of Signal Hill* [6] to the facts in *Henry*. The supreme court's decision to examine *Henry* under the Federal Constitution has jeopardized the right of privacy guaranteed by the Texas Constitution and the *TSEU* decision; however, the *Fleisher* test[7] will ensure that right in subsequent decisions.

Part I of this Note explores the Texas constitutional right of privacy and the right of privacy guaranteed by the United States Constitution as well as the relationship between the two. Part II reviews the facts in *Henry*, the Texas Supreme Court's decision, and concurrences of both Justice Owen and Justice Spector. Part III analyzes the court's

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mised the officers' ability to perform their jobs, and undermined the department's internal morale and community reputation); Shawgo v. Spradlin, 701 F.2d 470, 483 (5th Cir. 1983) (holding that an officer's right to privacy was not infringed by a regulation prohibiting cohabitation of two police officers or proscribing superiors from cohabiting with officers of a lower rank); Suddarth v. Slane, 539 F. Supp. 612, 618 (W.D. Va. 1982) (holding that a state trooper's adulterous affair is protected by neither the First nor Fourteenth Amendments since the Commonwealth of Virginia has a law which prohibits adultery); Wilson v. Swing, 463 F. Supp. 555, 562-64 (M.D.N.C. 1978) (holding that a police officer's adulterous relationship was not protected by the constitutional right of association or the analogous right of privacy). *See generally* ELLEN ALDERMAN & CAROLINE KENNEDY, THE RIGHT TO PRIVACY, 305-09 (1995) (surveying case law concerning lifestyle and off-duty behavior in the public sector).

5. 478 U.S. 186 (1986).

6. 829 F.2d 1491 (9th Cir. 1987).

7. *See id.* at 1498-99. In *Fleisher*, the Ninth Circuit Court of Appeals used a four-prong test to determine whether a police officer's right of privacy was violated. The four-prong test examines whether: (1) the conduct was legal or illegal; (2) the conduct occurred off-duty or on-duty; (3) the conduct affected the police department's community reputation and internal morale; and (4) the conduct was clearly listed in the department's regulations as grounds for punishment. *See id.* The court did not elaborate on whether each of the four prongs should be weighed equally or whether the magnitude of one prong could determine the outcome. However, it appears that if the police officer's off-duty behavior so interferes with his ability to perform his job or those of others around him, then his behavior would be grounds for termination regardless of whether it was legal or whether there were guidelines prohibiting it.

reasoning in *Henry* and determines that the decision fails to safeguard the constitutional right of privacy guaranteed by the Texas Constitution. Part IV proposes two potential solutions available to Texas courts to protect police officers and other public employees from unreasonable intrusions into their private lives, thus ensuring the effectiveness of the right of privacy guaranteed by the Texas Constitution in *TSEU*.

I. THE RIGHT OF PRIVACY GRANTED BY THE TEXAS CONSTITUTION, THE RIGHT OF PRIVACY GRANTED BY THE UNITED STATES CONSTITUTION, AND THE RELATIONSHIP BETWEEN THE TWO

A. *The Constitutional Right of Privacy in Texas*

The Texas Constitution contains no express guarantee to a right of privacy.[8] The *TSEU* court recognized constitutionally protected zones of privacy emanating from several sections of the Texas Constitution.[9] These sections of the Texas Constitution are similar to provisions in the United States Constitution that have been recognized as implicitly creating protected "zones of privacy."[10] In *TSEU*, the court evaluated the constitutionality of the Texas Department of Mental Health and Retardation's polygraph policy. The court framed the issue as whether the Department's interests in administering the test were sufficiently compelling to outweigh the employee's privacy interests.[11] According to the court, "the Texas Constitution protects personal privacy from unreasonable [governmental] intrusion."[12] However, "the right of privacy, like other constitutional freedoms, is presumptive and not absolute and in some instances it may give way to overriding governmental interests."[13] In some instances "[a] state may have interests

8. *See Henry*, 928 S.W.2d 464, 472 (Tex. 1996).

9. *See* Texas State Employees Union v. Texas Dep't of Mental Health & Retardation, 746 S.W.2d 203, 205 (Tex. 1987). Six sections of the Texas Constitution implicitly create a right of privacy. Section 6 concerns freedom of worship and protects the rights of conscience in matters of religion. *See* TEX. CONST. art. I, § 6. Section 8 provides for the freedom to "speak, write, or publish." TEX. CONST. art. I, § 8. Section 9 guarantees the sanctity of the home from unreasonable searches and seizures. *See* TEX. CONST. art. I, § 9. Section 10 protects the rights of an accused in criminal prosecutions. *See* TEX. CONST. art. I, § 10. Section 19 protects against arbitrary deprivation of life, liberty and property, without due course of law. *See* TEX. CONST. art. I, § 19. Lastly, section 25 concerns the quartering of soldiers in houses. *See* TEX. CONST. art. I, § 25.

10. *Texas State Employees Union*, 746 S.W.2d at 205 (quoting Roe v. Wade, 410 U.S. 113, 152 (1972)).

11. *See id.*

12. *Id.*

13. City of Sherman v. Henry, 910 S.W.2d 542, 554 (Tex. App.—Dallas 1995), *rev'd*, 928 S.W.2d 464 (Tex. 1996), *cert. denied*, 117 S. Ct. 1098 (1997). For the remainder of the Note, the author will refer to the Texas Supreme Court's opinion in comparison and contrast to the Dallas Court of Appeals opinion. The reader should note that the short citation form of both opinions is *Henry*.

as an employer in regulating the conduct of its employees that differ significantly from those it possesses in connection with its regulation of the public generally."[14] More importantly, "[t]he interests of the State are even more compelling in the oversight of police officers and other quasi-military organizations because of the state's goal of protecting the safety of the general public."[15] Nevertheless, "[w]hen the state acts as an employer, it may not without *substantial justification* condition employment on the relinquishment of constitutional rights . . . ."[16]

"Under the Texas constitution [the proponent] bears the burden of proving that his conduct implicates the protection of the Texas right of privacy."[17] If a proponent meets this burden, the governmental agency or department may still prevail if it conclusively establishes a compelling governmental interest or objective that can be "achieved by no less intrusive, more reasonable means."[18] Thus, once a right of privacy is found, the burden shifts to the state to demonstrate a compelling governmental objective.[19]

In the matters of sexual conduct, the scope of the Texas right of privacy is not well established.[20] With the exception of two lower court cases[21] and *Henry*, the courts have not elaborated on the scope

14. *Texas State Employees Union*, 746 S.W.2d at 205. *See also* Pickering v. Board of Educ., 391 U.S. 563, 568 (1968) (balancing the free speech interests of state employed teacher with the interest of the State as an employer).

15. *Henry*, 928 S.W.2d at 477 (Owen, J., concurring) (citing *Texas State Employees Union*, 746 S.W.2d at 205-06).

16. Briggs v. North Muskegon Police Dep't, 563 F. Supp. 585, 587 (W.D. Mich. 1983), *aff'd*, 746 F.2d 1475 (6th Cir. 1984) (emphasis added). *See also Pickering*, 391 U.S. at 568.

17. *Henry*, 910 S.W.2d at 549 (citing *Texas State Employees Union*, 746 S.W.2d at 205).

18. *Id.* at 549-50.

19. *See id.* at 549.

20. *See id.* at 551.

21. *See* State v. Morales, 826 S.W.2d 201, 204 (Tex. App.—Austin 1992), *rev'd on other grounds*, 869 S.W.2d 941 (Tex. 1994). In *Morales*, a group of private individuals challenged the constitutionality of the Texas sodomy statute. The appellate court held the statute unconstitutional because it violated the state constitutional right of privacy applied in *Texas State Employees Union*. *See id.* at 205. The court said the state had not met its burden of showing a compelling governmental objective that justified its intrusion into appellees' private lives. *See id.* *Morales* was reversed on other grounds in a 5-4 decision by the Supreme Court of Texas. The supreme court held the court of appeals had no equity jurisdiction to grant relief when no vested property rights were infringed. *See* State v. Morales, 869 S.W.2d 941, 941 (Tex. 1994). *See also* City of Dallas v. England, 846 S.W.2d 957 (Tex. App.—Austin 1993, writ dism'd w.o.j.). In *England*, a lesbian was denied an opportunity to work for the Dallas Police force because of the Texas sodomy statute criminalizing private sexual behavior between consenting adults of the same sex. When England applied for the position, the interviewer asked her about her sexual orientation. She responded truthfully that she was a lesbian. *See id.* at 958. The court of appeals held that the City of Dallas had violated her right to privacy under the Texas Constitution and that the Texas sodomy statute was unconstitutional. *See id.* at 960.

or extent of the Texas right of privacy in matters of sexual conduct. Nevertheless, the *TSEU* court, in establishing a privacy right, stated that "a right of individual privacy is implicit among those 'general, great, and essential principles of liberty and free government' established by the Texas Bill of Rights."[22] Subsequent to the *TSEU* decision, two appellate decisions, *State v. Morales*[23] and *City of Dallas v. England*,[24] found the Texas right of privacy protects private sexual behavior between consenting adults. Both appellate decisions focused on the governmental intrusion, not on whether the actual behavior was proper or improper.[25] The *TSEU*, *Morales*, and *England* courts implicitly recognized that individuals are free to choose how to conduct their private lives regardless of the morality or immorality of their behavior.[26]

As established in *TSEU*, and absent a compelling reason, the Texas constitutional right of privacy guarantees that individuals as well as public employees should be free from an intrusion by the state into their private lives. Although private and public individuals both enjoy this protection, in some instances, especially those involving police officers, this right must sometimes yield. Nevertheless, a police officer is entitled to know when, how, and why his right to privacy might be compromised.

B. *The Right of Privacy Under the United States Constitution*

Like the Texas Constitution, the United States Constitution does not explicitly mention the right of privacy.[27] However, the United States Supreme Court has acknowledged at least two distinct privacy interests that are protected by the Federal Constitution.[28] The first is the right of the individual to be free in his private life from disclosure

22. *Texas State Employees Union*, 746 S.W.2d at 205 (quoting TEX. CONST. art. I, Introduction to the Bill of Rights).

23. 826 S.W.2d 201 (Tex. App.—Austin 1992), *rev'd on other grounds*, 869 S.W.2d 941 (Tex. 1994).

24. 846 S.W.2d 957 (Tex. App.—Austin 1993, writ dism'd w.o.j.).

25. *See* City of Sherman v. Henry, 910 S.W.2d 542, 551 (Tex. App.—Dallas 1995), *rev'd*, 928 S.W.2d 464 (Tex. 1996), *cert. denied*, 117 S. Ct. 1098 (1997).

26. *See supra* note 21.

27. The Supreme Court has found the roots of privacy in several constitutional amendments. In the First Amendment, the Court recognized privacy in *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). In the Fourth and Fifth Amendments, rights were recognized in *Katz v. United States*, 389 U.S. 347, 350 (1967) and *Terry v. Ohio*, 392 U.S. 1, 8-9 (1968), respectively. In *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965) the Court found protection in penumbras of the Ninth Amendment. And, in the Fourteenth Amendment's Due Process Clause the Court has recognized rights in *Roe v. Wade*, 410 U.S. 113, 152 (1973) and *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). Other opinions have also recognized privacy rights. In *Olmstead v. United States*, 277 U.S. 438, 478 (1928), Justice Brandeis in his dissent acknowledges privacy interests.

28. *See* Whalen v. Roe, 429 U.S. 589, 599 (1977).

of personal information by a governmental intrusion.[29] This interest is known as "*the right to be let alone*" and has been called "the right most valued by civilized men."[30] The second recognized privacy interest is the right to make certain kinds of important decisions.[31] This second interest protects individual autonomy[32] in decision making related to child rearing and education,[33] family relationships,[34] procreation,[35] marriage,[36] contraception,[37] and abortion.[38]

The United States Supreme Court, like the Texas Supreme Court, has not addressed the full extent of the right of privacy in relation to private sexual behavior between consenting adults. However, in *Bowers v. Hardwick*,[39] the Supreme Court expressly stated the federal right of privacy does not protect all private sexual conduct.[40] Bowers, a homosexual male, was charged with violating Georgia's sodomy statute.[41] The defendant challenged the constitutionality of the statute insofar as it criminalized consensual sodomy.[42] The *Bowers* Court held no fundamental right existed to engage in homosexual sodomy.[43] Comparing homosexual sodomy with the *recognized* privacy rights of marriage, family, and procreation, the Court concluded that sodomy bore no connection or resemblance to these fundamental rights.[44] Next, the Court analyzed whether there was a substantive due process right for homosexual activity under the Fourteenth Amendment, concluding that homosexual activity was not a right either "'implicit in the concept of ordered liberty' such that 'neither liberty nor justice would exist if [it was] sacrificed[,]'"[45] or a liberty so "'deeply rooted in this Nation's history and tradition'" such that it should receive constitutional protection.[46] The Court reached this conclusion by looking at

29. *See id.* at 600 n.25 (citing *Griswold*, 381 U.S. at 483).
30. *Id.* at 600 & n.25 (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).
31. *See id.* at 599-600 & n.26.
32. *See* City of Sherman v. Henry, 928 S.W.2d 464, 468 (Tex. 1996), *cert. denied*, 117 S. Ct. 1098 (1997).
33. *See Roe*, 410 U.S. at 153 (citing Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925); Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).
34. *See* Prince v. Massachusetts, 321 U.S. 158, 166-67 (1944).
35. *See* Skinner v. Oklahoma, 316 U.S. 535, 541-42 (1942) (invalidating Oklahoma's sterilization law).
36. *See* Loving v. Virginia, 388 U.S. 1, 12 (1967) (invalidating Virginia's miscegenation statute).
37. *See* Eisenstadt v. Baird, 405 U.S. 438, 453-54 (1972) (invalidating Massachusetts's law banning the distribution of contraceptives to unmarried individuals).
38. *See Roe*, 410 U.S. at 153.
39. 478 U.S. 186 (1986).
40. *Id.* at 192 (quoting Moore v. East Cleveland, 431 U.S. 494, 503 (1977)).
41. *See id.* at 186.
42. *See id.*
43. *See id.* at 191. *See also Henry*, 928 S.W.2d at 469.
44. *See Bowers*, 478 U.S. at 190-91.
45. *Id.* at 192 (quoting Moore v. East Cleveland, 431 U.S. 494, 503 (1977)).
46. *See id.* at 191.

the history of laws criminalizing sodomy since the ratification of the Bill of Rights. Neither formulation of the issue created a fundamental right for homosexuals to engage in consensual sodomy.[47]

Based on the Federal Constitution, the threshold question a court must answer is the type of privacy interest implicated[48] (1) the "right to be let alone" and free from governmental intrusion into private lives, or (2) the right to make certain kinds of decisions. The initial characterization of the facts affects not only the test used to determine whether the conduct is protected by a right of privacy, but is also often outcome determinative. Determining the basis for the initial inquiry is critical. If the basis is autonomy (*i.e.* the right to make certain kinds of decisions or engage in certain types of conduct), then one outcome may follow. If the basis is governmental intrusion, then a different outcome may follow. When framed as an intrusion, the right to privacy should only be sacrificed when the state can demonstrate a compelling interest "that can be achieved by a no less intrusive, more reasonable means."[49] If the threshold inquiry concerns decisions or conduct under the Due Process Clause, then the conduct or decisions must meet the test set forth in *Bowers*.[50] The conduct must be "implicit in the concept of ordered liberty" such that "neither liberty nor justice would exist"[51] if it was sacrificed, or the conduct must be one of those liberties which is "deeply rooted in this Nation's history and tradition."[52] Establishing that conduct satisfies either of these tests may prove difficult. In the case of intrusion, once implicated, the right of privacy exists unless *the government* can show a compelling objective to interfere. In the case of conduct, the right of privacy does not exist unless *the proponent* can show that the conduct in question is a fundamental right. In situations where both threads are present, the court's framing of the issue as either one of conduct or one of intrusion determines the outcome.

47. *See id.* (citing several state statutes that demonstrate a history of proscription).

48. In many cases both types of privacy interests are involved and the court must determine which one applies. *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186, 199-200 (1986) (dissenting Justices arguing that the case was not about a fundamental right to engage in sodomy but was about the right to be free from governmental intrusion); Fleisher v. City of Signal Hill, 829 F.2d 1491, 1497 n.5 (9th Cir. 1987) (stating that both types of privacy interests were implicated); Thorne v. City of El Segundo, 726 F.2d 459, 468 (9th Cir. 1983) (stating that both types of privacy interests were implicated).

49. Texas State Employees Union v. Texas Dep't of Mental Health & Retardation, 746 S.W.2d 203, 204-05 (Tex. 1987).

50. *See Bowers*, 478 U.S. at 191-93. *Bowers* is the seminal case analyzing what fundamental rights are protected under the Due Process Clause of the Fourteenth Amendment to the Federal Constitution. The Supreme Court addressed the issue of whether the right to engage in homosexual sodomy was protected by the right of privacy previously recognized under the Due Process Clause after a split developed between the Fifth and Eleventh Circuit.

51. Palko v. Connecticut, 302 U.S. 319, 325-26 (1937).

52. Moore v. East Cleveland, 431 U.S. 494, 503 (1977).

C. *The Relationship Between the Texas Constitution and the United States Constitution*

The Texas Constitution provides greater safeguards for personal freedoms than does the United States Constitution.[53] In *LeCroy v. Hanlon*,[54] the Texas Supreme Court held the Texas Constitution has independent vitality separate and distinct from the United States Constitution.[55] According to the *LeCroy* court, under the principles of federalism, each state must independently interpret its constitution.[56] While "[t]he Federal Constitution sets the floor for individual rights[,] state constitutions establish the ceiling."[57] In other words, state constitutions cannot subtract from the rights guaranteed by the United States Constitution; however, they can and often do provide additional rights for their citizens.[58] This notion is reflected in the fact that state courts do not hesitate to protect individual rights based on their respective constitutions.[59]

Specifically, Texas courts have relied on the Texas Constitution to find more expansive rights than those guaranteed in the Federal Constitution.[60] Over the last decade, both the Texas Supreme Court and the Court of Criminal Appeals have been instrumental in expanding Texans' rights.[61]

Therefore, when violations of both state and federal constitutions are alleged, Texas courts should initially examine the Texas Constitu-

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53. *See* LeCroy v. Hanlon, 713 S.W.2d 335, 339 (Tex. 1986).

54. 713 S.W.2d 335 (Tex. 1986).

55. *See id.* at 339.

56. *See id.* at 338-39.

57. *Id.* at 338.

58. *See* Massachusetts v. Upton, 466 U.S. 727, 738-39 (1984); PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980); Oregon v. Kennedy, 456 U.S. 667, 679 (1982) (Brennan, J., concurring in the judgment). Justice Brennan was joined by Justice Marshall.

59. *See LeCroy*, 713 S.W.2d at 338. *See also* Symposium: *The Emergence of State Constitutional Law*, 63 TEX. L. REV. 959 (1985); Hans A. Linde, *First Things First: Rediscovering the States' Bill of Rights*, 9 U. BALT. L. REV. 379 (1980) (explaining that the federal Bill of Rights is modeled after then existing state constitutions and several post-1789 state constitutions are also patterned after pre-existing state constitutions instead of the federal Bill of Rights); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). According to the *LeCroy* court, Texas has been in the mainstream of this movement. *See, e.g.*, Whitworth v. Bynum, 699 S.W.2d 194 (Tex. 1985) (affording equal protection pursuant to Article I, § 3); Nelson v. Krusen, 678 S.W.2d 918 (Tex. 1984); Haynes v. City of Abilene, 659 S.W.2d 638 (Tex. 1983) (taking private property for public use without just compensation in violation of Article I, § 17); Hajek v. Bill Mowbray Motors, Inc., 647 S.W.2d 253 (Tex. 1983) (allowing free speech under Article I, § 8).

60. The Texas Supreme Court extends the right to make certain kinds of decisions to include not only the right to make decisions but also includes the right to engage "in certain types of conduct." *Henry*, 928 S.W.2d at 467.

61. *See supra* note 59.

tion and base their decisions on it whenever possible.[62] Consequently, if the challenged action violates the Texas Constitution, then consideration of any federal claim is unnecessary.[63] Under the dual system of federalism, the states have the responsibility to interpret and apply their respective state constitutions.[64] "To do otherwise would deprive . . . citizens of a critical source of protection for their rights and render moot [the] state constitution[s]."[65] Since the Texas Constitution guarantees more expansive rights of personal freedom than the United States Constitution, Texas courts must independently interpret and enforce "provisions of the state constitution even if the federal courts have given a different interpretation to . . . similar provision[s] of the Federal Constitution."[66]

Because the Texas Constitution grants more expansive rights than the United States Constitution, the Texas Supreme Court, in order to champion the rights of Texans, should have examined the facts in *Henry* under the Texas Constitution first. If the Texas Supreme Court will not protect the rights of its citizens granted by the Texas Constitution, then who will protect those rights? The supreme court should not have resorted to an analysis under the Federal Constitution when *LeCroy* mandated consideration of claims under the Texas Constitution rather than the Federal Constitution.[67] With the decision in *Henry*, the supreme court has narrowed the right of privacy granted by the Texas Constitution. Whether this decision foreshadows other restrictions on Texans' rights is uncertain.

III. *CITY OF SHERMAN V. HENRY*

A. *Factual Background*

Patrolman Otis Henry was next in line for promotion to Sergeant in January of 1992. Henry had the highest eligibility points and had been named "'Outstanding Officer of the Year in 1991.'"[68] According to the Government Code, "[u]nless [a] department head has a valid reason for not appointing the person, the department head shall appoint the eligible promotional candidate having the highest grade on the eligibility list."[69] Therefore, the City of Sherman could only deny Henry the promotion for a valid reason.[70]

62. *See Ex parte* Tucci, 859 S.W.2d 1, 5 (Tex. 1993); Davenport v. Garcia, 834 S.W.2d 4, 17 (Tex. 1992).

63. *See Davenport*, 834 S.W.2d at 11.

64. *See* City of Sherman v. Henry, 910 S.W.2d 542, 550 (Tex. App.—Dallas 1995), *rev'd*, 928 S.W.2d 464 (Tex. 1996), *cert. denied*, 117 S. Ct. 1098 (1997); LeCroy v. Hanlon, 713 S.W.2d 335, 338-39 (Tex. 1986).

65. *Henry*, 910 S.W.2d at 550.

66. *Id.* at 551.

67. *See* Davenport v. Garcia, 834 S.W.2d 4 (Tex. 1992).

68. *Henry*, 910 S.W.2d at 546.

69. *Id.* (citing TEX. LOC. GOV'T CODE ANN. § 143.036(f) (Vernon Supp. 1997)).

70. *See* TEX. LOC. GOV'T CODE ANN. § 143.036(f) (Vernon Supp. 1997).

Although Henry had the highest eligibility points, there were rumors that he was dating another officer's wife, Kelly Olson, who worked as a dispatcher for the City of Sherman.[71] Chief Pliant of the Sherman Police Department requested that a lieutenant informally investigate the rumors.[72] This investigation resulted in a single report prepared by Officer Pollard, the disgruntled husband, while his divorce from Olson was pending.[73] The report stated that Henry and Olson were having an affair.[74] The lieutenant pursued no further investigation into the relationship.[75] According to the record, when Henry and Olson began dating in April 1991, Henry was aware that Olson and Pollard lived together but was unaware of their marriage.[76] When Officer Henry discovered that Officer Pollard and Olson were in fact married, he stopped dating her.[77] After a failed reconciliation attempt with Officer Pollard, Olson filed for divorce and thereafter she and Henry resumed dating.[78]

In February of 1992, Chief Pliant denied Henry the promotion, explaining that the denial was based *solely* on Henry's relationship with Olson.[79] In a written explanation, Pliant stated that (1) he believed Henry could not "command respect and trust from rank and file officers or other members of the department, and [(2) Henry's] promotion would adversely affect the efficiency and morale of the department."[80]

B. *Procedural History*

Henry appealed the decision to the Firemen's and Police Officers' Civil Service Commission ("Commission").[81] The Commission ruled in favor of the City of Sherman, and Henry appealed to the district court.[82]

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71. *See* City of Sherman v. Henry, 928 S.W.2d 464, 465 (Tex. 1996), *cert. denied*, 117 S. Ct. 1098 (1997).

72. *See Henry*, 928 S.W.2d at 465; *Henry*, 910 S.W.2d at 546. There appears to be discrepancy between the appellate court and the supreme court concerning which lieutenant led the investigation. The supreme court identifies the officer as Lieutenant Mayo. The appellate court states the record is unclear who led the investigaton.

73. *See Henry,* 928 S.W.2d at 465; *Henry*, 910 S.W.2d at 546.

74. *See Henry*, 928 S.W.2d at 465; *Henry*, 910 S.W.2d at 546 ("This conclusion was based in part on copies of private correspondence between [Henry] and Olson that Pollard found hidden in Olson's closet. The private correspondence was attached to Pollard's report.").

75. *See Henry*, 928 S.W.2d at 465; *Henry*, 910 S.W.2d at 546.

76. *See Henry*, 928 S.W.2d at 465; *Henry*, 910 S.W.2d at 546.

77. *See Henry*, 910 S.W.2d at 546. *But see Henry*, 928 S.W.2d at 465 (stating that the sexual affair between Olson and Henry continued).

78. *See Henry*, 910 S.W.2d at 546.

79. *See Henry*, 928 S.W.2d at 466.

80. *Henry*, 910 S.W.2d at 546.

81. *See Henry*, 928 S.W.2d at 465, 466.

82. *See Henry*, 910 S.W.2d. at 546-47.

Finding a violation of Henry's right to privacy under both the Texas and United States Constitutions, the district court held that the basis of Chief Pliant's decision was not a valid reason for denying Henry's promotion.[83] The City of Sherman appealed, and the Dallas Court of Appeals fixed the issue as "whether a public employee's private, legal sexual conduct is protected under the Texas Constitution."[84] Since the right of privacy under the Texas Constitution was implicated, the court of appeals did not address the claim under the Federal Constitution. Utilizing the test set forth in *TSEU*, the appellate court stated that if such a right of privacy existed, the court must then decide whether the City of Sherman has a compelling governmental interest that could be "achieved by no less intrusive, more reasonable means."[85] The court held that Henry's private, legal sexual conduct was protected by the Texas Constitution.[86] On the issue of the State's competing interest, the court of appeals found it significant that the City did not offer any evidence of individual officers' ability to work for Henry, nor did it have any written guidelines concerning officers' off-duty sexual behavior.[87] Therefore, the City failed to prove it had a compelling governmental interest that could be "achieved by no less intrusive, more reasonable means."[88]

The City appealed to the Texas Supreme Court, which reversed the court of appeals decision.[89] Rather than focusing on the governmental intrusion into Henry's private life, the court began its analysis by focusing on Henry's conduct.[90] The supreme court sanctioned the City's denial of Henry's promotion, and found no violation of Henry's rights, reasoning that neither the Texas nor United States Constitution guarantees a right of privacy to commit adultery.[91]

C. *Majority Opinion*

The majority begins by stating that Henry "maintains his conduct is protected by the right of privacy under both the United States and Texas Constitutions."[92] Turning to the Texas Constitution, the court acknowledges the constitutional right of privacy in Texas recognized by its decision in *TSEU*. The *Henry* court then clarified and limited the right set forth in *TSEU* to one that protects personal privacy from

83. *See id.* at 545.
84. *Id.*
85. *Id.*
86. *See id.*
87. *See id.* at 555-56.
88. *See id.*
89. *See* City of Sherman v. Henry, 928 S.W.2d 464, 468-69 (Tex. 1996), *cert. denied*, 117 S. Ct. 1098 (1997).
90. *See id.*
91. *See id.* at 474.
92. *Id.* at 467.

"unreasonable intrusion"[93] as opposed to one that protects conduct.[94] Starting from this proposition, the court evaluated whether Henry's conduct was a fundamental right. Had the *Henry* court focused on the governmental intrusion, Henry and all Texans following him would be secure in their right of privacy pursuant to the Texas Constitution. The court's focus was not on the Department's intrusion because Henry did not plead governmental intrusion.[95] The court asserted that Henry's complaint was not about an intrusion into his personal life but was instead a claim under the "autonomy aspect of the right to privacy—the right to make certain fundamental decisions and engage in certain conduct without state interference."[96] The court concluded the sole issue for review was "whether conduct involving an affair by one police officer with the wife of another officer is a fundamental, constitutionally protected right."[97] The court staunchly refused to address the intrusion and carefully avoided addressing or expressing any opinion on that issue.[98]

The Texas Supreme Court stated that *recognized* privacy rights are limited to procreation, contraception, abortion, marriage, family relationships, child rearing, and education as found by the Supreme Court in *Bowers*.[99] Using the analysis in *Bowers*, the Texas Supreme Court concluded that Henry's affair with Officer Pollard's wife was not like the recognized privacy rights of family, marriage, and procreation.[100] Next, in determining whether Henry's behavior *should* be recognized, the court determined that the right to commit adultery is not "implicit in the concept of ordered liberty"[101] or "deeply rooted in this Nation's history and tradition."[102] Historically, adultery was a crime in most states until the latter half of the nineteenth century, and remains a crime in roughly half of the states.[103] Although Texas repealed its laws criminalizing adultery in 1973,[104] the court concluded that adultery is not a fundamental right. The court strengthened its argument with dicta from Supreme Court decisions holding that adultery and fornication are not favored in the law.[105]

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93. *Id.* at 468.
94. *See id.*
95. *See* City of Sherman v. Henry, 928 S.W.2d 464, 468-69 (Tex. 1996), *cert. denied*, 117 S. Ct. 1098 (1997).
96. *Id.*
97. *Id.*
98. *See id.*
99. *See Henry*, 928 S.W.2d at 469. *See also* Bowers v. Hardwick, 478 U.S. 186, 190 (1986).
100. *See Henry*, 928 S.W.2d at 469-70.
101. *Id.* (quoting Palko v. Connecticut, 302 U.S. 319, 325-26 (1937)).
102. *Id.* (quoting Moore v. East Cleveland, 431 U.S. 494, 503 (1977)).
103. *Id.* at 470.
104. Act of June 14, 1973, 63d Leg., R.S., ch. 399, § 3, 1973 Tex. Gen. Laws 883, 992 *repealing* TEX. PENAL CODE art. 499 (1925).
105. *See Henry*, 928 S.W.2d at 470-71.

Henry relied on several cases that the court distinguishes. First, in *Briggs v. North Muskegon Police Department*,[106] a married police officer was discharged for living with a married woman who was not his wife. A Michigan federal district court held that the officer's right of privacy was infringed when he was fired from his job.[107] Second, in *Thorne v. City of El Segundo*,[108] the Ninth Circuit ruled that an applicant's right of privacy was infringed when the police department denied her employment because she stated in response to polygraph questions that she had suffered a miscarriage by a married officer on the force.[109] The Texas Supreme Court found neither of these cases persuasive because *Thorne* was based on an intrusion into personal matters, "an interest not implicated in [the *Henry*] case[,]"[110] and both cases were decided before *Bowers*.[111]

The supreme court concluded the "United States Constitution does not include the right to maintain a sexual relationship with the spouse of someone else[ ]"[112] because adultery does not resemble the other constitutionally protected privacy rights like marriage or family, and it is not a fundamental right that can be characterized as "implicit in the concept of ordered liberty"[113] or "deeply rooted in this Nation's history and tradition."[114] In fact, the court stated, "adulterous conduct is the very antithesis of marriage and family" and therefore not protected.[115]

Finally, the court turned its analysis to the Texas Constitution. Several sections of the Texas Constitution grant a right of privacy according to the *TSEU* court.[116] The court states that the only section addressing the situation in *Henry* is article I, section 19 that concerns the deprivation of life, liberty, and property, and due course of law.[117] In order to determine if this section protects Henry's conduct, the court looked at several factors including the intent, purpose, history, and language of the Constitution as well as the law in other jurisdictions.[118] Without explaining exactly how it arrived at its conclusion, other than stating that section 19 is similar to the Fourteenth Amend-

106. 563 F. Supp. 585 (W.D. Mich. 1983), *aff'd*, 746 F.2d 1475 (6th Cir. 1984).

107. *See id.* at 586.

108. 726 F.2d 459 (9th Cir. 1983).

109. *See id.* at 462, 472.

110. City of Sherman v. Henry, 928 S.W.2d 464, 471 (Tex. 1996), *cert. denied*, 117 S. Ct. 1098 (1997).

111. *See id.*

112. *Id.*

113. *Id.* (quoting Moore v. East Cleveland, 431 U.S. 494, 503 (1977)).

114. *Id.* at 471-72 (quoting Palko v. Connecticut, 302 U.S. 319, 325-26 (1937)).

115. *Id.* at 469-70.

116. *See* Texas State Employees Union v. Texas Dep't of Mental Health & Retardation, 746 S.W.2d 203, 205 (Tex. 1988).

117. *Henry*, 928 S.W.2d at 472.

118. *See id.*

ment, the court concluded that there is no reason to believe the Texas Constitution protects Henry's conduct.[119]

Henry further argued that since adultery is no longer illegal in Texas his conduct should be constitutionally protected. The court finds this argument fallacious. Although adultery is no longer illegal, it is still not favored in the law and is used by Texas courts in dividing community assets or granting a divorce.[120] Finally, the court reiterates that because *Henry* is about whether conduct is protected and not about whether the government intruded, *TSEU* is not applicable.[121] Therefore, the court ruled Henry's right of privacy was not implicated under either the Texas or United States Constitutions.[122]

D. *Justice Rose Spector's Concurrence*

Justice Spector begins by expressing concern that "the Texas constitutional right of privacy has somehow shriveled to the point that the most personal aspects of our lives are the government's business."[123] A unanimous *TSEU* court left no doubt "that a right of individual privacy is implicit among those, 'general, great, and essential principles of liberty and free government' established by the Texas Bill of Rights."[124] "In order to pronounce its views on morality (and transform them into law),"[125] Justice Spector states that the majority framed the issue to focus on Henry's conduct in order to ensure the result it wanted. Accordingly, the correct issue was not Henry's fundamental right to have an affair, but his fundamental "right to be let alone," the right most valued by civilized men.[126] Specifically, she argued that the only issue the case presented was "the individual's right to enter into intimate personal relationships[ ] secure in the knowledge that [the Texas] Constitution protects the relationship from intrusion by the [state, absent] a compelling governmental interest."[127] In comparing *TSEU* to the instant case, Justice Spector noted that *Henry* is no more about a fundamental right to have an affair than *TSEU* was about a fundamental right to commit theft or child

119. *See id.* at 473.

120. *See* TEX. FAM. CODE ANN. §§ 3.03, 3.63 (Vernon 1993). *See also* Morrison v. Morrison, 713 S.W.2d 377, 379 (Tex. App.—Dallas 1986, writ dism'd); Young v. Young, 609 S.W.2d 758, 761 (Tex. 1980) (considering adultery when granting a divorce or dividing community assets).

121. *See Henry*, 928 S.W.2d at 474.

122. *See id.*

123. *Id.*

124. *Id.* at 475. *See also* TEX. CONST. art. I., Introduction to the Bill of Rights.

125. *Henry*, 928 S.W.2d at 475 (Spector, J., concurring).

126. *See id.* (quoting Bowers v. Hardwick, 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting) (Justice Blackmun joined by Justices Brennan, Marshall, and Stevens). In his dissent, Justice Blackmun quotes Justice Brandeis's dissenting opinion in *Olmstead v. United States*, 277 U.S. 438, 478 (1928).

127. *Id.*; *See also* Stanley v. Georgia, 394 U.S. 557, 564 (1969).

abuse.[128] If Henry's right of privacy was not implicated then the right recognized in *TSEU* is "no more than a hollow shell."[129]

According to Justice Spector, the City interfered with Henry's right of privacy at two points: (1) when Chief Pliant ordered an investigation into his relationship with Olson, and (2) when the chief denied him the promotion to which he was entitled based on that relationship.[130] Based on the City's actions, Justice Spector described any conclusion that the City did not intrude into Henry's private life as "unfathomable."[131]

The justice also attacked the majority's anachronistic analysis. Assuming no investigation, the majority's rationale that the conduct is not constitutionally protected is based solely on the fact that adultery was a crime at the time the Texas Constitution was ratified. She finds this analysis "implies that the scope of individual rights under the Texas Constitution is frozen in time, limited to conduct or actions that were legal . . . more than one hundred years ago."[132] Making an analogy between adultery and abortion, the justice surmised that since adultery was illegal in 1876, then no right of privacy protects "a woman's right to choose to terminate a pregnancy[133] or the right of an interracial couple to marry."[134] Nevertheless, Justice Spector concludes by stating that she concurs in the *result* despite the fact that Henry's right of privacy was implicated since the record contained evidence that the City had a compelling interest in denying Henry's promotion.[135]

E. *Justice Priscilla Owen's Concurrence*

Justice Owen focuses on the state's rights as an employer. In discerning the scope of the right to privacy, the state may have interests as an employer that it may not possess with regard to the public gener-

128. *See Henry*, 928 S.W.2d at 475 (Spector, J., concurring). These were some of the questions asked during Texas Department of Mental Health and Retardation's polygraph tests. *See* Texas State Employees Union v. Texas Dep't of Mental Health & Retardation, 746 S.W.2d 203, 205 (Tex. 1988).

129. *Henry*, 928 S.W.2d at 475 (Spector, J., concurring).

130. *See id.* (citing Thorne v. City of El Segundo, 726 F.2d 459, 468 (9th Cir. 1983)).

131. *Henry*, 928 S.W.2d at 475 (Spector, J., concurring).

132. *Id.* at 476.

133. Actually, abortion was first criminalized in 1854. *See* Law of Feb. 9, 1854, ch. 49 § 1, 1854 Tex. Gen. Laws 58, 3 H. GAMMEL, LAWS OF TEXAS 1502 (1898). The prohibition was initially codified at Texas Penal Code arts. 531-536 (1857) (also known as the "O.C." or "Old Code"). This article was carried substantially unchanged in the Penal Code arts. 536-541 (1879), Tex. Penal Code arts. 641-646 (1895), Tex. Penal Code arts. 1071-1076 (1911) and Tex. Penal Code arts 1191-1196 (1925). The 1925 provision was declared unconstitutional in *Roe v. Wade* 410 U.S. 113 (1973).

134. *Henry*, 928 S.W.2d at 476 (Spector, J., concurring) (citing TEX. PENAL CODE art. 326 (1879), *repealed by* Act of Jan. 1, 1970, 61st Leg., R.S., ch. 888, § 6, 1969 Tex. Gen. Laws 2733).

135. *Henry*, 928 S.W.2d at 476 (finding substantial doubt as to Henry's ability to command).

ally.[136] This is especially true in the "oversight of police officers . . . because of the state's goal in protecting the safety of the general public."[137] Henry's affair was disruptive within the department and "jeopardized his ability to command within an organization that requires 'unquestioning obedience' from its members,"[138] thus, she concludes that the City was justified in denying the promotion. However, she perceived the opinion was broader than necessary.[139] "The opinion may be read to decide issues not before us, issues not carefully considered in light of our own decisions and decisions of the United States Supreme Court."[140]

> Assume, for example, that Henry had an adulterous affair with the wife of someone wholly unrelated to the police department and that Henry's conduct had no disruptive effect within the police department. Could Henry be denied a promotion because of his immoral but legal association with a married woman? What if Henry were not a man, but an unmarried woman who gave birth to a child of a married man whom had no connection with the police department? Would we say that the City could discharge her or deny her a promotion because of her adulterous conduct? Would such actions raise a constitutional question about the right to bear or beget a child which the United States Supreme Court has said is a fundamental 'right of the individual, married or single' that must be free from unwarranted governmental intrusion?[141]

Although critical of the majority, Justice Owen also concurs in the judgment.

III. THE SUPREME COURT'S REASONING IN *HENRY* FAILS TO PROTECT THE CONSTITUTIONAL RIGHT OF PRIVACY IN TEXAS

In light of this background, the decision in *Henry* presents several problems: First, the supreme court adopted an analysis based on the Federal Constitution which clashes with the more expansive rights granted by the Texas Constitution. Second, is the court's erroneous focus on Henry's conduct rather than the police department's investigation into his private affairs. Was it simply due to Henry's poor pleadings? Third, the decision should have utilized the *TSEU* test, which should better protect police officers' and other public employ-

136. *See id.* at 477 (Owen, J., concurring). *See also* Pickering v. Board of Educ., 391 U.S. 563, 568 (1968) (balancing the free speech interests of state employed teacher with the interest of the State as an employer); Texas State Employees Union v. Texas Dep't of Mental Health & Retardation, 746 S.W.2d 203, 205 (Tex. 1987).

137. *Henry*, 928 S.W.2d at 477 (Owen, J., concurring) (citing *Texas State Employees Union*, 746 S.W.2d at 205-06).

138. *Id.*

139. *See id.* at 478.

140. *Id.*

141. *Id.* (quoting Eisenstadt v. Baird, 405 U.S. 438, 453 (1972)).

ees' rights of privacy under the Texas Constitution. Finally, in the alternative, the court should have applied the *Fleisher* test and reached a result that offers greater protection emanating from the Texas Constitutional Right of Privacy. The following sections explore these questions.

A. *The Court's Focus on Conduct*

Whether the claim is made by a private citizen or a public employee, the Texas Supreme Court's decision in *Henry* eviscerates the constitutional right of privacy in Texas.

In *Henry*, the court chose to examine whether Henry's right to have an "affair" was a fundamental right. The court refuses to consider that there was an intrusion into Henry's private off-duty behavior when Chief Pliant ordered the investigation. At no point prior to the Commission hearing did Henry voluntarily acknowledge his relationship with Olson.[142] The court looked only to the pleadings rather than to the facts.[143] However, "[i]t is imperative that the right to privacy under the Texas Constitution remain a vital right for the protection of all Texans[]"[144] and courts should "resist any attempts to trivialize or otherwise weaken this fundamental right"[145] Since the right of privacy is such a highly valued right, the court should have considered all facts in order to secure and prevent erosion of this right.

The court also fails to consider that when Henry began dating Olson he had no knowledge she was married.[146] When Henry found out she was married he stopped seeing her.[147] Henry resumed dating Olson only after a failed reconciliation with her husband.[148] Is it fair to characterize Henry's conduct as an "affair" and adulterous when he was unaware she was married at the outset and discontinued dating until she was in the process of a divorce? While the court may not have agreed with this behavior, "giving individuals freedom to choose how to conduct their lives is acceptance of the fact that different individuals will make different choices."[149]

Neither adultery nor fornication is illegal in Texas and have not been illegal for over twenty years.[150] Both laws were repealed in 1973.

142. *See id.* at 475 (Spector, J., concurring).
143. *See id.* at 468-69 & n.2.
144. *Id.*
145. Diamond Shamrock Ref. & Mktg. Co. v. Mendez, 844 S.W.2d 198, 203 (Tex. 1992) (Hightower, J., concurring).
146. *See* City of Sherman v. Henry, 910 S.W.2d 542, 546 (Tex. App.—Dallas 1995), *rev'd*, 928 S.W.2d 464 (Tex. 1996), *cert. denied*, 117 S. Ct. 1098 (1997).
147. *See id.*
148. *See id.*
149. Bowers v. Hardwick, 478 U.S. 186, 205-06 (1986) (Blackmun, J., dissenting).
150. Act of June 14, 1973, 63d Leg., R.S., ch. 399 § 3, 1973 Tex. Gen. Laws 883, 992, *repealing* TEX. PENAL CODE art. 503 (1925) (fornication); Act of June 14, 1973, 63d Leg., R.S., ch. 399 § 3, 1973 Tex. Gen. Laws 883, 992, *repealing* TEX. PENAL CODE art. 499 (1925) (adultery).

In *Davenport v. Garcia*,[151] the Texas Supreme Court stated that "historical analysis is only a starting point . . . . In no way must our understanding of [our Constitution's] guarantees be frozen in the past; rather, our concept of freedom of expression continues to evolve over time."[152] "[T]he concept of privacy embodies the 'moral fact that a person belongs to himself and not others nor society as a whole.'"[153] "[There is] nothing more fundamentally private and deserving of protection than sexual behavior between consenting adults in private."[154] In the instant case, Henry and Kelly can hardly be said to have been infringing on the rights of others. Olson was in the process of a divorce, had no children, and Henry was a bachelor. Today, people often begin relationships while one of them is in the process of a divorce. "Moral standards concerning sexuality have changed over the generations and are continuing to change at this time."[155] "What was immoral to our grandparents may be perfectly acceptable conduct today, and our laws reflect these attitudes."[156] Therefore, the court's historical analysis is simply a judicial proscription on the morality of Henry's conduct.

Lastly, the entire investigation consisted of a single report prepared by Officer Pollard. Chief Pliant denied Henry the promotion solely on the basis of his relationship with Olson as described in Pollard's

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151. 834 S.W.2d 4 (Tex. 1992).

152. *Id.* at 19. *See also Henry*, 928 S.W.2d at 476 (Spector, J., concurring).

153. Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 777 n.5 (1986) (Stevens, J., concurring) (quoting Charles Fried, *Correspondence*, 6 PHIL. & PUB. AFFAIRS 288-89 (1977)).

154. State v. Morales, 826 S.W.2d 201, 204 (Tex. App.—Austin 1992), *rev'd on other grounds*, 869 S.W.2d 941 (Tex. 1994).

155. Henry v. City of Sherman, No. 92-0720 (336th Dist. Ct., Grayson County, Tex., Dec. 2, 1993), *aff'd*, City of Sherman v. Henry, 910 S.W.2d 542 (Tex. App.—Dallas 1995), *rev'd*, 928 S.W.2d 464 (Tex. 1996), *cert. denied*, 117 S. Ct. 1098 (1997) (District Court opinion on file with the Texas Wesleyan Law Review).

156. *Id.* at 862 & n.1. Judge Ray Grisham gives an example of how norms have changed since the 1920's in Texas:

> In studying this case, this court cannot help but remember the true story of a young girl from Nocona, Texas, during the 1920's. Her older brother had some male friends over one Sunday afternoon and, as children will do, they began to "horse around." One thing lead to another and at some point the young girl danced with several of her brother's friends. Word got out and, by the middle of the next week, the young girl was called to the superintendent's office at the public school where she attended. After informing her how disgraceful her conduct had been, she was *expelled* from *public school* for having danced on Sunday. Her father, a poor and struggling cobbler, allowed the young girl to work making boots in his shop. Apparently very talented and adept at bootmaking, her reputation grew over the years. The young girl who was expelled from her public school for having danced on Sunday became the matriarch of the Nocona Boot empire, the largest employer in Nocona, Texas. For once, religious fanaticism and blind intolerance actually led to personal success . . . and now you know the rest of the story.

Id. at n.1.

report and never ordered independent verification.[157] Chief Pliant admitted that he was blinded by the affair and unable to consider any of Henry's numerous qualifications.[158] The supreme court continually emphasized the paramount importance of the fact that Henry was having an affair with Olson, but the only evidence was prepared by the disgruntled husband.[159] The court should not have relied on *this evidence* to narrow the right of privacy of all Texans.[160] In *Henry*, the Texas Supreme Court took the opportunity to circumscribe the right of privacy guaranteed under the Texas Constitution on the basis of an arguably innocent adulterer, a report offered by an upset husband, and poor pleadings, while at the same time conceding that "the government . . . does not have license to intrusively pry into the affairs of its employees."[161]

B. *The Court's Analysis Under the United States Constitution and* Bowers *Rather than Under the Texas Constitution*

The Texas Supreme Court relied on federal constitutional analysis, and, specifically, the *Bowers* decision to decide *Henry*. This analysis resulted in an unnecessary restriction on the right of privacy given by the Texas Constitution. The United States Constitution presents a floor through which constitutional rights may not descend.[162] The Texas Constitution, on the other hand, represents a higher floor.[163] Because the Texas Constitution grants more expansive rights, the court should have analyzed the facts in *Henry* pursuant to the Texas Constitution. Officer Henry did plead violations of both the state and federal constitutions. Both *Davenport* and *LeCroy* stated that violations of the state constitution must be examined under that constitution.[164] The supreme court did not do this, rather it evaluated *Henry* under the Federal Constitution first and then applied this analysis to the Texas Constitution. This reasoning simply falls short in protecting the rights given Texas citizens by the Texas Constitution.

In both *Bowers* and *Henry*, the majorities looked for evidence of a fundamental right, under the Fourteenth Amendment Due Process Clause and under article I, section 19 of the Texas Constitution, respectively. Further, both cases looked at conduct that has traditionally been in disfavor—homosexuality, on the one hand, and adultery, on the other. The dissent in *Bowers* and Justice Spector's concurrence

157. *See Henry*, 928 S.W.2d at 465-66.
158. *See Henry*, 910 S.W.2d at 547.
159. *Henry*, 928 S.W.2d at 465.
160. Although the parties did not contest the Commission's findings, questions of constitutional magnitude should not be premised on a *single* report admitted before a union commission.
161. *Id.* at 468.
162. *See* LeCroy v. Hanlon, 713 S.W.2d 335, 338 (Tex. 1986).
163. *See id.*
164. *See supra* Part II.C.

in *Henry* both argue that the majority opinions framed the issue incorrectly.[165] These dissents and concurrences further argue that it is not for the court to pass moral judgments[166] but that the right to choose how to conduct one's life should be paramount.[167]

The decision in *Henry* does not protect the Texas Constitutional Right of Privacy because the court applied federal analysis which grants less expansive rights than the Texas Constitution. The Texas Supreme Court's emphasis on *Bowers* is worthy of suspicion because *Bowers* was a close decision.[168] Since the Texas Supreme Court utilized *Bowers* extensively in reaching its decision in *Henry*, the *Henry* decision may not be as persuasive because of the strong dissent in *Bowers* which argued the same infirmities with the majority's decision as argued by the concurrences in *Henry*. Specifically, Justice Blackmun's dissent in *Bowers* and Justice Spector's concurrence in *Henry* complained that the majority framed the issue as one of conduct rather than intrusion and that the majority did not adhere to the purposes behind the right of privacy. Further, both argued that even though Hardwick and Henry did not plead their claims on certain constitutional provisions that should not hinder the court from looking at those provisions.

IV. THE SOLUTIONS: *FLEISHER* AND *TSEU*

A. *Solution One:* Fleisher

In *Fleisher v. City of Signal Hill*,[169] the Ninth Circuit Court of Appeals formulated a four-prong test to apply to situations involving police officers and the right of privacy guaranteed under the Federal Constitution. Since the Texas Supreme Court chose to use the Federal Constitution as a guideline, the *Fleisher* test offers a more protective alternative to *Bowers* while still using an analysis under the Federal Constitution. The *Fleisher* test is useful because regardless of how the issue is framed, the affect on the final outcome is limited. It also obviates the need for an inquiry into whether the right is fundamental or resembles the protected privacy rights concerning marriage, family, and procreation. The test examines (1) whether the conduct was legal

165. *See* Bowers v. Hardwick, 478 U.S. 186, 199 (1986). In their dissent in *Bowers*, Justices Blackmun, Brennan, Marshall, and Stevens said the case was not about a fundamental right to engage in homosexual sodomy but was about "'the most comprehensive of rights and the right most valued by civilized men,' namely the 'right to be let alone.'" *See id.* (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)); *Henry*, 928 S.W.2d at 475 (Spector, J., concurring).

166. *See Bowers*, 478 U.S. at 212-13, 219; *Henry*, 928 S.W.2d at 475 (Spector, J., concurring).

167. *See Bowers*, 478 U.S. at 204-07; *Henry*, 928 S.W.2d at 475 (Spector, J., concurring).

168. *Bowers* was a 5-4 decision. Justice Blackmun filed a dissenting opinion with Justices Brennan, Marshall, and Stevens joining.

169. 829 F.2d 1491 (9th Cir. 1987).

or illegal; (2) whether the conduct occurred off-duty or on-duty; (3) whether the conduct affected the police department's community reputation and internal morale; and (4) whether the conduct was clearly listed in the department's regulations as grounds for punishment.[170]

The *Fleisher* test encourages police departments to establish policies outlining departmental expectations and notifies employees of acceptable and unacceptable behavior. Further, since police officers presumably know what types of behavior are illegal they can refrain from those types of acts. "Without written guidelines and policies limiting the government's actions when those actions directly intrude on the core of a person's constitutionally protected privacy interests, the chances are too great that the government may act arbitrarily or capriciously."[171] Applying this test to the *Henry* case or any other case arising in Texas with similar facts will result in more cohesive decisions and encourage consistent application of inquiries into off-duty behavior. First, Henry's conduct was not illegal. Second, Chief Pliant admitted there was no evidence the affair took place during work hours.[172] Third, the effect on the police department's community reputation and internal morale was disputed. Although the Dallas Court of Appeals found insufficient evidence in the record to suggest Henry's conduct undermined the department,[173] the supreme court concurrences found the record established sufficient facts.[174]

Finally, adultery was not clearly listed in the department's regulations.[175] More importantly, there was no written rule concerning the type of conduct in which Henry engaged.[176] This was a significant factor in the court of appeals' decision in upholding Henry's right of privacy under the Texas Constitution.

> If the City chooses to regulate its employees' sexual morality, it must at least do so through regulations carefully tailored to meet the City's specified needs. Without narrowly tailored regulations, the risk is too great that an infringement of this important constitutionally protected right might be justified on the basis of individual prejudice and bias toward the protected conduct.[177]

The *Fleisher* test creates more protection under the right of privacy because the test focuses on the conduct's legality at the time and does not require an extensive analysis into the intent behind constitutional provisions, nor does it require a historical analysis into whether an activity is a fundamental right. The *Fleisher* analysis also prevents

170. *See Fleisher*, 829 F.2d at 1498-99.
171. City of Sherman v. Henry, 910 S.W.2d 542, 555 (Tex. App.—Dallas 1995), *rev'd*, 928 S.W.2d 464 (Tex. 1996), *cert. denied*, 117 S. Ct. 1098 (1997).
172. *See Henry*, 928 S.W.2d at 466; *Henry*, 910 S.W.2d at 547.
173. *See Henry*, 910 S.W.2d at 556.
174. *See Henry*, 928 S.W.2d at 476, 478.
175. *See Henry*, 910 S.W.2d at 547, 555.
176. *See id.* at 555.
177. *See id.*

moral biases from seeping into court opinions. Because the right of privacy is such a critical right guaranteed by the Federal Constitution, it is necessary to give employees notice of what types of behavior may jeopardize it. The conduct is either illegal or it is not. The conduct either occurred on-duty or it did not. And, the guidelines either prohibit it or they do not. These three prongs encourage even-handed enforcement; there is little room for opinions. Determining the effect on the department's reputation and morale is the most subjective of the four prongs and must be decided on a case-by-case basis, but the four together encourage both notice and consistent application. Under a *Fleisher* analysis, an individual's rights are more likely to receive constitutional protection.

B. *Solution Two:* TSEU

The *TSEU* test solves many of the same problems as the *Fleisher* test. The *TSEU* test is applied when there is a governmental intrusion. The Texas Supreme Court in *Henry* acknowledges this but refuses to apply *TSEU* to the facts.[178] In *Henry, there was an intrusion* that implicated his right to privacy. Although the majority refused to address an intrusion analysis, in the interest of protecting the right of privacy, the court should examine all issues.[179] In the instant case, if Henry's conduct were affecting his job performance and the ability of those around him to respect his judgment, then the City could justifiably deny his promotion. However, the City must do so in a way that is reasonable and not arbitrary. The *TSEU* test encourages written guidelines and guards against personal bias because it mandates policies that are reasonable and non-invasive. An example of unreasonable application is selective application of policies. *Henry* clearly demonstrates selective application. Officer Pollard violated the department's nepotism policy with no consequences while Officer Henry violated an unwritten rule[180] and lost a job promotion. This selective application of policies to the officers can hardly be the type of result the Texas Supreme Court hopes to encourage.

The *TSEU* test has an inherent advantage in that it protects the right of privacy granted by the Texas Constitution. *TSEU* will better protect the constitutional right of privacy in Texas because it protects the more expansive rights given to Texans' under their own constitution.

Either of these two solutions ensure that the right of privacy in Texas will remain strong for years to come, not just for police officers or public employees but also for citizens alike.

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178. *See Henry*, 928 S.W.2d at 468.

179. *See id.* (Spector, J., concurring).

180. *See Henry*, 910 S.W.2d at 546. Pollard and Olson were married in 1991 but did not disclose this information because of the department's nepotism policy. *See id.*

CONCLUSION

The problem *City of Sherman v. Henry* presents is not original or unique. In situations where a right of privacy is implicated, the court is faced with the difficult task of deciding whether the finger should be pointed at the government's intrusion or the actor and his conduct. Because the "right to be let alone" is such a fundamental right, the greater harm is not to err on the side of implicating the right and then testing whether the government can prove a compelling interest. The test utilized in *Fleisher* is one alternative that alleviates the problems of how to frame the issue and disposes of the need to inquire into the history behind a certain type of conduct. It further encourages police departments to supply their employees and future potential employees with written guidelines. Written guidelines put employees on notice concerning acceptable and unacceptable behavior as well as guard against capricious and arbitrary enforcement. The *Fleisher* test brings cohesiveness to these cases by looking at four factors: (1) whether the conduct was legal or illegal; (2) whether the conduct occurred off-duty or on-duty; (3) whether the conduct affected the police department's community reputation and internal morale; and (4) whether the conduct was clearly listed in the department's regulations as grounds for punishment.[181]

A second alternative is the test set forth in *Texas State Employees Union v. Texas Department of Mental Health & Retardation.* "The Texas Constitution protects personal privacy from unreasonable intrusion. This right to privacy should yield only when the government can demonstrate that an intrusion is reasonably warranted for the achievement of a compelling governmental objective that can be achieved by no less intrusive, more reasonable means."[182] The test also focuses on the intrusion, not the conduct, thus obviating the need for an inquiry into the history of the conduct and intent of the Texas Constitution. It also prevents moral biases from seeping into the inquiry. It encourages the least amount of governmental interference through a means that gives notice and garners evenhanded application. Lastly, the decision in *TSEU* was based on the Texas Constitution which grants more extensive rights than the Federal Constitution and thus is more likely to protect a Texan's constitutional right of privacy than an analysis under the Federal Constitution. With the Texas Supreme Court's decision in *City of Sherman v. Henry*, the right to privacy that is implicit among those "general, great, and essential principles of liberty and free government"[183] has shriveled to the point that it is no more

181. *See* Fleisher v. City of Signal Hill, 829 F.2d 1491, 1498-99 (9th Cir. 1987).

182. Texas State Employees Union v. Texas Dep't of Mental Health & Retardation, 746 S.W.2d 203, 205 (Tex. 1987).

183. *Henry*, 928 S.W.2d at 475 (Spector, J., concurring). *See also* TEX. CONST. art. I, Introduction to the Bill of Rights.

than a hollow shell of the right recognized ten years ago in *TSEU*.[184] Justice Owen warned that the implications of the decision in *Henry* may be far reaching for both public employees and the private persons involved with them.[185] What is left to prevent the state from firing an employee for something immoral but not illegal that was done fifteen years ago? Can the state inquire into one's affairs whenever it deems it reasonable to find evidence of conduct that is morally objectionable as long as the conduct it is looking for is not favored in the law? Will Texas courts now inquire into the moral background and history of a type of behavior for private individuals as well as police officers? Only time will answer these questions. It was not so long ago that abortion was both illegal and not favored in the law and now the decision to have an abortion is a protected privacy right "implicit in the concept of ordered liberty."[186] Should a distinction be made between a woman's right to choose whether to have an abortion and an individual's right to choose a sexual partner? It is important to note that private prejudice is never a cognizable governmental interest.[187] "In fact, the very purpose of constitutional protection of individual liberties is to prevent capricious coercion by the majority."[188]

Shelly L. Skeen

184. *Henry*, 928 S.W.2d at 475 (Spector, J., concurring).
185. *See id.* at 478 (Owen, J., concurring).
186. Palko v. Connecticut, 302 U.S. 319, 325-26 (1937).
187. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 448 (1985).
188. *Henry*, 910 S.W.2d at 555.