

## ADDRESS

### BEFORE *ROE V. WADE*: JUDGE FRIENDLY'S DRAFT ABORTION OPINION

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It is well known that Henry J. Friendly was one of the greatest judges in our nation's history.<sup>1</sup> Along with Holmes and Brandeis and Learned Hand, he was certainly one of the most brilliant. What is not known is that in 1970, three years before *Roe v. Wade*,<sup>2</sup> Judge Friendly wrote an opinion in the first abortion-rights case ever filed in a federal court. No one knows this because his opinion was never published. I have a copy of the opinion, and his papers are now at the Harvard Law School, awaiting indexing.

Tonight I want to share the opinion with you. I hope you will agree with me that Judge Friendly's draft of thirty-five years ago is not only penetrating, but prophetic. I have read my copy many times over the years. Not because our court hears abortion cases. In my fifteen years on the D.C. Circuit, I have not sat on a single abortion-rights case. I have read and reread my private copy because it embodies such a clear and brilliant message about the proper role of the federal judiciary, because it is timeless, because it is a classic in legal literature. After I give the opinion to you, I want to compare it with the Supreme Court's performance, from *Roe v. Wade* to *Lawrence v. Texas*.<sup>3</sup>

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\* Circuit Judge, United States Court of Appeals for the District of Columbia Circuit. This is an annotated version of the Barbara K. Olson Memorial Lecture given at the Federalist Society's National Lawyers Convention in Washington, D.C., on November 11, 2005. The full text of Judge Friendly's draft opinion is included as an appendix to this Article. I am indebted to my law clerks, Daniel G. Bird, Michael J. Burstein, and Ryan C. Morris, for their helpful suggestions. The citations make no attempt to cover in full the case law or the vast amount of commentary on the subjects discussed.

1. See, e.g., Extraordinary Session of the Court of Appeals for the Second Circuit, In Memoriam: Honorable Henry J. Friendly, 805 F.2d, at lxxxii (1986); Bruce A. Ackerman et al., In Memoriam: Henry J. Friendly, 99 HARV. L. REV. 1709 (1986); Pierre N. Leval, Henry J. Friendly: In Memory of a Great Man, 52 BROOK. L. REV. 571 (1986); A. Raymond Randolph, *Administrative Law and the Legacy of Henry J. Friendly*, 74 N.Y.U. L. REV. 1, 2-4 (1999).

2. 410 U.S. 113 (1973).

3. 539 U.S. 558 (2003).

Now for some history. In 1968, a few years after *Griswold v. Connecticut*,<sup>4</sup> Roy Lucas, an assistant professor at the University of Alabama Law School, wrote a law review article entitled *Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes*.<sup>5</sup> In his article, Lucas acknowledged that legislative efforts to reform state laws prohibiting abortion were making headway in states across the country.<sup>6</sup> But he had a quicker and easier way to get rid of the state laws: through the federal courts. To accomplish this, Lucas laid out a blueprint and proposed an innovation: use *Griswold* and its “penumbral right emanating from values embodied in the express provisions of the Bill of Rights”<sup>7</sup> to have the laws declared unconstitutional.<sup>8</sup>

After his article appeared, Lucas founded an organization in Manhattan to advance his cause. He named it—of all things—the James Madison Constitutional Law Institute. For the next four years he was involved in nearly every case around the country challenging abortion laws, including finally *Roe v. Wade*.<sup>9</sup>

Lucas chose to bring his first case in New York.<sup>10</sup> The case was assigned to a three-judge district court. At the time, federal actions challenging the constitutionality of a state law were heard by panels consisting of two district judges and one court of appeals judge, with direct appeal—not certiorari—to the Supreme Court.<sup>11</sup> Henry Friendly was drawn as the court of appeals judge.<sup>12</sup> I was his law clerk on the case.

There were several evidentiary hearings and a mountain of pleadings. Judge Friendly’s customary practice was to discuss a

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4. 381 U.S. 479 (1965).

5. 46 N.C. L. REV. 730 (1968).

6. *Id.* at 735, 737.

7. *Id.* at 755–56.

8. During the oral argument in *Griswold*, Justice Hugo Black asked Professor Thomas Emerson, counsel for petitioners: “Would your argument concerning these things you’ve been talking about relating to privacy, invalidate all laws that punish people for bringing about abortions?” Emerson responded: “No, I think it would not cover the abortion laws . . . [T]hat conduct does not occur in the privacy of the home.” Transcript of Oral Argument at 23, *Griswold*, 381 U.S. 479 (No. 496); see also JOHN W. JOHNSON, *GRISWOLD V. CONNECTICUT: BIRTH CONTROL AND THE CONSTITUTIONAL RIGHT OF PRIVACY* 149 (2005).

9. See David J. Garrow, *Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade* 371–72, 494, 563–64 (1994).

10. *Id.* at 353–54, 379–81.

11. 28 U.S.C. § 2281 (1964) (repealed 1976); *id.* § 2284. The opinion referring the case to a three-judge panel is reported at *Hall v. Lefkowitz*, 305 F. Supp. 1030 (S.D.N.Y. 1969).

12. District Judges Edward Weinfeld and Harold R. Tyler, Jr. were the other judges on the panel. GARROW, *supra* note 9, at 381.

case with his law clerk and then draft the opinion himself, with the clerk serving as editor. We had many conversations about the abortion case, but not once did the Judge mention his personal views about abortion, and I never offered mine.

In the early spring of 1970, the Judge and his wife Sophie went off on a long-planned cruise through the Panama Canal. The abortion case must have been weighing on his mind. While on the cruise, without the benefit of a law library, he wrote—in long-hand—a preliminary opinion and mailed it to chambers. The package arrived just about the time President Nixon nominated Harry Blackmun to the Supreme Court.<sup>13</sup>

The Judge's secretary typed the draft in the usual triple-spaced format and handed me a copy, together with a note from the Judge. In the note he said that during the cruise, his views on the case had "crystallized"—his word—and that if I found "time hanging heavy" I should start working on the draft. Judge Friendly added, in a note to all of us: "The trip has been just fine. The ship is perfect, built for cruising and very modern. . . . The only rub concerns our fellow passengers. About two-thirds of them are Californians, and if I were in Ray's shoes, I'd think twice before settling there. [I was then considering this.] Most of them regard New York as a foreign city and their political views are somewhere to the right of Reagan. Yet they are well supplied with money—many of them having taken the cruise both ways, a rather evident lack of imagination."<sup>14</sup>

I did not make much headway on the Judge's draft. Shortly after it arrived, the New York legislature amended the state's abortion statute to allow abortion on demand during the first twenty-four weeks of pregnancy.<sup>15</sup> The three-judge court dismissed the case as moot, and no opinion issued.

In sharing Judge Friendly's draft with you, I must ask for your patience. It was intended for the eye, not the ear, and I will have to summarize portions of it. But I will read some parts exactly as he wrote them because they have such an important bearing on the Supreme Court's continuing struggle with the problems he identified so long ago.

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13. See Linda Greenhouse, *Becoming Justice Blackmun: Harry Blackmun's Supreme Court Journey* 46–49 (2005).

14. None of the quotations from Judge Friendly's draft and notes are set off in block quotes, regardless of length. Bracketed footnotes are my own.

15. Act of Apr. 11, 1970, ch. 127, 1970 N.Y. Laws 852 (codified as amended at N.Y. PENAL LAW § 125.05(3) (McKinney 2004)); see Robert M. Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 *FORDHAM L. REV.* 807, 840 & n.212 (1973).

The Judge went straight to Lucas's argument from *Griswold*: "At first sight the *Griswold* decision would not seem to afford even a slender foundation for the plaintiffs' superstructure. The Connecticut statute [struck down in *Griswold*] . . . was the most offensive form of anti-contraception legislation possible; it banned the *use* of contraceptive devices." *Griswold*, he thought, might rest on the obnoxious prospect of the police, as he put it, "spying the marital couch," a prospect he thought extremely unlikely in any event.

Judge Friendly viewed abortion as another matter entirely, having nothing to do with privacy of the *Griswold* variety. "The type of abortion the plaintiffs particularly wish to protect against governmental sanction is the antithesis of privacy," he wrote. "The woman consents to intervention in the uterus by a physician, with the usual retinue of assistants, nurses, and other paramedical personnel . . . . While *Griswold* may well mean that the state cannot compel a woman to submit to an abortion, but see *Buck v. Bell* \_\_\_ U.S. \_\_\_ (\_\_\_),<sup>[16]</sup> it is exceedingly hard to read it as supporting a conclusion that the state may not prohibit other persons from committing one . . . ."

The Judge then moved to what he saw as the heart of the plaintiffs' argument: "that a person has a constitutionally protected right to do as he pleases with his—in this instance, her—own body so long as no harm is done to others." As I will discuss in a moment, the Supreme Court, knowingly or unknowingly, has now embraced this concept as a matter of constitutional law. Judge Friendly would have none of it. He wrote, "Apart from our inability to find all this in *Griswold*, the principle would have a disturbing sweep. Seemingly it would invalidate a great variety of criminal statutes which existed generally when the 14th Amendment was adopted and the validity of which has long been assumed, whatever debate there has been about their wisdom. Examples are statutes against attempted suicide, homosexual conduct . . . , bestiality, and drunkenness unaccompanied by threatened breach of the peace. Much legislation against the use of drugs might also come under the ban."

He continued, "Plaintiffs' position is quite reminiscent of the famous statement of J. S. Mill. This has given rise to a spirited debate in England in recent years.<sup>[17]</sup> We are not required to umpire

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16. 274 U.S. 200 (1927).

17. Here Judge Friendly dropped a footnote: "Lord Devlin has been the leading antagonist of Mill's position and Professor H. L. A. Hart the chief protagonist. [Include

that dispute, which concerns what a legislature should do—not what it may do.” And then he wrote this: “[Y]ears ago, when courts with considerable freedom struck down statutes that they strongly disapproved, Mr. Justice Holmes declared in a celebrated dissent that the Fourteenth Amendment did not enact Herbert Spencer’s *Social Statics*. No more did it enact J. S. Mill’s views on the proper limits of law-making.”

I should pause here and briefly give you the theories of Spencer and Mill.

In his dissent in *Lochner v. New York*,<sup>18</sup> to which Judge Friendly referred, Justice Holmes summarized Herbert Spencer’s idea. (This year, by the way, marks the one-hundredth anniversary of the once-repudiated *Lochner v. New York*, which found a violation of the Due Process Clause in New York’s limitation on the maximum hours bakers could work.) As Holmes put it, Spencer laid down a principle in his book *Social Statics* that a person had the “liberty . . . to do as he likes so long as he does not interfere with the liberty of others to do the same.”<sup>19</sup>

John Stuart Mill, Spencer’s contemporary, proposed much the same idea in his book *On Liberty*, published in 1859. Mill’s “harm principle,” as it came to be known, was this: “[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.”<sup>20</sup>

Judge Friendly, after rejecting the notion that the theories of Mill and Spencer reflected constitutional law, turned to the evidence in the New York abortion case. The evidence dealt with “the hardship to a woman who is carrying and ultimately bearing an unwanted child . . . [,] the plight of the unmarried mother, the problems of poverty, fear of abnormality of the child, the horror of conception resulting from incest or rape. These and other fac-

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discussion of how the gap has been narrowed.]” The Judge had in mind John M. Finnis’s essay *Three Schemes of Regulation in THE MORALITY OF ABORTION: LEGAL AND HISTORICAL PERSPECTIVES* 172, 204–05 (John T. Noonan, Jr. ed., 1970), in which Finnis maintained that by the end of their debate, there was very little difference between Hart and Devlin.

18. 198 U.S. 45 (1905).

19. *Id.* at 75 (Holmes, J., dissenting); see HERBERT SPENCER, *SOCIAL STATICS: THE CONDITIONS ESSENTIAL TO HUMAN HAPPINESS SPECIFIED, AND THE FIRST OF THEM DEVELOPED* 95 (Robert Schalkenback Found. 1995) (1851) (identifying Spencer’s “first principle” as this: “Every man has freedom to do all that he wills, provided he infringes not the equal freedom of any other man.”).

20. JOHN STUART MILL, *ON LIBERTY* 80 (David Bromwich & George Kateb eds., Yale Univ. Press 2003) (1859).

tors may transform a hardship into austere tragedy. Yet, even if we were to take plaintiffs' legal position that the legislature cannot constitutionally interfere with a woman's right to do as she will with her own body so long as no harm is done to others, the argument does not support the conclusion plaintiffs would have us draw from it. For we cannot say the New York legislature lacked a rational basis for considering that abortion causes such harm. Even if we should put aside the interests of the father, negligible indeed in the many cases when he has abandoned the prospective mother but not in all, the legislature could permissibly consider the fetus itself to deserve protection. Historically such concern may have rested on theological grounds, and there was much discussion concerning when 'animation' occurred. We shall not take part in that debate or attempt to determine just when a fetus becomes a 'human being.' It is enough that the legislature was not required to accept plaintiffs' demeaning characterizations of it. Modern biology instructs that the genetic code that will dictate the entire future of the fetus is formed as early as the \_\_\_ day after conception; the fetus is thus something more than inert matter. The rules of property and of tort have come increasingly to recognize its rights. While we are a long way from saying that such decisions compel the legislature to extend to the fetus the same protection against destruction that it does after birth, it would be incongruous . . . for us to hold that a legislature went beyond constitutional bounds in protecting the fetus, as New York has done, save when its continued existence endangered the life of the mother."

He continued, "We would not wish our refusal to declare New York's abortion law unconstitutional as in any way approving or 'legitimizing' it. The arguments for repeal are strong; those for substantial modification are stronger still. . . . But the decision what to do about abortion is for the elected representatives of the people, not for three, or even nine, appointed judges."

Judge Friendly then predicted the issues that would arise if a court ruled the other way, issues that have plagued the Supreme Court ever since it did just that three years later in *Roe v. Wade*. For each of his points, I could drop a footnote citing one or more of the dozens of Supreme Court decisions that came after *Roe*.

Judge Friendly mentioned a large range of what he called "policy choices" for revising state abortion laws, including danger to

the health of the mother,<sup>21</sup> conception by incest or rape,<sup>22</sup> and probable abnormality of the child.<sup>23</sup> "A legislature might," he said, decide to "permit abortions whenever the mother was below . . . a certain age,<sup>[24]</sup> whenever she was unmarried,<sup>[25]</sup> when the parents could establish inability to care for the child,<sup>[26]</sup> . . . etc. There is room also for considerable differences in procedures—how far to leave the decision to the physician performing the abortion, how far to require concurrence by other physicians<sup>[27]</sup> or, where appropriate, psychologists or social workers. One can also envision a more liberal regime in the early months of pregnancy and a more severe one in later months.<sup>[28]</sup> There is also opportunity for debate, both on ethical and on physiological grounds, as to what is early and what is late.<sup>[29]</sup> The legislature can make choices among these variants, observe the results, and act again as observation may dictate. Experience in one state may benefit others . . . . In contrast a court can only strike down a law, leaving a vacuum in its place. . . . [I]f we were to accept plaintiffs' argument based on *Griswold*, we would have to condemn any control of abortion, at least up to the uncertain point where the fetus is viable outside the womb. We find no basis for holding that by

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21. See, e.g., *Stenberg v. Carhart*, 530 U.S. 914, 930 (2000) (requiring a "health [of the mother] exception" to both pre- and post-viability abortion restrictions); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 879 (1992) (opinion of O'Connor, Kennedy, and Souter, JJ.).

22. See, e.g., *Dalton v. Little Rock Family Planning Servs.*, 516 U.S. 474, 474–75, 478 (1996) (per curiam) (enjoining enforcement of a state regulation that conflicted with federal law requiring "rape or incest" exception for expenditure of Medicaid funds for abortions).

23. See, e.g., *Stenberg*, 530 U.S. at 929 (citing utility of late-term abortion procedure for circumstances where significant abnormalities will render fetus nonviable).

24. See, e.g., *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 439–40 (1983) (holding unconstitutional an Ohio provision requiring parental consent for minors under age 15), *overruled in part by Casey*, 505 U.S. 833 (1992).

25. See, e.g., *H.L. v. Matheson*, 450 U.S. 398, 444 (1981) (Marshall, J., dissenting) (addressing statute that required parental notification for unmarried, but not married, minors).

26. See, e.g., *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 763–64 (1986) (holding unconstitutional a state law requiring mothers to be informed prior to receiving an abortion that the father is responsible for financial assistance), *overruled in part by Casey*, 505 U.S. 833 (1992).

27. See, e.g., *Doe v. Bolton*, 410 U.S. 179, 198–99 (1973) (holding unconstitutional a state requirement that two additional physicians concur in the performing physician's judgment regarding the decision to perform the abortion).

28. See, e.g., *Casey*, 505 U.S. at 870 (opinion of O'Connor, Kennedy, & Souter, JJ.) ("We conclude the line should be drawn at viability, so that before that time the woman has a right to choose to terminate her pregnancy.").

29. See, e.g., *id.* at 860, 873 (discussing how changes in technology have rendered the trimester framework obsolete).

ratifying the Fourteenth Amendment the states placed at risk of judicial condemnation statutes then so generally in effect and still not without a rational basis, however one may regard them from a policy standpoint."

Over the years, of course, the Supreme Court has treated each of these "policy choices" as if it were a matter of constitutional law. *Roe* left a "vacuum," to use Judge Friendly's word, and the Court had no other law to apply except three words in the Fourteenth Amendment: "due process" and "liberty."

Judge Friendly ended his draft with his view of the proper role of the federal judiciary: "An undertone of plaintiffs' argument is that legislative reform is hopeless, because of the determined opposition of one of the country's great religious faiths. Experience elsewhere, notably Hawaii's recent repeal of its abortion law,<sup>[30]</sup> would argue otherwise. But even if plaintiffs' premise were correct, the conclusion would not follow. The contest on this, as on other issues where there is determined opposition, must be fought out through the democratic process, not by utilizing the courts as a way of overcoming the opposition[,] . . . clearing the decks, [and] thereby enabl[ing] legislators to evade their proper responsibilities. Judicial assumption of any such role, however popular at the moment with many high-minded people, would ultimately bring the courts into the deserved disfavor to which they came dangerously near in the 1920's and 1930's. However we might feel as legislators, we simply cannot find in the vague contours of the Fourteenth Amendment anything to prohibit New York from doing what it has done here."

To this Judge Friendly appended a note to me, to be inserted in an appropriate point. It read: "If a woman has an absolute right to the destruction of a fetus, incapable of making a decision for itself, it would be hard to see why a man or woman does not have an absolute right to have his body destroyed. The discomfort of pregnancy and the pain of childbirth are surely not [more] than what often attends years of invalidism without hope of cure. The economic burden of an added child — readily avoidable if the parents wish — are not of the same order or magnitude as the costs of many 'terminal' illnesses, which may consume or exceed the savings of a lifetime and entail misery for a surviving spouse."

History is full of "what ifs." Over the years, Judge Friendly's opinions and writings have had a profound effect on many areas

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30. Act of March 11, 1970, ch. 1, sec. 2, 1970 Haw. Sess. Laws 1, 1 (codified at HAW. REV. STAT. § 453-16 (2004)).



of federal law. I have often wondered whether his New York abortion opinion, had it been published, might have made a decisive difference on the lower federal courts where abortion cases were pending and, ultimately, on the Supreme Court.<sup>31</sup> He too must have wondered. But he later said that he was happy that the New York case had been mooted by the state legislature, because that is where he thought the issue belonged.<sup>32</sup>

*Griswold v. Connecticut* has been much in the news lately, now that Supreme Court confirmation hearings are back, and I want to say a few more words about it. The author of the Court's opinion, Justice Douglas, denied that it rested on substantive due process.<sup>33</sup> Justice Douglas, a New Dealer, had a vivid memory of *Lochner* and the mischief it caused until the Court changed course in the late 1930s.<sup>34</sup> In the interim, the Court, relying on the *Lochner* analysis, had struck down nearly 200 state and federal laws.<sup>35</sup> Talk about super-precedents! And so Justice Douglas's opinion avoided due process and invoked instead the First, Third, Fourth, and Fifth Amendments, and penumbras and emanations from these provisions, from which he derived a constitutionally protected "zone of privacy."<sup>36</sup>

No one seriously supported the Connecticut law in *Griswold*. But there are many objections to *Griswold's* reasoning, and no one has made them more dispassionately, courageously, and powerfully than Judge Robert Bork.<sup>37</sup> I want to register my own objection to the *Griswold* technique.

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31. It is widely recognized that a later three-judge district court opinion from the Second Circuit, *Abele v. Markle*, 351 F. Supp. 224 (D. Conn. 1972), had a significant impact on the Supreme Court's deliberations in *Roe*. See, e.g., David J. Garrow, *Roe v. Wade Revisited*, 9 GREEN BAG 2D 71, 78-79 (2005). Judge Friendly was not on the panel.

32. In a 1970 address at NYU School of Law, Judge Friendly remarked, "How much better that the issue was settled by the legislature! I do not mean that everyone is happy . . . . But the result is acceptable in the sense that it was reached by the democratic process and thus will be accepted, even though many will not regard it as right." Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 385 n.81 (1985) (quoting Judge Friendly's 1970 unpublished remarks).

33. See 381 U.S. 479, 481-82 (1965).

34. See, e.g., *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

35. See Benjamin F. Wright, *The Growth of American Constitutional Law* 154 (1942); see also William B. Lockhart et al., *Constitutional Rights and Liberties* 60 (8th ed. 1996).

36. See *Griswold*, 381 U.S. at 484-85.

37. See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 95-100, 224-25, 257-58 (1990); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 7-11 (1971).

Justice Douglas approached the Bill of Rights as if he were a common law judge dealing with a series of judicial decisions. The common law judge analyzes past judicial decisions, considers the reasons behind the decisions, comes up with a principle to explain the cases, and then applies that principle to a new case. This does not work with the Bill of Rights, and it does not work with legislation. To illustrate, suppose I read the provisions of the Clean Air Act, which unfortunately I have to do on occasion. I decide that emanations from the Clean Air Act—I am tempted to say “emissions”—create a right to a pollution-free environment. And from then on I use this general right to a pollution-free environment to decide cases without regard to the language of the Clean Air Act. The *Griswold* technique is identical. Some may object that the Constitution is different from a statute. After all, as Chief Justice John Marshall wrote, “we must never forget, that it is a *constitution* we are expounding.”<sup>38</sup> Whenever someone took Marshall out of context like this, Alexander Bickel had a rejoinder: “We must never forget that it is a blank check we are expounding.”<sup>39</sup>

At least the *Griswold* Court, near the end of the opinion, tried to tie the right of privacy to a specific provision of the Constitution, the Fourth Amendment, when it asked, “Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives?”<sup>40</sup> It was this aspect of *Griswold* on which Judge Friendly focused in his draft. Judge Bork did the same in his confirmation hearings in 1987. Here is one small example of what Judge Bork endured:

[Judge BORK.] Nobody ever tried to enforce [the Connecticut] statute, but the police simply could not get into the bedroom without a warrant, and what magistrate is going to give the police a warrant to go in to search for signs of the use of contraceptives? I mean it is a wholly bizarre and imaginary case.

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The CHAIRMAN. If they had evidence that a crime was being committed—

Judge BORK. How are they going to get evidence that a couple is using contraceptives?

The CHAIRMAN. Wiretap.

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38. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

39. See Michael M. Uhlmann, *Hail to the Chief*, *Claremont Rev. of Books*, Fall 2002, at 17, 17 (reviewing R. Kent Newmyer, *John Marshall and the Heroic Age of the Supreme Court* (2002)).

40. 381 U.S. at 485.

Judge BORK. Wiretapping?

The CHAIRMAN. Wiretap.

Judge BORK. You mean to say that a magistrate is going to authorize a wiretap to find out if a couple is using contraceptives?

The CHAIRMAN. They could, could they not, under the law?

Judge BORK. Unbelievable, unbelievable.<sup>41</sup>

On January 22, 1973, the Supreme Court handed down *Roe v. Wade*,<sup>42</sup> fulfilling Roy Lucas's dream just five years after his law review article appeared. Needless to say, the Court's opinion did not even come close to measuring up to Judge Friendly's rough draft. The heart of the *Roe* opinion is easy — too easy — to summarize. The Court cited *Griswold*, listed various provisions of the Bill of Rights that were said to create zones of privacy, and then simply announced that the constitutional right of privacy was "broad enough to encompass" a right to an abortion.<sup>43</sup> And that was that. The next day, a front page article in the *New York Times* stated that the Supreme Court's decision marked the "historic resolution of" this "fiercely controversial issue."<sup>44</sup> I have yet to see a retraction.

*Roe v. Wade* was greeted with withering academic criticism, not only from those personally opposed to abortion, but also from those who thought abortion should be available. John Hart Ely's article in the 1973 *Yale Law Journal* was devastating. Ely concluded that *Roe* "is bad because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be."<sup>45</sup>

Since then, scarcely anyone has attempted to defend the *Roe* opinion. Archibald Cox, no opponent of abortion, doubted that any reformulated opinion could ever be written to support the Supreme Court's result.<sup>46</sup> Over the years, there have been many

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41. Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary, 100th Cong. 241 (1989) [hereinafter *Hearings*].

42. 410 U.S. 113 (1973).

43. *Id.* at 152–53.

44. Warren Weaver, Jr., *National Guidelines Set by 7-to-2 Vote*, N.Y. TIMES, Jan. 23, 1973, at A1.

45. John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 947 (1973).

46. Archibald Cox, *The Role of the Supreme Court in American Government* 113–14 (1976).

attempts. Harvard Professor Laurence Tribe has made several.<sup>47</sup> And just recently a book appeared entitled *What Roe v. Wade Should Have Said*.<sup>48</sup> The book contains mock opinions written by law professors. I have not read it yet.

Unlike *Griswold*, *Roe* explicitly embraced the concept of substantive due process to strike down the Texas abortion statute.<sup>49</sup> Substantive due process is the idea that the Due Process Clause of the Fourteenth Amendment protects rights even if they are not set out specifically in the Constitution.

The Due Process Clause states simply that “nor shall any State deprive any person of life, liberty, or property, without due process of law.”<sup>50</sup> Given the originalist theme of this conference, one must ask about the original meaning of these words. The Fourteenth Amendment Due Process Clause is identical to the Due Process Clause in the Fifth Amendment, applicable to the federal government.<sup>51</sup> Two current Justices—you may guess who they are—think the phrase “substantive due process” is an “oxymoron.”<sup>52</sup> Process means procedure, not substance, and that is what it meant historically. That the Due Process Clause ever came to apply to legislation, as it did for the first time in the infamous *Dred Scott* case,<sup>53</sup> is strange enough. What is the process due from a legislature? A quorum? An accurate vote count? There is something else I find quite odd about this concept. In many of the substantive due process cases, the Court has stated that “fundamental liberty interest[s]” are protected.<sup>54</sup> *Roe v. Wade* is an example.<sup>55</sup> Freedom of religion is, by all accounts, a fundamental liberty. Are we to suppose that freedom of religion is a right the state can take away so long as it does so with due process? That would be pro-

47. See, e.g., LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-10, at 1352-62 (2d ed. 1988); Laurence H. Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330, 335-40 (1985); Laurence H. Tribe, *The Supreme Court, 1972 Term—Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973).

48. *What Roe v. Wade Should Have Said: The Nation's Top Legal Experts Rewrite America's Most Controversial Decision* (Jack M. Balkin ed., 2005).

49. See 410 U.S. 113, 153 (1973).

50. U.S. CONST. amend. XIV, § 1.

51. Compare U.S. CONST. amend. XIV, § 1, with U.S. CONST. amend. V.

52. See, e.g., *United States v. Carlton*, 512 U.S. 26, 39 (1994) (Scalia, J., joined by Thomas, J., concurring in the judgment).

53. *Scott v. Sandford*, 60 U.S. (19 How.) 393, 450 (1857).

54. E.g., *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997); *Reno v. Flores*, 507 U.S. 292, 301-02 (1993).

55. See 410 U.S. 113, 152-53, 155 (1973).

protecting a civil right in one amendment, the First, only to allow it to be taken away through another.

The Framers were smart people; they could not have intended such an absurdity. And they did not. History shows that the meaning of “liberty” as used in the Fifth and Fourteenth Amendments is simply freedom from restraint, that is, imprisonment.<sup>56</sup> This explains why the Framers placed the Due Process Clause in the Fifth Amendment, which deals almost entirely with criminal proceedings. Learned Hand found the historical evidence supporting this interpretation clear beyond, in his words, any “reasonable doubt.”<sup>57</sup> Yet the chances of the Supreme Court going back to the original understanding are, I think, slim to none. As Judge Friendly anticipated before *Roe v. Wade*, and as many critics of the opinion have noted since, it is exceedingly difficult to see abortion as a right of *privacy*, even if such a right might be found in the Due Process Clause. Privacy deals with preserving seclusion, or with keeping personal information secret.<sup>58</sup> Although the Constitution does not use the term “privacy,” it is fair to say — as Judge Bork did in his hearings<sup>59</sup> — that portions of the First, Fourth, and Fifth Amendments deal in certain, specific ways with protecting seclusion and secrecy. This still leaves the question why abortion is a right of privacy. Among its many faults, the opinion in *Roe v. Wade* never even attempted to supply an answer.

Over the years, many people, lawyers and nonlawyers, have come around to Judge Friendly’s view that abortion is not about privacy. Only last month, Richard Cohen, a thoughtful *Washington Post* columnist who does not oppose abortion, wrote that “the very basis of the *Roe v. Wade* decision” now “strikes many people . . . as faintly ridiculous.”<sup>60</sup> He continued, “As a layman, it’s hard for me to raise profound constitutional objections to the decision.

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56. Charles E. Shattuck, The True Meaning of the Term “Liberty” in Those Clauses in the Federal and State Constitutions Which Protect “Life, Liberty, and Property,” 4 HARV. L. REV. 365, 373, 377, 382 (1891).

57. Learned Hand, *Due Process of Law and the Eight-Hour Day*, 21 HARV. L. REV. 495, 495 n.2 (1908) (citing Shattuck, *supra* note 56).

58. See, e.g., THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1396 (4th ed. 2000); 2 SHORTER OXFORD ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES 2350 (5th ed. 2002); Hyman Gross, *The Concept of Privacy*, 42 N.Y.U. L. REV. 34, 35–36 (1967).

59. See, e.g., *Hearings*, *supra* note 41, at 183, 241.

60. Richard Cohen, *Op-Ed.*, *Support Choice, Not Roe*, WASH. POST, Oct. 20, 2005, at A27.

But it is not hard to say it confounds our common-sense understanding of what privacy is."<sup>61</sup>

The Court itself may have entertained similar doubts. In cases after *Roe*, it did not suggest that the abortion procedure was itself private. Rather, the Court stressed that the privacy involved was a woman's private decision to have an abortion.<sup>62</sup> But this explanation could not hold. It was not the *decision* to have an abortion that was at stake in *Roe*. It was the carrying out of that decision. People make all kinds of decisions in private. One person may privately decide to rob a bank. Another may decide in private to smoke crack cocaine. Someone else may decide to commit suicide or to give a speech. That the decision is made in private says nothing about whether the person is exercising a constitutional right in carrying out the decision.

Maybe the Court realized as much. For whatever reason, the right of privacy, as first conceived in *Griswold*, no longer drives the Supreme Court in substantive due process cases, even in those involving abortion. In more than a decade, the Court has not decided a single case on the basis of a general right of privacy. Little appreciated, lost in the rhetoric of privacy, a transformation has occurred. *Griswold* and *Roe* have morphed.

*Griswold's* zone of privacy for married couples and *Roe's* right of privacy for women in matters of abortion have become everyone's right to do as he or she pleases so long as there is no harm to others. This is the principle of John Stuart Mill and Herbert Spencer, a principle Judge Friendly rejected, as had Justice Holmes in his *Lochner* dissent.

You would not know any of this from the Supreme Court confirmation hearing held last September, the first such hearing in eleven years. It was as if nothing had changed. The old questions were dusted off and asked again. Does the nominee believe the Fourteenth Amendment protects a right of privacy?<sup>63</sup> Was *Gris-*

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61. *Id.*

62. See, e.g., *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 772 (1986); *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 419, 428 n.10 (1983); *Bellotti v. Baird*, 443 U.S. 622, 639 (1979); *Maher v. Roe*, 432 U.S. 464, 471–72 (1977); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684–86 (1977); *Roe v. Wade*, 410 U.S. 113, 153 (1973); see also *Hodgson v. Minnesota*, 497 U.S. 417, 434 (1990) (opinion of Stevens, J.); *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 529 (1990) (Blackmun, J., dissenting); *H.L. v. Matheson*, 450 U.S. 398, 435 (1981) (Marshall, J., dissenting).

63. See, e.g., Confirmation Hearing On the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 186 (2005) (question of Sen. Joseph R. Biden).

would *v. Connecticut*, with its penumbras and zones of privacy, correctly decided?<sup>64</sup> Is a woman's right of privacy, as recognized in *Roe v. Wade*, "settled" law?<sup>65</sup> And so forth. Most of the commentary and the press releases and the sound bites about *Griswold* and *Roe* were along the same lines.

All of this missed the major transformation that started in the mid-1980s. A majority of the Court began framing the constitutional rights involved in *Roe* not simply in terms of a private decision but in terms of "individual dignity and autonomy."<sup>66</sup> *Planned Parenthood v. Casey*, handed down in 1992, was the watershed. The joint opinion of Justices O'Connor, Kennedy, and Souter described *Roe* as resting on a "rule (whether or not mistaken) of personal autonomy and bodily integrity."<sup>67</sup> The opinion repeated several other times that "personal dignity and autonomy" were "central to the liberty protected by the Fourteenth Amendment."<sup>68</sup> Justice Stevens, in a separate opinion, picked up on the theme. He reframed the majority opinion in *Roe* as one resting on "[d]ecisional autonomy."<sup>69</sup>

Some thought the 1997 decision in *Washington v. Glucksberg*,<sup>70</sup> rejecting a constitutional right to assisted suicide, put an end to the personal autonomy rationale. The Court rejected the idea that just because many of the rights protected under the Due Process Clause could be characterized as sounding in personal autonomy, "any and all important, intimate, and personal decisions are so protected."<sup>71</sup> Rather, any new due process right of this sort had to be firmly rooted in this country's history and traditions.<sup>72</sup> This at least gave the appearance—and the hope—that in the guise of due process, the Court was not simply making it up.

But two years ago the Court turned its face from *Glucksberg*. Texas had a law making homosexual sodomy a Class C misdemeanor—the equivalent of a traffic ticket—punishable by a fine

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64. See, e.g., *id.* at 207 (question of Sen. Herbert Kohl).

65. See, e.g., *id.* at 145–46 (question of Sen. Arlen Specter, Chairman, S. Comm. on the Judiciary).

66. *Thornburgh*, 476 U.S. at 772, *overruled in part by* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

67. *Casey*, 505 U.S. at 857.

68. *Id.* at 851, 857, 860–61.

69. *Id.* at 916 (Stevens, J., concurring in part and dissenting in part).

70. 521 U.S. 702 (1997).

71. *Id.* at 727.

72. *Id.* at 720–21.

only.<sup>73</sup> The Supreme Court's opinion in *Lawrence v. Texas*<sup>74</sup> held that the Texas law violated the Due Process Clause. The Court therefore overruled *Bowers v. Hardwick*,<sup>75</sup> thus adding to the long list of cases the Supreme Court has overruled. *Lawrence* not only tossed out the analytical framework of *Glucksberg*, it contradicted a host of other precedents dealing with the States' police power, precedents dating back to the 1800s.<sup>76</sup> (The Congressional Research Service, by the way, reports that through the October 2003 Term, the Supreme Court has overruled 324 of its past decisions, in whole or in part.<sup>77</sup>) So much for stare decisis.

Without mentioning *Glucksberg* or any of the Court's state police power cases, the *Lawrence* majority created a new constitutional right to engage in homosexual sodomy, at least if this were not done in a public square. Autonomy was back. *Lawrence* is full of rhetoric having only a remote connection to the facts of the case<sup>78</sup> and no clear connection to anything in the Constitution. In addition to quoting the autonomy language of *Casey*,<sup>79</sup> the *Lawrence* Court said this: "Liberty presumes an autonomy of self . . . . [and t]he instant case involves liberty of the person both in its spatial and in its more transcendent dimensions."<sup>80</sup>

The law schools greeted the *Lawrence* decision with cheers. Among the professors, there were only a handful of detractors, the most notable being Nelson Lund and John McGinnis. In their *Michigan Law Review* article,<sup>81</sup> Lund and McGinnis did for *Lawrence v. Texas* what John Hart Ely had done for *Roe v. Wade*. Professor Tribe once again offered an alternative basis for decision. In

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73. See TEX. PENAL CODE ANN. § 12.23 (Vernon 1994) (punishment for Class C misdemeanor). Compare TEX. PENAL CODE ANN. § 21.06 (Vernon 1994) (homosexual conduct) with TEX. TRANSP. CODE ANN. § 542.301(b) (Vernon 1999) (traffic offenses).

74. 539 U.S. 558 (2003).

75. 478 U.S. 186 (1986).

76. See *infra* note 96.

77. See Cong. Research Serv., *The Constitution of the United States of America: Analysis and Interpretation*, S. Doc. No. 108-17, at 2387-99 (2d Sess. 2004); Cong. Research Serv., *The Constitution of the United States of America: Analysis and Interpretation—2004 Supplement*, S. Doc. No. 108-19, at 63 (2d Sess. 2004).

78. Compare 539 U.S. at 567 ("When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring."), with Dale Carpenter, *The Unknown Past of Lawrence v. Texas*, 102 MICH. L. REV. 1464, 1475-1519 (2004) (detailing the facts of the case and describing them as "only dimly lit in the opinion itself").

79. *Lawrence*, 539 U.S. at 574 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

80. *Id.* at 562.

81. Nelson Lund & John O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, 102 MICH. L. REV. 1555 (2004).



the *Harvard Law Review*, he proposed putting *Lawrence* on First Amendment grounds. After all, he wrote, the First Amendment protects the right to “peacabl[e] [sic] . . . assembl[y],” and “those terms [should be taken] in their most capacious sense” to include the right to engage in homosexual sodomy.<sup>82</sup> He then explained:

For what are speech and the peaceful commingling of separate selves but facets of the eternal quest for such boundary-crossing—for exchanging emotions, values, and ideas both expressible in words and wordless in the search for something larger than, and different from, the merely additive, utility-aggregating collection of separate selves?<sup>83</sup>

Got it?

The actual *Lawrence* opinion confirms Judge Friendly’s insight into the true nature of controversies of this sort. The “general rule,” the *Lawrence* Court wrote, is “against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person.”<sup>84</sup> This is John Stuart Mill writ large. The Court repeated the same theme throughout its opinion, emphasizing that the case did not “involve persons who might be injured or coerced,”<sup>85</sup> a statement nicely blending Mill’s no-harm-to-others principle with Herbert Spencer’s *Social Statics*. The Court also cited with approval the Model Penal Code, which opposed punishing “private conduct not harmful to others.”<sup>86</sup> No matter that the Model Penal Code was a call for legislation and did not purport to represent an interpretation of the Constitution.

Judge Friendly wrote in his draft that the Fourteenth Amendment did not enact Mill’s *On Liberty*. *Lawrence v. Texas* ruled otherwise. Supreme Court decisions command compliance; they do not command agreement, and on this question, I side with Henry Friendly. Consider the historical evidence. Mill, writing in 1859, talked of Mormons in Utah practicing polygamy, and discussed why, by his lights, they were entitled to do so.<sup>87</sup> Congress did not agree. Congress refused Utah statehood because it allowed po-

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82. Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1939–40 (2004) (internal quotation marks omitted; alterations in original).

83. *Id.* at 1940.

84. 539 U.S. at 567.

85. *Id.* at 578.

86. *Id.* at 572 (citing MODEL PENAL CODE § 213.2 cmt. 2 (1980) and MODEL PENAL CODE cmt. 277–80 (Tentative Draft No. 4, 1955)).

87. MILL, *supra* note 20, at 153–55.

lygamy.<sup>88</sup> In 1862, only a short time before sending the Fourteenth Amendment to the States for ratification,<sup>89</sup> Congress passed a law outlawing polygamy in the Territories.<sup>90</sup> To suppose that the Fourteenth Amendment incorporated Mill's principle, one would have to believe that at the same time Congress was telling Utah to abolish polygamy, it was sponsoring an amendment that would make any such state law unconstitutional. To quote a famous American, "Unbelievable, unbelievable."

At one time, the Supreme Court did not believe it either. *Paris Adult Theatre I v. Slaton*<sup>91</sup> cited Mill and then expressly rejected his harm principle as basis for deciding a constitutional issue. The Court held that the Constitution did not incorporate "the proposition that conduct involving consenting adults only is always beyond state regulation,"<sup>92</sup> thus echoing Holmes's *Lochner* dissent. What was the response to this precedent in *Lawrence*? Silence. The Court did not even cite the case.

Among the Court's failings in *Lawrence* was its inability to see, or if it saw, to admit, the many problems Mill's principle raises. What kind of harm to others should be recognized? Why should a legislature be forbidden from legislating on the basis of morality? Is that even possible? Judge Friendly, in a portion of his draft opinion that I condensed, mentioned the debate on Mill's theory in the 1950s between Lord Devlin and H.L.A. Hart in England, a debate triggered by the Wolfenden Report on homosexual sodomy. The *Lawrence* Court invoked the Wolfenden Report,<sup>93</sup> which urged Parliament—not the courts—to enact reforms.

When Mill talked about the absence of harm to others, and when the Supreme Court did the same in *Lawrence*, who exactly are the "others" they have in mind? The Court assumes that the "others" are only those living now. But what of the unborn and the generations that will follow us? They will be affected by the society we leave behind. I know of no principled reason to exclude them from consideration, even if Mill's principle reflected constitutional law. And neither did Judge Friendly. You may re-

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88. See Eric Biber, The Price of Admission: Causes, Effects, and Patterns of Conditions Imposed on States Entering the Union, 46 AM. J. LEGAL HIST. 119, 150–62 (2004) (discussing the history of Utah's statehood).

89. H.R.J. Res. 48, 39th Cong., 14 Stat. 358 (1866).

90. Act of July 1, 1862, ch. 126, 12 Stat. 501; see *Reynolds v. United States*, 98 U.S. 145, 168 (1878).

91. 413 U.S. 49 (1973).

92. *Id.* at 68.

93. *Lawrence v. Texas*, 539 U.S. 558, 572–73 (2003).

call that after stating the Mill principle, the Judge confronted it on its own terms. He wrote that even if the harm principle were constitutional law, the State had made a rational judgment in treating the fetus as an "other" worthy of protection. On Judge Friendly's reasoning, *Lawrence*, by aligning itself with Mill, has therefore undermined the foundation of *Roe v. Wade*—a supreme irony.

Mill's principle, and the Court's adoption of it, moves in the direction of radical autonomy. Some on the left, and some libertarians, welcome this. The *Lawrence* Court denied that it was imposing its own moral code.<sup>94</sup> But autonomy is itself a moral value and it is one that tends to crowd out other values. As Gaylin and Jennings point out in their book *The Perversion of Autonomy*, "Autonomy now preempts civility, altruism, paternalism, beneficence, community, mutual aid, and other moral values that essentially tell a person to set aside his own interests in favor of the interests of other people"<sup>95</sup> or the good of the community.

If I were a legislator, I might well go along with Mill and Spencer—sometimes. Mill believed that his theory would allow not only polygamy, but also prostitution and some group activities among consenting adults, which I will not go into. I might vote for repealing sodomy laws, but not the laws against these other activities. Legislators do not have to be logically consistent in their votes. Nor do they have to extend their dictates to their logical conclusions. It is another matter entirely for the Supreme Court to make the Mill-Spencer philosophy a tenet of constitutional law, which is exactly the point of Holmes's dissent in *Lochner*.

The *Lawrence* Court never even acknowledged its countless decisions, dating back to the 1800s, which held that a State's power to regulate—its police power—extended not only to the health, safety, and welfare of its citizens, but also to matters of morality.<sup>96</sup>

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94. *Id.* at 571 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850 (1992)).

95. Willard Gaylin & Bruce Jennings, *The Perversion of Autonomy: The Proper Uses of Coercion and Constraints in a Liberal Society* 58 (1996).

96. *See, e.g.*, *Penn Cent. Transp. Co. v. N.Y. City*, 438 U.S. 104, 125, 129 (1978); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942); *Samuels v. McCurdy*, 267 U.S. 188, 198 (1925); *Crane v. Campbell*, 245 U.S. 304, 307–08 (1917); *Hoke v. United States*, 227 U.S. 308, 322 (1913); *Cosmopolitan Club v. Virginia*, 208 U.S. 378, 384 (1908); *Cronin v. Adams*, 192 U.S. 108, 115 (1904); *Lottery Case*, 188 U.S. 321, 356–57 (1903); *Austin v. Tennessee*, 179 U.S. 343, 348 (1900); *L'Hote v. City of New Orleans*, 177 U.S. 587, 596 (1900); *Scott v. Donald*, 165 U.S. 58, 91 (1897); *In re Rahrer*, 140 U.S. 545, 558, 564–65 (1891); *Crowley v. Christensen*, 137 U.S. 86, 91 (1890); *Powell v. Pennsylvania*, 127 U.S. 678, 683 (1888); *Mugler v. Kansas*, 123 U.S. 623, 662–63 (1887); *Thurlow v. Massachusetts*, 46 U.S. (5 How.) 504, 592 (1847); *see also Powell*, 127 U.S. at 683 ("[T]he Four-

Even *Lochner* recognized this.<sup>97</sup> Yet the *Lawrence* Court, ignoring this huge body of precedent, declared: “[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice . . . .”<sup>98</sup> This is a shocker, or should have been. No one can safely predict what the Court will do with its earlier decisions upholding state laws against polygamy and bigamy;<sup>99</sup> against prostitution;<sup>100</sup> against adultery;<sup>101</sup> against gambling<sup>102</sup> and alcohol use;<sup>103</sup> against obscenity.<sup>104</sup> “The law,” the Court wrote in *Bowers*, “is constantly based on notions of morality.”<sup>105</sup> And indeed it is. How else to explain not only the laws just mentioned and those cited in Judge Friendly’s draft, but statutes prohibiting bestiality, voluntary self-mutilation, dueling, sadism, assisted suicide, bear-baiting, cockfighting, cruelty even to your own animals in your own home, and so forth?

Justice Scalia wrote a powerful dissent.<sup>106</sup> The *Lawrence* majority responded by ignoring the dissent, a practice which, unfortunately, is becoming more common.

In the three years since *Lawrence*, the Supreme Court has not cited the case, even once. The high Court has a distinct advantage. It can control its docket. After an upheaval, it can take a breather. But the lower courts, state and federal, have no such luxury. They—we—must grapple with what the Supreme Court has handed us. Throughout the country, in case after case, *Lawrence* and the reformulated *Griswold* and *Roe* are now being used in efforts to strike down a vast array of laws, some with deep historical roots. *Lawrence* is invoked in suits seeking to force states to recognize homosexual marriage.<sup>107</sup> It is used as a defense to ob-

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teenth Amendment was not designed to interfere with the exercise of [the police] power by the States.”).

97. *Lochner v. New York*, 198 U.S. 45, 53 (1905).

98. 539 U.S. at 577 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

99. *Davis v. Beason*, 133 U.S. 333, 344–45 (1890).

100. *Caminetti v. United States*, 242 U.S. 470, 484–87, 491–92 (1917).

101. *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964).

102. *Lottery Case*, 188 U.S. 321, 355–56 (1903); see also *Douglas v. Kentucky*, 168 U.S. 488 (1897); *Stone v. Mississippi*, 101 U.S. 814 (1879); *Ex parte Jackson*, 96 U.S. 727 (1877); *Phalen v. Virginia*, 49 U.S. (8 How.) 163 (1850).

103. *Samuels v. McCurdy*, 267 U.S. 188, 197–99 (1925).

104. *Miller v. California*, 413 U.S. 15, 23–24 (1973).

105. 478 U.S. 186, 196 (1986).

106. *Lawrence v. Texas*, 539 U.S. 558, 586–605 (2003) (Scalia, J., dissenting).

107. See, e.g., *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 959 (Mass. 2003).

scenity prosecutions<sup>108</sup> and to attack laws against pedophilia;<sup>109</sup> adoption of children by homosexuals;<sup>110</sup> prostitution;<sup>111</sup> polygamy;<sup>112</sup> sex offender registration;<sup>113</sup> statutory rape;<sup>114</sup> and the military's "Don't Ask, Don't Tell" policy.<sup>115</sup> A note in the *Harvard Law Review* plausibly relies on *Lawrence* to argue that there is a constitutional right to use marijuana for medicinal purposes.<sup>116</sup> And a law professor has written a lengthy article using *Lawrence* to claim that laws outlawing consensual sex between a teacher and student in a state university are invalid under the Due Process Clause.<sup>117</sup> Most of these efforts have not been successful—yet. But where it will all lead is anyone's guess.

The joint opinion in *Casey*, in a sentence the *Lawrence* majority adopted, stated, "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."<sup>118</sup> Judge Bork had this comment:

This is not an argument but a Sixties oration. It has no discernible intellectual content; it does not even tell us why the right to define one's own concept of "meaning" includes a right to abortion or homosexual sodomy but not a right to incest, prostitution, embezzlement, or anything else a person might regard as central to his dignity and autonomy.<sup>119</sup>

The Court's talk about the mystery of life brings to my mind the three great questions: Who am I? Why am I here? Where am I

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108. See, e.g., *United States v. Extreme Assocs., Inc.*, 431 F.3d 150, 161–62 (3d Cir. 2005).

109. See, e.g., *State v. Lowe*, No. 2004CA00292, 2005 WL 1983964, at \*2 (Ohio Ct. App. Aug. 15, 2005), *appeal docketed*, No. 2005-1843 (Ohio Jan. 25, 2006).

110. See, e.g., *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 815 (11th Cir. 2004).

111. See, e.g., *People v. Williams*, 811 N.E.2d 1197, 1199 (Ill. App. Ct. 2004), *appeal denied*, 823 N.E.2d 977 (Ill. 2004).

112. See, e.g., *Bronson v. Swensen*, 394 F. Supp. 2d 1329, 1333 (D. Utah 2005).

113. See, e.g., *In re W.M.*, 851 A.2d 431, 449 (D.C. 2004), *cert. denied sub nom. W.M. v. Court Servs. Offender Supervision Agency*, 543 U.S. 1062 (2005).

114. See, e.g., *State v. Clark*, 588 S.E.2d 66, 68–69 (N.C. Ct. App. 2003).

115. See, e.g., *Burt v. Rumsfeld*, 354 F. Supp. 2d 156, 189 (D. Conn. 2005).

116. Note, *Last Resorts and Fundamental Rights: The Substantive Due Process Implications of Prohibitions on Medical Marijuana*, 118 HARV. L. REV. 1985, 2002–04 (2005).

117. Paul M. Secunda, *Lawrence's Quintessential Millian Moment and its Impact on the Doctrine of Unconstitutional Conditions*, 50 VILL. L. REV. 117 (2005).

118. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (opinion of O'Connor, Kennedy, Souter, JJ.), *quoted in Lawrence v. Texas*, 539 U.S. 558, 574 (2003).

119. Robert H. Bork, *Introduction to "A COUNTRY I DO NOT RECOGNIZE": THE LEGAL ASSAULT ON AMERICAN VALUES*, at ix, xviii (Robert H. Bork ed., 2005).

going? All courts, the Supreme Court included, need to ask themselves the same questions.

## APPENDIX

JUDGE HENRY J. FRIENDLY'S DRAFT OPINION IN  
*Hall v. Lefkowitz*\*

Plaintiffs' strongest argument rests on an attempted extrapolation of *Griswold v. Connecticut*, \_\_\_ U.S. \_\_\_ (\_\_\_), which recognized a protected area of privacy into which the state cannot enter.

At first sight the *Griswold* decision would not seem to afford even a slender foundation for the plaintiffs' superstructure. The Connecticut statute there held invalid was the most offensive form of anti-contraception legislation possible; it banned the *use* of contraceptive devices. To be sure it was scarcely likely that, as suggested in Mr. Justice Douglas' opinion, \_\_\_ U.S. at \_\_\_, the state would seek to enforce the statute by spying the marital couch—a method which, apart from weightier considerations of human dignity, would be of scant effectiveness with respect to methods of contraception now in general use. Acquisition of contraceptives would evidence an intention to use them, and repeated acquisition the actuality. Still such proof by the state would require the defendant to testify with respect to conduct which the Court regarded as so private as to lie beyond government's right to inquire. Even that position enlisted the support of only \_\_\_ of the Justices, and these differed widely as to the rationale.

A holding that the privacy of sexual intercourse is protected against governmental intrusion scarcely carries as a corollary that when this has resulted in conception, government may not forbid destruction of the fetus. The type of abortion the plaintiffs particularly wish to protect against governmental sanction is the antithesis of privacy. The woman consents to intervention in the uterus by a physician, with the usual retinue of assistants, nurses, and other paramedical personnel, indeed the condition calling for such intervention may very likely have been established by clinical tests. While *Griswold* may well mean that the state cannot compel a woman to submit to an abortion, but see *Buck v. Bell* \_\_\_ U.S. \_\_\_ (\_\_\_), it is exceedingly hard to read it as supporting a conclusion that the state may not prohibit other persons from committing one or even her doing so herself.

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\* The first two footnotes below are original to Judge Friendly's draft. Footnotes three through seven are bracketed to indicate that I inserted them to provide additional explanation.

Plaintiffs say that to confine *Griswold* to the protection of marital privacy is to read the case too narrowly. They regard it as having established a principle that a person has a constitutionally protected right to do as he pleases with his—in this instance, her—own body so long as no harm is done to others.

Apart from our inability to find all this in *Griswold*, the principle would have a disturbing sweep. Seemingly it would invalidate a great variety of criminal statutes which existed generally when the 14th Amendment was adopted and the validity of which has long been assumed, whatever debate there has been about their wisdom. Examples are statutes against attempted suicide, homosexual conduct (at least when this is between consenting unmarried adults), bestiality, and drunkenness unaccompanied by threatened breach of the peace. Much legislation against the use of drugs might also come under the ban.

Plaintiffs' position is quite reminiscent of the famous statement of J. S. Mill. This has given rise to a spirited debate in England in recent years.<sup>1</sup> We are not required to umpire that dispute, which concerns what a legislature should do—not what it may do. \_\_\_\_\_ years ago, when courts with considerable freedom struck down statutes that they strongly disapproved, Mr. Justice Holmes declared in a celebrated dissent that the Fourteenth Amendment did not enact Herbert Spencer's Social Statics. No more did it enact J. S. Mill's views on the proper limits of law-making.

One would have to be insensitive indeed not to be deeply moved by the evidence the plaintiffs have presented. Testimony is scarcely needed to understand the hardship to a woman who is carrying and ultimately bearing an unwanted child under the best of circumstances. The evidence shows how far circumstances often are from the best. It stressed the plight of the unmarried mother, the problems of poverty, fear of abnormality of the child, the horror of conception resulting from incest or rape. These and other factors may transform a hardship into austere tragedy. Yet, even if we were to take plaintiffs' legal position that the legislature cannot constitutionally interfere with a woman's right to do as she will with her own body so long as no harm is done to others, the argument does not support the conclusion plaintiffs would have us draw from it. For we cannot say the New York legislature lacked a rational basis for considering that abortion

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1. Lord Devlin has been the leading antagonist of Mill's position and Professor H. L. A. Hart the chief protagonist. [Include discussion of how the gap has been narrowed.]



causes such harm. Even if we should put aside the interests of the father, negligible indeed in the many cases when he has abandoned the prospective mother but not in all, the legislature could permissibly consider the fetus itself to deserve protection. Historically such concern may have rested on theological grounds, and there was much discussion concerning when "animation" occurred. We shall not take part in that debate or attempt to determine just when a fetus becomes a "human being". It is enough that the legislature was not required to accept plaintiffs' demeaning characterizations of it. Modern biology instructs that the genetic code that will dictate the entire future of the fetus is formed as early as the \_\_\_ day after conception; the fetus is thus something more than inert matter. The rules of property and of tort have come increasingly to recognize its rights. While we are a long way from saying that such decisions compel the legislature to extend to the fetus the same protection against destruction that it does after birth, it would be incongruous in their face for us to hold that a legislature went beyond constitutional bounds in protecting the fetus, as New York has done, save when its continued existence endangered the life of the mother.<sup>2</sup>

We would not wish our refusal to declare New York's abortion law unconstitutional as in any way approving or "legitimizing" it. The arguments for repeal are strong; those for substantial modification are stronger still. Apart from the humanitarian considerations to the prospective mother that we have outlined, the state's interest with respect to abortion would seem very much less in an era when the birth rate constitutes perhaps the most serious single danger to society than when a young nation needed people for its development.<sup>[3]</sup> But the decision what to do about

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2. The exception is of long standing. Catholic theologians rationalized it on the basis that in such cases the destruction of the fetus was only an "indirect" consequence of an effort to preserve the mother's life. Later discussions have characterized the fetus in this instance as "aggressor" that may properly be killed by analogy to the privilege of self-defense.

[3.] In 1968 a Stanford biologist published a book that caused a sensation. The author predicted "a *minimum* of ten million people, most of them children, will starve to death during each year of the 1970s" and that "this is a mere handful compared to the numbers that will be starving before the end of the century." PAUL R. EHRLICH, *THE POPULATION BOMB* 3 (rev. ed. 1971). Dr. Ehrlich's thesis was that the earth's inhabitants were multiplying at a much faster rate than the world's ability to supply food. The book became a best-seller and Dr. Ehrlich became a celebrity. He was widely quoted and made frequent appearances on television. Hence, one finds in the opening paragraphs of *Roe v. Wade*, 410 U.S. 113, 116 (1973), a statement about the problem of population growth.

abortion is for the elected representatives of the people, not for three, or even nine, appointed judges.

Policy choices with respect to abortion are not limited to drastic prohibition like New York's on the one hand or complete freedom on the other. One variant is a liberalization of grounds. Here there are subvariants. The proposal in the American Law Institute's Model Penal Code, which includes danger not only to the life but to the health of the mother, conception as a result of incest or rape, and probable abnormality of the child, is the best-known example. A legislature might decide to enlarge upon this list. It might permit abortions whenever the mother was below (or above) a certain age, whenever she was unmarried, when the parents could establish inability to care for the child, when there were already more than a certain number of children in the household, etc. There is room also for considerable differences in procedures—how far to leave the decision to the physician performing the abortion, how far to require concurrence by other physicians or, where appropriate, psychologists or social workers. One can also envision a more liberal regime in the early months of pregnancy and a more severe one in later months. There is also opportunity for debate, both on ethical and on physiological grounds, as to what is early and what is late. The legislature can make choices among these variants, observe the results, and act again as observation may dictate. Experience in one state may benefit others; this is conspicuously an area for application of Mr. Justice Brandeis' view that the Fourteenth Amendment should not be so utilized as to prevent experimentation in the laboratories of the several states. In contrast a court can only strike down a law, leaving a vacuum in its place. To be sure, when it does this, it may sometimes be able to indicate how the legislature may remodel the statute to conform it to constitutional requirements. [Cite instances, e.g., FELA, obscenity, wiretapping]. But if we were to accept plaintiffs' argument based on *Griswold*, we would have to condemn any control of abortion, at least up to the uncertain point where the fetus is viable outside the womb. We find no basis for holding that by ratifying the Fourteenth Amendment the states placed at risk of judicial condemnation statutes then so generally in effect and still not without a rational basis, however one may regard them from a policy standpoint.

An undertone of plaintiffs' argument is that legislative reform is hopeless, because of the determined opposition of one of the country's great religious faiths. Experience elsewhere, notably Hawaii's recent repeal of its abortion law, would argue otherwise.

But even if plaintiffs' premise were correct, the conclusion would not follow. The contest on this, as on other issues where there is determined opposition, must be fought out through the democratic process, not by utilizing the courts as a way of overcoming the opposition of what plaintiffs assume but we cannot know to be a minority and thus clearing the decks, thereby enable legislators to evade their proper responsibilities. Judicial assumption of any such role, however popular at the moment with many high-minded people, would ultimately bring the courts into the deserved disfavor to which they came dangerously near in the 1920's and 1930's. However we might feel as legislators, we simply cannot find in the vague contours of the Fourteenth Amendment anything to prohibit New York from doing what it has done here.

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[Shortly after I received the foregoing draft, two handwritten notes from Judge Friendly arrived. The first read as follows:]

Re abortion case

If a woman has an absolute right to the destruction of a fetus, incapable of making a decision for itself, it would be hard to see why a man or woman does not have an absolute right to have his body destroyed. The discomfort of pregnancy and the pain of childbirth are surely not less than what often attends years of invalidism without hope of cure. The economic burden of an added child—readily avoidable if the parents wish—are not of the same order or magnitude as the costs of many "terminal" illnesses, which may consume or exceed the savings of a lifetime and entail misery for a surviving spouse.

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[The second note read as follows:]

A.R.R.—As a result of reading the first few pages of Bickel's book<sup>[4]</sup> today I think the discussion in the abortion case (being sent under separate cover) must include not simply *Griswold*, but cases like *Meyer v. Nebraska*,<sup>[5]</sup> *Pierce v. Society of Sis-*

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[4.] Alexander M. Bickel, *The Supreme Court and the Idea of Progress* (1970).

[5.] 262 U.S. 390 (1923). Justices Holmes and Sutherland simply noted their dissent. Justice Holmes did write a dissenting opinion but attached it to the companion case

ters,<sup>[6]</sup> and the right to travel cases.<sup>[7]</sup> But I would not consider the right to an abortion to be in the same category as the rights there recognized.

This is more of a reminder than anything else.

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of *Bartels v. Iowa*, 262 U.S. 404, 412 (1923). Oddly, most modern constitutional law casebooks include *Meyer* but omit Holmes's dissent in *Bartels*.

[6.] 268 U.S. 510 (1925).

[7.] See, e.g., *Shapiro v. Thompson*, 394 U.S. 618, 629–30 & n.8 (1969), and cases there cited.