

**BARBARA K. OLSON MEMORIAL LECTURE
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It is good to look out and see so many old friends. But one is missing.

This is for Barbara.

It is well-known that Henry J. Friendly was one of the greatest judges in our nation's history. 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*, 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 make this opinion public for the first time. I hope you will agree with me that Judge Friendly's draft of 35 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 15 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 share the opinion with you, I want to compare it with the Supreme Court's performance, from *Roe v. Wade* to *Lawrence v. Texas*.

Now for some history. In 1968, a few years after *Griswold v. Connecticut*, Roy Lucas, an assistant professor at the University of Alabama law school, wrote a law review article – “Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes.” In his article, Lucas acknowledged that legislative efforts to reform state abortion laws were making headway in states across the country. 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” to have the laws declared unconstitutional.

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 4 years he was involved in nearly every case around the country challenging abortion laws, including finally *Roe v. Wade*.

Lucas chose to bring his first case in New York. 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. Henry Friendly was drawn as the court of appeals judge. I was his law clerk.

There were several evidentiary hearings and a mountain of pleadings. Judge Friendly’s customary practice was to discuss a 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. That of course is how it should have been.

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 longhand – a preliminary opinion and mailed it to chambers. The package arrived around the time President Nixon was nominating Harry Blackmun to the Supreme Court.

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.” 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. 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.

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. ____ (____), 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’ll 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. . . . We are not required to umpire 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* – to which Judge Friendly referred – Justice Holmes summarized Herbert Spencer’s idea. [This year, by the way, marks the 100th 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”

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 – “the 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.”

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 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 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, conception by incest or rape, and probable abnormality of the child. “A legislature might,” he said, decide to “permit abortions whenever the mother was below . . . a certain age, whenever she was unmarried, when the parents could establish inability to care for the child, . . . 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 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 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; the Court had no other law to apply except three words in 14th 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, 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 enabling 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:

“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 [more?] than what often attends years of invalidism without hope of cure. The economic burdens 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 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. He too must have wondered. But years later he 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.

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. Justice Douglas, a New Dealer, had a vivid memory of *Lochner* and the mischief it caused until the court changed course in the late 1930's. In the interim, the court, relying on the *Lochner* analysis – had struck down nearly 200 state and federal laws. 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.

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. I want to register my own objection to the *Griswold* technique.

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.” 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.”

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?”

It was this aspect of *Griswold* 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.”

* * *

SENATOR: “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?”

“SENATOR: Wiretap.

“JUDGE BORK: Wiretapping?

“SENATOR: 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?

“SENATOR: They could, could they not, under the law?

“JUDGE BORK: Unbelievable, unbelievable.”

On January 22, 1973, the Supreme Court handed down *Roe v. Wade*, fulfilling Roy Lucas’s dream just 5 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. And that was that. The next day, the front page headline in the New York Times read: “Supreme Court Settles Abortion Issue.” 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 law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be."

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. Over the years, there have been many attempts. Harvard Professor Laurence Tribe has made several. And just a few weeks ago a book appeared entitled "*What Roe v. Wade Should Have Said*." 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. Substantive due process is the idea that the Due Process Clause of the

14th 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.” Given the theme of this conference, one must ask about the original meaning of these words. The 14th Amendment due process clause is identical to the due process clause in the Fifth Amendment, applicable to the federal government. Two current Justices – you may guess who they are – think the phrase “substantive due process” is an oxymoron. 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, 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 liberties” are protected. *Roe v. Wade* is an example. 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 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 5th and 14th Amendments is simply freedom from restraint – that is, imprisonment. 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.” 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.

Although the Constitution does not use the term “privacy,” it is fair to say – as Judge Bork did in his hearings – that portions of First, Fourth Amendment 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 non-lawyers alike, have come around to Judge Friendly’s view that abortion is not about privacy. Only last month, Richard Cohen, a thoughtful columnist for the Washington Post who does not oppose abortion, wrote that the “very basis of” the *Roe* decision now “strikes many people as faintly ridiculous.” He continued: “As a layman, it’s hard for me to raise profound constitutional objections to the decision. But it is not hard to say it confounds our common-sense understanding of what privacy is.”

[Oct. 20, 2005 column]

The Court itself may have entertained similar doubts. In cases after *Roe*, a subtle change took place. The Court began stressing that the

privacy involved was a woman's "private decision" to have an abortion, with the Court often italicizing the word "decision." But this explanation could not hold for long. 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 *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 11 years. It was as if nothing had changed. The old questions were dusted off and asked again. Does the nominee believe the 14th Amendment protects a right of privacy? Was *Griswold v. Connecticut*, with its penumbras and zones of privacy, correctly decided? Is a woman's right of privacy, as recognized in *Roe v. Wade*, settled law? 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-1980's. The Court majority began framing the constitutional right involved in *Roe* not simply in terms of a private decision but in terms of "individual dignity and autonomy." *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” The opinion repeated several other times that “personal dignity and autonomy” were “central to the liberty protected by the Fourteenth Amendment” Justice Blackmun, in his concurring opinion, picked up on the theme. He re-framed his opinion in *Roe* as one resting on “decisional autonomy.”

Some thought the 1997 decision in *Washington v. Glucksberg*, the case 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.” Rather, any new Due Process right of this sort had to be firmly rooted in this country’s history and traditions. 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, a traffic ticket, punishable by a fine only. The Supreme Court's opinion in *Lawrence v. Texas* held that the Texas law violated the Due Process Clause. The Court therefore overruled *Bowers v. Hardwick*, 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 1800's. 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. So much for *stare decisis*.

Without mentioning *Glucksberg* or any of its state police power cases, *Lawrence* 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, and no clear connection to anything in the Constitution. After quoting the autonomy language of *Casey*, the

Lawrence Court said this: “Liberty presumes an autonomy of self” and the “instant case involves liberty of the person both in its spatial and in its more transcendent dimensions.”

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, 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 the Harvard Law Review, he proposed putting *Lawrence* on First Amendment grounds. After all, he wrote, the First Amendment protects the right to “peaceably assemble” – and “those terms [should be taken] in their most capacious sense” to include the right to engage in homosexual sodomy. 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?” 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 . . .” This is John Stuart Mill writ large. The Court repeated the same theme later in its opinion, emphasizing that the case did not “involve persons who might be injured or coerced” – 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.” 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 14th 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, discussed Mormons in Utah practicing polygamy, and why, according to his principle, they were entitled to do so. Congress did not agree. Congress refused Utah statehood because it allowed polygamy and in 1862, only a short time before sending the 14th Amendment to the States for ratification, Congress passed a law outlawing polygamy in the Territories. To suppose that the 14th 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*, an opinion for the Court by Chief Justice Burger, 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," 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 1950's 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, 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 recall 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. But autonomy is itself a moral value and it is one that tends to crowd out other values. As Jennings and Gaylin point out in their book *The Perversion of Autonomy*, "[a]utonomy 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" 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 1800's, 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. Even *Lochner* recognized this. Yet the *Lawrence* Court, ignoring this huge body of precedent, declared: “the 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 . . .” 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; against prostitution; against gambling and alcohol use; against obscenity. “The law,” the Court wrote in *Bowers*, “is constantly based on morality.” 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. The *Lawrence* majority responded by ignoring the dissent, a practice which – unfortunately – is becoming more common.

In the two 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. It is used as a defense to obscenity prosecutions; and to attack laws against pedophilia; adoption of children by homosexuals; prostitution; polygamy; sex offender registration; statutory rape; and the military's don't-ask-don't-tell policy. 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. 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. Most of these efforts have not been successful – yet. But where it will lead is anyone's guess.

The joint opinion in *Casey*, in a sentence the majority opinion in *Lawrence* adopted, wrote: “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.”

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.”

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 going?

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

Judge Randolph's remarks, along with the complete text of Judge Friendly's draft opinion, will be published in the Harvard Journal of Law & Public Policy, Vol. 29, No. 3 (forthcoming June 2006).