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The Constitution and Personal Autonomy: The Lawyering Perspective

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THE CONSTITUTION AND PERSONAL AUTONOMY: THE LAWYERING PERSPECTIVE

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INTRODUCTION: THE LAWYERING PERSPECTIVE

I am very honored to have been invited to present the Fifth Annual Krinock Lecture. The topic of the lecture will be "*The Constitution and Personal Autonomy: The Lawyering Perspective.*" In the lecture, I will trace the development of the constitutional protection of personal autonomy through the decisions of the United States Supreme Court, going back to the 1920's,[1] through *Roe v. Wade*,[2] and ending up with the Court's 1992 abortion decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[3] I will conclude by relating the Court's holding and statement of the due process doctrine in *Casey* to the current constitutional challenge to Michigan's ban on "assisted suicide."

I will trace this development of the constitutional protection of personal autonomy from the perspective of the lawyer who is litigating these constitutional challenges. The perspective of the litigating lawyer involves framing particular kinds of constitutional challenges in light of existing constitutional doctrine and its capacity for extension. Constitutional cases do not just "happen," as one might think if one were to look only at the cases that have been decided by the Supreme Court as they appear in constitutional law casebooks and are discussed in academic commentary. There are reasons why particular kinds of constitutional cases are brought at particular times, and more importantly, why particular kinds of constitutional challenges are asserted on the basis of particular constitutional provisions rather than on the basis of others. Thus, this lecture will emphasize the lawyer's role in constitutional litigation and will examine how the way in which a particular kind of constitutional question is litigated may shape the ultimate result

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* A.B., 1956; J.D., 1959, University of Pittsburgh. Professor of Law, Wayne State University. As the introduction indicates, this article is an expanded version of the Fifth Annual Krinock Lecture that it was my privilege to deliver at the Thomas M. Cooley Law School on November 23, 1993.

[To preserve the flavor of the original lecture, only minor modifications have been made by the editors. *Ed.*]

1. Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1925).

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

3. 112 S. Ct. 2791 (1992).

and the development of constitutional doctrine.

I am both an academic commentator and a constitutional litigator. Throughout my career, I have combined scholarly research with constitutional litigation, mostly as a volunteer attorney for the American Civil Liberties Union (ACLU), and I have tried to bring the lawyering perspective to my writing and teaching. In the area of constitutional protection of personal autonomy, I litigated the "Kentucky version" of *Roe v. Wade*,[4] when I was on the law faculty of the University of Kentucky, as well as the "Kentucky version" of the "round two abortion litigation,"[5] reflected in the Supreme Court's decision in *Planned Parenthood of Central Missouri v. Danforth*.[6] In Michigan, I have been one of the attorneys in the ACLU challenges to the ban on Medicaid funding for abortion[7] and the parental consent law.[8] I litigated what turned out to be an inconclusive challenge to the ban on surrogate parenting,[9] and I am currently a part of the ACLU legal team challenging Michigan's ban on "assisted suicide."[10]

Because of my litigation involvement in the area of constitutional protection of personal autonomy, my discussion of the development of constitutional law in this area will admittedly lack the purported impartial and dispassionate perspective of the pure legal scholar. But I believe that there is an existential as well as an objective component to legal analysis, and that participation and involvement might thus yield insights that detached observation

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4. 410 U.S. 113 (1973); Crossen v. Attorney Gen., 344 F. Supp. 587 (E.D. Ky. 1972), *vacated*, 410 U.S. 950 (1973).

5. Wolfe v. Schroering, 388 F. Supp. 631 (W.D. Ky. 1974), *aff'd in part, rev'd in part*, 541 F.2d 523 (6th Cir. 1976).

6. 428 U.S. 52 (1976).

7. Doe v. Department of Social Serv., 487 N.W.2d 166 (Mich. 1992).

8. Planned Parenthood of Mid-Michigan, Inc. v. Attorney Gen., No. D 91-0571 AZ (Kalamazoo Cir. Ct. Mar. 29, 1993).

9. *See* Doe v. Attorney Gen., 487 N.W.2d 484 (Mich. Ct. App. 1992). The Court of Appeals held that the surrogate parenting arrangement that we claimed was constitutionally protected was not prohibited by the then existing statute. The statute was amended during the course of the litigation, and for various reasons the constitutional challenge was not pursued subsequently.

10. Hobbins v. Attorney Gen., No. 164963 (filed but not decided).

[Since the time of the speech this case has been decided by the court of appeals. *See* 518 N.W.2d 487 (Mich. Ct. App.), *stay denied sub nom.* People v. Kevorkian, 519 N.W.2d 890 (Mich.), *amended*, 519 N.W.2d 898 (Mich.), *appeal granted*, 521 N.W.2d 4 (Mich. 1994). *Ed.*]

In a 2-1 decision, the Michigan Court of Appeals held that the enactment of the law violated Article 4, section 24 of the Michigan Constitution. However, lining up differently, the court also held 2-1, that the law did not violate substantive due process. The Michigan Supreme Court granted leave to appeal on both issues. The case was argued before that Court on October 4, 1994, and at that time this article went to press, the case is awaiting decision.

could not possibly supply.[11] In any event, this lecture will relate the lawyering perspective to the development of the line of growth of constitutional doctrine in the area of personal autonomy.[12]

Like all other areas of law, constitutional law develops in a line of growth. The Supreme Court's decisions in prior cases serve as precedents for the resolution of future cases presenting the same or similar issues. The doctrine that the Court promulgates in these cases and the rationale for its decisions are applicable in future cases, where that doctrine and rationale can be extended or limited. The meaning of a constitutional provision thus develops incrementally over a period of time, and the line of growth of that constitutional provision strongly influences its application in particular cases.[13]

For the litigating lawyer, the "stuff of constitutional litigation" is the Supreme Court's precedents and the constitutional doctrine that has been promulgated by the Court in prior cases. In deciding whether or not to assert a constitutional challenge to a particular law or governmental action, and in deciding on the basis of that challenge, the lawyer must look to the precedents and doctrine. This examination of precedents and doctrine will determine the viability of a particular constitutional challenge and the basis on which that challenge should be made. Any limitation on governmental power designed to protect individual rights, such as those associated with personal autonomy, must be found in the text or internal inferences of the Constitution, and the lawyer must make a decision as to which constitutional provision or provisions the

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11. I have previously approached legal questions from the dual perspectives of an academic commentator and a litigating lawyer. *See, e.g.*, Robert A. Sedler, *The Unconstitutionality of Campus Bans on "Racist Speech:" The View from Without and Within*, 53 U. PITT. L. REV. 631 (1992); Robert A. Sedler, *The Summary Contempt Power and the Constitution: The View From Without and Within*, 51 N.Y.U. L. REV. 34 (1976); Robert A. Sedler, *Metropolitan Desegregation in the Wake of* Milliken - *On Losing Big Battles and Winning Small Wars: The View Largely from Within*, 1975 WASH. U. L.Q. 535 (1975); Robert A. Sedler, *The Procedural Defense in Selective Service Prosecutions: The View from Without and Within*, 56 IOWA L. REV. 1121 (1971).

12. It is especially appropriate that this lecture analyzing constitutional protection of personal autonomy from the lawyering perspective be presented at the Thomas M. Cooley Law School. This law school, unlike most any other, approaches legal education from the lawyering perspective and attempts to integrate the development of lawyering skills into the law school curriculum. The curriculum of this law school "focuse[s] as much on practical application of the law as academic mastery," and like the English Inns of Court, the law school is designed to "function as an educational arm of the legal profession." Its stated mission "is to prepare its students for entry into the legal profession through an integrated program with practical legal scholarship as its guiding principle and focus." THOMAS M. COOLEY LAW SCHOOL CATALOG 6 (1994).

13. *See generally* Terrance Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1054 (1981) (discussing the development of constitutional doctrine in a line of growth). *See also* Robert A. Sedler, *The Legitimacy Debate in Constitutional Adjudication: An Assessment and a Different Perspective*, 44 OHIO ST. L.J. 93, 118-20 (1983).

lawyer will rely upon in asserting the particular challenge. Sometimes, the challenge may be asserted on a number of constitutional grounds, sometimes only on one.

The objective of a lawyer in a constitutional case is to *win* the particular case. In constitutional litigation, as in professional football, the lawyer may take guidance from the oft-quoted words of famous Green Bay Packers' coach Vince Lombardi: "Winning isn't everything; it's the only thing." Since the lawyer's objective is to win the particular case and not to "make" constitutional law that will cover an array of future cases that have not yet arisen and may never arise, the lawyer should keep in mind the principle of constitutional adjudication that the Court will not decide a case "in broader terms than are required by the precise facts to which the ruling is to be applied."[14] The lawyer's objective then is to invalidate the particular law or governmental action that is being challenged, and to leave for another day any challenge to a new law or governmental action that may be enacted or taken in response to that invalidation.

THE DEVELOPMENT OF THE CONSTITUTIONAL PROTECTION OF PERSONAL AUTONOMY

With this introduction, let us now trace the development of constitutional protection of personal autonomy from the lawyer's perspective. We begin with two cases from the 1920's, *Meyer v. Nebraska*,[15] and *Pierce v. Society of Sisters*.[16] In 1919, in the wake of the anti-German hysteria of World War I, Nebraska passed a law prohibiting the teaching of schoolchildren in any language other than English and the teaching of any foreign language at all to elementary schoolchildren. The law was directed at the teaching of German in the Lutheran parochial schools. Meyer, a teacher in a Lutheran parochial school, was prosecuted under the law for teaching the children in German. Put yourself in the place of Meyer's lawyer contemplating a constitutional challenge to the law. It is obvious today that this law violates the First Amendment. The problem for you as Meyer's lawyer, however, is that in 1919, there was no First Amendment law for you to use. The Court had not yet held that the First Amendment was incorporated into the Fourteenth Amendment's due process clause, so as to be binding on the states,[17] and in any event, in the few World War I cases

14. Rescue Army v. Municipal Court, 331 U.S. 549, 569 (1947).

15. 262 U.S. 390 (1923).

16. 268 U.S. 510 (1925).

17. In *Gitlow v. New York*, the Court assumed for the first time that the First Amendment was incorporated into the Fourteenth Amendment's due process clause. 268 U.S. 652,

asserting First Amendment challenges to the "sedition-type" prosecutions against opponents of the war, the First Amendment challenge had been singularly unsuccessful.[18] So, you are not going to use the First Amendment.

When you look to Supreme Court precedents and doctrine, what is it that you see? The answer is that you see *Lochner*,[19] and the line of cases where the Court used substantive due process to invalidate federal and state economic regulation.[20] We generally are very critical of the Court for its use of substantive due process in the *Lochner* era to protect the so-called "economic freedom" of business enterprises, and are pleased that the Court has now completely repudiated its *Lochner* era use of substantive due process for this purpose.[21] What is sometimes forgotten, however, is that during the *Lochner* era the Court was also using substantive due process as the textual basis for invalidating governmental action interfering with personal autonomy. During this time, there was an all-inclusive theory holding that *all* liberties, personal as well as economic, were inviolable.[22] Thus, Meyer's lawyer argued that the ban on teaching a foreign language to schoolchildren was violative of substantive due process, and the Court agreed. In a ringing opinion by Justice McReynolds - who is not exactly a favorite of liberal commentators - the Court gave a broad definition to the meaning of "liberty," which encompassed personal as well as economic freedom. As Justice McReynolds explained:

> Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience and generally to enjoy

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666 (1925).

18. *See, e.g.*, Schenck v. United States, 249 U.S. 47 (1919); Debs v. United States, 249 U.S. 211 (1919).

19. Lochner v. New York, 198 U.S. 45 (1905).

20. *See, e.g.*, Adams v. Tanner, 244 U.S. 590 (1917) (banning private employment agencies from accepting fees from workers placed by the agencies); Coppage v. Kansas, 236 U.S. 1 (1915) (forbidding discrimination by employers for union activity); Adair v. United States, 208 U.S. 161 (1908) (forbidding discrimination by employers for union activity and also forbidding employers from requiring employees to sign "yellow dog" agreements not to join a union).

21. *See* Nebbia v. New York, 291 U.S. 502 (1934) (upholding a regulation of retail milk prices). See the discussion in *Ferguson v. Skrupa*, where the Court, in rejecting a due process challenge to a law that prohibited all but lawyers from engaging in the business of debt adjusting, stated: "Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation. . . . The doctrine that prevailed in *Lochner, Coppage, Adkins, Burns* and like cases . . . has long since been discarded." Ferguson v. Skrupa, 372 U.S. 726, 729-30 (1963).

22. *See* Ira C. Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981, 1029-30 (1979).

> those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[23]

Under this definition of liberty, the right of Meyer to teach German and the right of parents to engage him so to instruct their children "are within the liberty of the [Fourteenth] Amendment."[24] Since none of the interests that the state asserted were found to be a legitimate restriction on this liberty, the law was held to violate the liberty rights of the teacher and the parents.[25]

In 1922, the Oregon polity adopted an initiative law requiring all parents to enroll their children only in public schools. This law was challenged by private and parochial schools. Today, this law would be held to violate the First Amendment's guarantees of freedom of speech and association, and as regards the prohibition of attendance at parochial schools, the First Amendment's guarantee of free exercise of religion as well. But this was 1922, and the First Amendment had not yet been held to apply to the states. So, there was no First Amendment that the lawyers for the private and parochial schools could use to challenge this law.[26] But there was the precedent of *Meyer v. Nebraska*. In the first place, *Meyer* had held that the teacher could assert the constitutional rights of the parents who wanted to have their children taught a foreign language.[27] Thus, under the authority of *Meyer*, the schools could assert the constitutional rights of the parents who wanted to have their children taught in private and parochial schools. And likewise, under the authority of *Meyer*, the law was violative of substantive due process, because, it "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."[28] As Justice McReynolds, again writing for the Court, went on to say: "The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[29]

In *Griswold v. Connecticut*,[30] which we shall discuss subsequently, Justice Douglas, who strongly objected to the use of substantive due process as the doctrinal basis for the constitutional protection of personal autonomy, tried to explain *Pierce* and *Meyer* as First Amendment cases, but they were not decided as

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23. Meyer v. Nebraska, 262 U.S. 390, 399 (1923).
24. *Id.* at 400.
25. *Id.* at 401-03.
26. Gitlow v. New York, 268 U.S. 652, 666 (1925).
27. *Meyer*, 262 U.S. at 400.
28. Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925).
29. *Id.* at 535.
30. 381 U.S. 479, 482 (1965).

First Amendment cases; they were decided as substantive due process cases. They are cases that are about parenting, cases that recognize the *right to parent* as a fundamental right, and that affirm the right of parents to "direct and control the upbringing of their children."

With these cases as precedents, I now want to explore further the meaning of the constitutional right to parent. The status of parent belongs to those who have gestated a child, and the biological father of a child born out of marriage, once he is identified, likewise has rights and obligations with respect to the child that he has gestated.[31] Once parental rights have come into being, they can only be terminated by clear and convincing evidence of parental unfitness.[32] When parental rights have been terminated under this exacting standard, however, the parent becomes a legal stranger to the child, and the child can be adopted by new parents, who then have the full panoply of parental rights and obligations. As a constitutional matter, as *Meyer* and *Pierce* make clear, the right to parent includes the right to custody and control over the child. A child can be removed from the parents' custody by the state only for abuse or neglect, and must be returned whenever it is established that the parents will no longer be abusive or neglectful.

Today, we are hearing a lot about children's rights. However, whenever the state acts to give children rights against their parents, the state is constrained by the constitutional guarantee of parents' rights. The state may authorize a child to bring a termination of parental rights action against the child's parents by a next friend. This is the meaning of a suit by a child to "divorce the parents." The parents' rights are adequately protected by the constitutional requirement that their parental rights can only be terminated upon clear and convincing evidence of parental unfitness. What the state cannot constitutionally do, however, is to remove a child from the custody of parents, *who have not been determined to be unfit by clear and convincing evidence*, on the ground that a judge concludes that the "best interests of the child" will be served by giving someone else custody.[33]

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31. Caban v. Mohammed, 441 U.S. 380 (1979); Stanley v. Illinois, 405 U.S. 645, 651 (1972).

32. Santosky v. Kramer, 455 U.S. 745 (1982).

33. *See, e.g.*, *In re* Baby Girl Clausen, 502 N.W.2d 649 (Mich. 1993) (Baby Jessica case) (holding that the Michigan court must recognize the decree of the Iowa court which denied the petition for adoption of the child and ordered the return of child to biological father). It was argued that the "best interests of the child" would be served by giving custody to the DeBoers, the Michigan couple who had sought to adopt the child and who had temporary custody of the child for over two years, instead of to Dan Schmidt, her biological father. Michigan courts, of course, are bound to recognize decrees from Iowa courts under the full faith and credit clause. But what about the Iowa court? The answer is that the Iowa

The point is that under *Meyer* and *Pierce*, the right to parent includes the right to custody and control of the child. So long as parental rights have not been terminated on the basis of clear and convincing evidence of parental unfitness, the child cannot be removed from the custody of the parent on the ground that the judge has concluded that it is in the "best interests of the child" to be in someone else's custody.[34]

Returning now to our consideration of the development of constitutional protection of personal autonomy, we next consider *Skinner v. Oklahoma*,[35] decided in 1942. The State of Oklahoma, ostensibly in the misplaced belief that criminal tendencies were an inheritable trait - or perhaps simply to sterilize the poor people and racial minorities who had been convicted of committing "common crimes," - provided for the compulsory sterilization of persons who had been convicted of and sentenced to imprisonment for three felonies "involving moral turpitude." The law exempted "white collar" crimes, such as embezzlement, political offenses, and tax law violations, from the required sterilization. Skinner had been convicted and imprisoned once for stealing chickens and twice for robbery, and so was subject to the required sterilization.

In 1928, in the little-noticed case of *Buck v. Bell*,[36] the Court had upheld against due process challenge a state law providing for the compulsory sterilization of mentally retarded persons confined in state institutions, so that they could be released to the outside world without the ability to procreate. The Court held that the legislature could accept the then current - and now completely discredited - eugenics view that mental retardation was inheritable, with Justice Holmes' famous aphorism, "[t]hree generations of

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court could not constitutionally give custody of the child to the DeBoers. Once the Iowa judge found that Dan Schmidt was the biological father and had not voluntarily terminated parental rights, the Iowa judge was constitutionally compelled to deny the DeBoers' petition for adoption, and since Schmidt had not yet had the opportunity to parent the child, the judge could not find by clear and convincing evidence that he was an unfit parent. Unfortunately, the judge let the DeBoers retain physical custody of the child pending the completion of the appeal process. Once that process came to an end, the child had to be removed from the custody of the DeBoers and returned to the custody of her father, regardless of whether or not the judge thought that this was in the child's "best interests."

34. A recent case from Grand Rapids, Michigan, where the child had lived with another family for a long time, the lawyer bringing the case on behalf of the child litigated it effectively by concentrating on parental unfitness. Once the judge found parental unfitness, the judge could at a minimum, remove the child from parental custody and then put the child in the custody of the family with whom she had been living. But the judge also could terminate parental rights, which would permit the child to be adopted by the family with whom she had been living. Duong v. Hong, 478 N.W.2d 922 (Mich. Ct. App. 1991), *appeal granted*, Duong v. Hong, 479 N.W.2d 698 (Mich.), *rev'd sub nom.* Bowie v. Arder, 490 N.W.2d 568 (Mich. 1992).

35. 316 U.S. 535 (1942).

36. 274 U.S. 200 (1927).

imbeciles are enough."[37]

Skinner's lawyer had to deal with the *Buck v. Bell* precedent, and did so by launching a two-fold attack on the compulsory sterilization requirement. First, he argued that it violated due process because scientific knowledge had now shown that criminal tendencies were not inheritable. The same scientific knowledge had also shown that mental retardation was not inheritable, which would completely undercut the premises of *Buck v. Bell*. Second, he argued that the law violated equal protection because of the exemption for "white collar crime." Applying the principle that constitutional cases should be decided on the narrowest possible ground,[38] Justice Douglas, writing for the Court, based the decision on the equal protection argument. The classification between "white collar crime" and other crimes, said Douglas, violated equal protection, because it "lays an unequal hand on those who have committed intrinsically the same quality of offense, and sterilizes one and not the other," as illustrated by the distinction between embezzlement and larceny.[39]

At this time, however, the Court was generally not disposed to sustain equal protection challenges. And it had also completely overturned the substantive due process doctrine of the *Lochner* era in the area of economic regulation. Douglas thus found it necessary to justify a higher level of scrutiny for the equal protection challenge in the present case, which he did by saying that the compulsory sterilization requirement implicated the fundamental rights of marriage and procreation (which at that time were assumed to go together; only married persons were supposed to be procreating). Douglas referred to marriage and procreation as involving "one of the basic civil rights of man" and "fundamental to the very existence and survival of the [human] race."[40] It was thus possible for the Court, under this analysis, to protect Skinner from being sterilized without overruling *Buck v. Bell*, without reviving substantive due process, and without calling into question the effect of its prior decisions generally rejecting equal protection challenges to legislative classifications.

Regardless of what may have motivated the *Skinner* court to decide the case the way it did and to promulgate the "fundamental rights" doctrine of that case, *Skinner* stands as a very important precedent in regard to constitutional protection of personal autonomy. Marriage is recognized as a fundamental right. Procreation is

37. *Id.* at 207.
38. Rescue Army v. Municipal Court, 331 U.S. 549, 568-73 (1947).
39. *Skinner*, 316 U.S. at 541.
40. *Id.*

also recognized as a fundamental right. And while the Court had not yet specifically articulated a two-tier standard of review for due process and equal protection challenges, *Skinner* clearly does stand for the proposition that laws interfering with marriage and procreation are subject to a higher degree of scrutiny than, let us say, laws dealing with economic regulation.

There were no further developments in the area of constitutional protection of personal autonomy until *Griswold v. Connecticut* [41] came before the Court in 1965. This case involved a challenge to a nineteenth-century Connecticut law that prohibited the use of contraceptives by all persons, including presumably by married persons. In a test case of the law's constitutionality, a physician and the executive director of Connecticut Planned Parenthood were prosecuted as accessories to a violation of the law for giving medical advice about the use of contraceptives to a married couple. The plaintiffs' lawyers in *Griswold* drew on *Meyers*, *Pierce*, and *Skinner* in developing their constitutional challenge.

First, as the teachers and schools in *Meyers* and *Pierce* were able to assert the constitutional rights of the parents, the physician in *Griswold* was able to assert the rights of his patients, and the executive director of Planned Parenthood the rights of her clients.[42] Second, drawing on *Meyers* and *Pierce*, their primary constitutional challenge was based on substantive due process, more particularly on the "right of privacy" that they argued was a part of the "liberty" protected by substantive due process. Third, relying on *Skinner*, they argued that the ban on contraceptive use by married persons interfered with the fundamental right of married persons to engage in intimate marital relationships without risking pregnancy - in essence that the right to procreate also included the right to avoid procreation.

The Court held the ban unconstitutional as violating the married couple's constitutional "right of privacy." However, only two of the seven Justices comprising the majority, Harlan and White, explicitly found this "right of privacy" to inhere in substantive due process.[43] The Court, it will be recalled, was coming off a "bad trip" with substantive due process in the *Lochner* era, and the majority of the Justices were unwilling to revive substantive due process in the area of personal autonomy while the Court was interring it completely in the area of economic regulation. Douglas, writing the Court's opinion, found this "right of privacy" in the "penumbras" of specific constitutional provisions that reflected

41. 381 U.S. 479 (1965).

42. *Id.* at 481.

43. *Id.* at 499-502 (Harlan, J., concurring); *id.* at 502-06 (White, J., concurring).

"privacy" values, such as the First, Third, Fourth and Fifth Amendments.[44] Goldberg, Warren and Brennan found it in the Ninth Amendment,[45] which had never before been invoked as a limitation on governmental power. All agreed, however, that marriage and what we would now call reproductive freedom were within the "zone of privacy" protected by the newly found constitutional "right of privacy," and all agreed that Connecticut's ban on the use of contraceptives by married persons violated the constitutional "right of privacy."

There has been much academic debate about *Griswold* and the proper source of the constitutional "right of privacy."[46] In *Roe v. Wade*,[47] the Court simply said that the "right of privacy" was "founded in the Fourteenth Amendment's concept of personal liberty," thereby in effect adopting the Harlan-White due process position in *Griswold*. Doctrinally then, *Griswold* is linked to *Meyer* and *Pierce*, and the Fourteenth Amendment's due process clause is indisputably the source of constitutional protection of personal autonomy.

From the lawyer's standpoint, of course, the academic debate about the proper source of the constitutional "right of privacy" at the time of *Griswold* was completely irrelevant. *Griswold* had recognized a constitutional "right of privacy," and in the wake of *Griswold*, lawyers could and did use this constitutional "right of privacy" to challenge the constitutionality of the anti-abortion laws that existed in virtually all of the states at this time. More about this shortly.

In many ways, *Griswold* was more a case about marriage than about reproductive freedom. In speaking of marriage, Justice Douglas stated:

> We deal with a right of privacy older than the Bill of Rights. . . . Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.[48]

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44. *Id.* at 484-85.

45. *Id.* at 486-99 (Goldberg, J., concurring).

46. *See, e.g.*, Robert G. Dixon, Jr., *The "New" Substantive Due Process and the Democratic Ethic: A Prolegomenon*, 1976 B.Y.U. L. REV. 43 (1976); Ira G. Lupu, *supra*, note 22 at 981; Michael J. Perry, *Abortion, the Public Morals, and the Police Power: The Ethical Function of Substantive Due Process*, 23 UCLA L. REV. 689 (1976); Richard Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 SUP. CT. REV. 173 (1979).

47. 410 U.S. 113, 153 (1973).

48. *Griswold*, 381 U.S. at 486.

I now want to follow the marriage component of *Griswold* through its application in subsequent cases. Because marriage is a fundamental right, any restrictions or burdens on marriage are subject to exacting scrutiny under the compelling governmental interest standard of review. Thus, a ban on marriage between persons of different races, while held in *Loving v. Virginia*[49] to violate the Fourteenth Amendment's equal protection clause as amounting to invidious racial discrimination, was also held to violate Fourteenth Amendment due process as an improper interference with the freedom to marry. In the 1978 case of *Zablocki v. Redhail*,[50] the Court struck down on equal protection grounds (and in the view of some Justices on due process grounds as well) a state law prohibiting the remarriage of a divorced parent under a duty of support to a child unless the parent could show that he was in compliance with the existing court order, and that the child was not likely to become a public charge. The restriction could not satisfy the compelling governmental interest standard, both because it imposed too heavy a burden on the right to marry, and because it would not be effective in ensuring the support of the child. In addition, there were less onerous means of enforcing the parent's support obligations, such as wage assignment and civil and criminal sanctions against the parent. As Justice Stewart put it: "[I]n regulating the intimate human relationship of marriage, there is a limit beyond which a State may not constitutionally go."[51] Because marriage is a fundamental right, the lawyer for a prison inmate was able to successfully challenge a prison regulation prohibiting an inmate from marrying without the permission of the prison authorities. It is irrelevant in this regard that the prison inmate and the spouse may not be able to engage in sexual relations as long as the inmate remains in confinement, since they can still enjoy the other incidents of marriage.[52] Likewise, since a person may be validly married to only one person at a time, the right to marry includes the right to divorce. Thus, a legal services lawyer was able to obtain a holding from the Court that a state is constitutionally required to permit an indigent person to bring a divorce proceeding without having to pay court fees.[53]

Going beyond marriage and parenting, the Court has held that the right to family relationships includes the relationships of the extended family. In *Moore v. City of East Cleveland*,[54] decided in

49. 388 U.S. 1 (1967).
50. 434 U.S. 374 (1978).
51. *Id.* at 392 (Stewart, J., concurring).
52. Turner v. Safley, 482 U.S. 78 (1987).
53. Boddie v. Connecticut, 401 U.S. 371 (1971).
54. 431 U.S. 494 (1977).

1977, the Court was faced with a city zoning ordinance that had defined "single family" in such a way as to preclude a grandmother from sharing a household with her two grandchildren who were cousins rather than siblings. The Court had previously upheld a zoning law that prohibited more than two unrelated persons from living in the same household. But this case involved family, and so Mrs. Moore's lawyer was able to invoke the compelling governmental interest standard of review. The Court struck down the zoning law. As Justice Powell, writing for the Court stated:

> Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. . . .
>
> Ours is by no means a tradition limited to respect for the . . . nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children [especially in times of adversity] has roots equally venerable and equally deserving of constitutional recognition. . . .
>
> . . .[T]he Constitution prevents East Cleveland from standardizing its children - and its adults - by forcing all to live in certain narrowly defined family patterns.[55]

We see then that the Constitution protects marriage and family relationships as a fundamental right. People have a right to marry, parents have a right to parent their children, and members of the extended family have a right to live together. These rights are protected by the Fourteenth Amendment's due process clause, and the line of growth of constitutional protection of this element of personal autonomy traces back to the *Meyer* and *Pierce* decisions of the 1920's.

THE CONSTITUTION AND REPRODUCTIVE FREEDOM

We now turn to the reproductive freedom element of personal autonomy. As we said earlier, *Griswold* armed lawyers with a constitutional basis for challenging the anti-abortion laws that were in effect in virtually all of the states at that time. If it had not been for the Court's explicit recognition of a constitutional "right of privacy" in *Griswold*, such a constitutional basis for challenge simply would not have existed at that time. These cases were filed in the late 1960's, and in 1973, two of these cases reached the Supreme Court. *Roe v. Wade*[56] involved a challenge to the strict anti-abortion law in effect in Texas and thirty-five other states at that time, which allowed an abortion only to save the life of the mother. *Doe*

55. *Id.* at 503-04, 506 (citations omitted).
56. 410 U.S. 113 (1973).

v. Bolton[57] involved a challenge to Georgia's "liberalized" abortion law of the kind in effect in about a dozen states that allowed abortion in some limited circumstances, such as where the pregnancy threatened the woman's health, the fetus would likely be born with a serious defect, or the pregnancy was the result of rape.

The year before the Court decided *Roe* and *Doe*, it had decided another case, *Eisenstadt v. Baird*,[58] which clearly separated the right of reproductive freedom from the right of marriage. Following *Griswold*, Massachusetts amended its anti-contraception law to allow married couples to have access to contraception when prescribed by a physician. Baird, a non-physician and an advocate of contraceptive use, was prosecuted for a violation of the law when, during a speech about contraceptive use, he gave a can of vaginal foam to an unmarried woman. Baird's lawyer argued successfully that Baird, as an advocate for the use of contraception by unmarried persons, could assert the reproductive freedom rights of unmarried persons.[59] The Court then held that, as a matter of equal protection, unmarried persons must have the same access to contraception as married persons, because a ban on contraception interfered with their right to reproductive freedom. The Court emphasized that the "right of privacy," recognized in *Griswold*, was an individual right, not a right of the married couple, and stated that, "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[60] The Court rejected the state's asserted justification that the law was a legitimate means of deterring unmarried persons from having "illicit" sex, saying that this was not the purpose of the law, but indicating that if it was, it would be an impermissible means of advancing that objective because of its interference with reproductive freedom.[61] In effect, the Court held that the state could not constitutionally "prescribe pregnancy and the birth of an unwanted child as punishment for fornication," which already was made a criminal offense in Massachusetts. In other words, the state is constitutionally required to advance its interest in deterring "illicit sex" by "less drastic means" - means that do not directly interfere with reproductive freedom - such as by punishing persons for violation of the criminal prohibition against "illicit sex."

As we will see, the Court subsequently has held that sexual

57. 410 U.S. 179 (1973).
58. 405 U.S. 438 (1972).
59. *Id.* at 445-46.
60. *Id.* at 453.
61. *Id.* at 447-50.

freedom is not a fundamental right, and so has upheld the constitutionality of state laws prohibiting unmarried persons from engaging in sexual relations.[62] It may seem anomalous that the state can constitutionally prohibit unmarried persons from engaging in sexual relations, but that it cannot constitutionally prohibit them from using contraception while engaging in the illegal sexual relations. But in terms of the constitutional doctrine relating to the protection of personal autonomy, this result is not anomalous. Under this constitutional doctrine, reproductive freedom has the status of a fundamental right, while sexual freedom does not, so the "less drastic means" aspect of the compelling governmental interest test renders the prohibition on contraception an impermissible means of advancing the state's otherwise valid interest in deterring "illicit sex."

Eisenstadt v. Baird then turns out to be a very important case in the development of the line of growth of constitutional doctrine applicable to the protection of reproductive freedom. As pointed out above, it separates reproductive freedom from marriage, which were linked together in *Griswold* as they were in *Skinner*. It also makes it clear that all persons, married or unmarried, have the same right to reproductive freedom. Finally, it makes it clear, as the Court affirmed in *Roe v. Wade*, that reproductive freedom is a fundamental right, so that any interference with reproductive freedom must be tested under the exacting compelling governmental interest standard of review.

Let us now analyze *Roe v. Wade* and the companion case of *Doe v. Bolton* from the perspective of the lawyers who were challenging and the lawyers who were defending the Texas and Georgia anti-abortion laws. The argument for the lawyers challenging the laws is obvious: reproductive freedom is a fundamental right - *Skinner*, *Griswold* and now *Eisenstadt* - and, as regards to the reproductive freedom of the pregnant woman, there is no logical difference between using contraception to prevent an unwanted pregnancy from occurring and having a medical abortion to undo an unwanted pregnancy that has occurred because contraception was not used or has failed. Thus, under the compelling governmental interest standard of review, since both the Texas and Georgia laws prevent a woman from exercising this fundamental right, they are unconstitutional.

At first glance, the task of the lawyers defending the anti-abortion laws may seem more difficult. They must justify the laws under the exacting compelling governmental interest standard of review, and they are faced with the precedents of *Skinner*, *Gris-*

62. Bowers v. Hardwick, 478 U.S. 186 (1986).

wold, and *Eisenstadt*. But they can rise to the occasion. Their argument goes along these lines. Fundamental rights are not absolute, and *this* interference with the fundamental right of reproductive freedom can be justified under the compelling governmental interest standard of review. In this case, unlike the situation in *Skinner*, *Griswold*, and *Eisenstadt*, where the particular interference with reproductive freedom could not be shown to be rationally related to the advancement of any legitimate governmental interest, the prohibition against abortion does indeed advance a compelling governmental interest, the protection of potential human life. It does not matter that a fetus is not a "person" within the meaning of the Fourteenth Amendment. In the great majority of cases, the pregnancy will not "spontaneously abort" - what we call a miscarriage - and so will result in a live birth. Since the state's interest in protecting potential human life from the moment of conception is a compelling interest, and since a prohibition against abortion is the only effective way - and thus the "least drastic means" of advancing that interest - the prohibition against abortion can be sustained under the exacting compelling governmental interest standard of review.

This is a *doctrinally valid* argument and could have been accepted by the Court in *Roe* and *Doe*. The Court could have distinguished *Skinner*, *Griswold*, and *Eisenstadt* on a constitutionally principled basis, that is, on a basis that was consistent with the line of growth of existing constitutional doctrine applicable to the protection of reproductive freedom. And, staying within the analytical framework of the compelling governmental interest standard, the Court could have held that the state's interest in protecting potential human life from the moment of conception was "compelling," and that the ban on abortion was the "least drastic means" of advancing that interest. The Court then, consistent with existing constitutional doctrine, could have upheld the constitutionality of the Texas and Georgia anti-abortion laws.

Instead, the Court, adopting a "stages of pregnancy" formulation, held that the state's interest in protecting potential human life did not become "compelling" until the stage of viability had been reached, so that the state could not constitutionally prohibit pre-viability abortions. After the stage of viability had been reached, the state could prohibit abortion except where the abortion was necessary to protect the life or health of the mother.[63] Since no post-viability abortion will be performed unless it is necessary to protect the woman's life or health (ninety percent of the abortions in this country are performed during the first ten weeks

63. Roe v. Wade, 410 U.S. 113, 162-65 (1973).

of pregnancy), the effect of *Roe v. Wade* was to make abortion "available on demand."

In holding that the state's interest in protecting potential human life was not "compelling" until the stage of viability had been reached, the Court was obviously engaging in *constitutional balancing*. It was making a value judgment about the *relative constitutional importance* of the woman's interest in reproductive freedom and the state's interest in protecting potential human life, and it made that value judgment in favor of the woman's reproductive freedom interest. This value judgment was obscured, perhaps deliberately, by the Court's invocation and application of the "stages of pregnancy" test. In writing the opinion for the Court, Justice Blackmun does not attempt to provide any articulated justification for the constitutional balancing that took place and in fact does not even acknowledge that the Court had engaged in such balancing and had extended the precedents and line of growth of constitutional doctrine applicable to the protection of reproductive freedom. He tries to make it appear that the "stages of pregnancy" formulation is the "analytically proper" method for determining the "compelling" nature of the asserted governmental interests to justify interference with the woman's right of reproductive freedom, and that the result that the Court obviously reached through constitutional balancing "logically followed" from the application of that formulation. In this sense, Justice Blackmun may be accused of doing a "judicial sleight of hand."

In the years following *Roe*, when Justice O'Connor came to the Court, she launched a sweeping attack on the structural unsoundness of the "stages of pregnancy" formulation,[64] and her views prevailed in *Casey*.[65] In that case, in a joint opinion authored by Justices O'Connor, Kennedy and Souter, and joined in by Justices Blackmun and Stevens in order to keep intact what the joint opinion called the "central holding" of *Roe*,[66] the Court replaced the "stages of pregnancy" formulation with an "undue burden" test. Under the "undue burden" test, the "central holding" of *Roe* relating to the "prohibition of abortion" is reaffirmed: the state may not prohibit abortions until the stage of viability has been reached.[67] The other holding of *Roe v. Wade* that we have not discussed - that the state may not regulate abortion at all during the

64. *See* Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 452-66 (1983) (O'Connor, J., dissenting) (beginning the attack in her dissenting opinion), *overruled in part by* Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992).

65. *Casey*, 112 S. Ct. 2791.

66. *Id.* at 2838-39 (Stevens, J., concurring in part, dissenting in part); *Id.* at 2843-50 (Blackmun, J., concurring in part, concurring in the judgment in part, dissenting in part).

67. *Id.* at 2810-17.

first semester and thereafter may only regulate where this is clearly necessary to protect maternal health - is in effect replaced by the "undue burden" test. This means that "harassing-type" regulations that were unconstitutional under *Roe* and cases after *Roe*, such as a twenty-four hour wait and "state required information" designed to discourage the woman from having the abortion,[68] are now constitutionally permissible. It is only where the regulation could actually prevent some women from having an abortion, such as a requirement of consent by the husband of a married woman or by the parents of a minor,[69] or a requirement of notification to the husband of a married woman,[70] that it amounts to an "undue burden," and so is unconstitutional.

The "regulation of abortion" cases that the Court decided between *Roe* and *Casey* are not central to our analysis of the constitutional protection of personal autonomy from the lawyer's perspective, and so will not be discussed at length in this lecture. However, I do want to say something about the lawyer's use of the now-discarded "stages of pregnancy" test of *Roe* and the "no discrimination against abortion" principle that also emerged from *Doe v. Bolton* in the years following those cases. Precisely because the Court had held that the state could not regulate abortion at all prior to the end of the first semester and thereafter could regulate the abortion procedure only to protect maternal health, any restrictions on abortion during the first trimester, and any restrictions on abortion that were not clearly related to the protection of maternal health, such as a twenty-four hour wait, could successfully be challenged on constitutional grounds. The "no discrimination against abortion" principle that emerged from *Doe v. Bolton*, also meant that any discrimination against abortion, such as the refusal to perform abortions at a public hospital and the denial of Medicaid funding for abortions for indigent women, could also be successfully challenged on constitutional grounds, and were invalidated in a number of lower court cases.

In *Maher v. Roe*,[71] however, decided in 1977, the Supreme Court "pulled the rug" under these challenges, and reversing all the lower court decisions that had relied on the "no discrimination against abortion" principle of *Doe v. Bolton*, held that this principle did not apply when the state was acting as dispenser of benefits

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68. *See* Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986), *overruled by Casey*, 112 S. Ct. 2791; *Akron*, 462 U.S. 416, *overruled by Casey*, 112 S. Ct. 2791.

69. Planned Parenthood v. Danforth, 428 U.S. 52, 67-75 (1976).

70. Planned Parenthood of Southeastern Pennsylvania v. Casey, 112 S. Ct. 2791, 2826-31 (1992) (holding this requirement unconstitutional).

71. 432 U.S. 464 (1977).

rather than as regulator. When the state was acting as dispenser of benefits, said the Court, it was not interfering with the woman's abortion decision, so the compelling governmental interest test did not apply. Rather, the rational basis test applied, and although the state did provide Medicaid funding for pregnancy-related cases, it could decide to advance the interest in protecting potential human life, and deny Medicaid funding for abortion. In effect, the Court now made the value judgment that when the state was acting as dispenser of benefits, the woman's interest in reproductive freedom was *not* constitutionally more important than the state's interest in advancing the protection of potential human life by subsidizing only pregnancy. From the standpoint of the lawyer seeking to protect a woman's reproductive freedom by asserting constitutional challenges to state laws that interfere with or burden that freedom, the decision is unfortunate. But since that lawyer must rely on the courts to protect reproductive freedom when the "political battle" has been lost in the legislature, after *Maher v. Roe* the lawyer can only say: "The Lord giveth and the Lord taketh away. Blessed be the name of the Lord."

The lawyer, however, still has another weapon at his or her disposal - the state constitution. All of the state constitutions have bill of rights provisions protecting individual rights against governmental actions, parallelling the guarantees of the federal Constitution, and sometimes going even further, such as a specific right of privacy guarantee. The state courts can, of course, interpret the guarantees of the state constitution more expansively than the United States Supreme Court has interpreted the parallel guarantees of the federal Constitution.[72] Following *Maher v. Roe*, challenges were brought to bans on Medicaid funding for abortion in some states under the state constitution, and some of these challenges were successful.[73] Unfortunately, from the standpoint of reproductive freedom and equality for indigent women in Michigan, the challenge to Michigan's ban on Medicaid funding for abortion was not.[74]

I now want to come back to the *Roe v. Wade* decision itself. The decision was a surprise, even to the most ardent advocate of a woman's right to reproductive freedom, because of its sweeping nature. The decision was inconsistent with the principle that a con-

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72. *See generally* Robert A. Sedler, *The State Constitutions and the Supplemental Protection of Individual Rights*, 16 U. TOL. L. REV. 465 (1985).

73. *See, e.g.*, Committee to Defend Reproductive Rights v. Myers, 625 P.2d 779 (Cal. 1981); Doe v. Maher, 515 A.2d 134 (Conn. Super. Ct. 1986); Moe v. Secretary of Administration & Finance, 417 N.E.2d 387 (Mass. 1981); Right to Choose v. Byrne, 450 A.2d 925 (N.J. 1982).

74. Doe v. Department of Social Serv., 487 N.W.2d 166 (Mich. 1992).

stitutional decision should not be rendered "in broader terms than are required by the precise facts to which the ruling is to be applied."[75] The lawyers who were asserting the constitutional challenges to state anti-abortion laws were only concerned about striking down the draconian Texas law in *Roe* that prohibited all abortions except where necessary to preserve the woman's life, and the still highly restrictive Georgia law in *Doe* that allowed abortion only in limited circumstances. And the focus of the challenge was on abortion prohibition rather than on abortion regulation. All that the Court had to decide in *Roe* and *Doe* was that these kinds of laws constituted an improper interference with a woman's fundamental right of reproductive freedom. Instead, the Court came down with a sweeping decision, invalidating all the anti-abortion laws then in existence, as well as any other law that would prohibit a woman from having a pre-viability abortion, and imposing significant constitutional restrictions on a state's efforts to regulate the abortion procedure. It was a complete and unexpected victory for advocates of reproductive freedom.[76]

It was this feature of the *Roe v. Wade* decision that Supreme Court Justice Ruth Bader Ginsburg - who at the time of *Roe* was the head of the ACLU's Women's Rights Project and who, through her writing and litigation of major Supreme Court cases, was developing the constitutional protection of gender equality under the Fourteenth Amendment's equal protection clause - has called into question. Justice Ginsburg has criticized *Roe v. Wade* first for the sweeping nature of the decision, which went beyond invalidating the Texas and Georgia anti-abortion laws that were at issue in that case, and for "fashion[ing] a regime . . . a set of rules that displaced virtually every state law then in force."[77] Secondly, she criticized the decision for not focusing sufficiently on the impact that anti-abortion laws had on the " 'ability [of a woman] to control [her] [own destiny] . . .' and her 'ability . . . to participate equally in the economic and social life of the Nation,' "[78] a focus that she found in the *Casey* decision. She notes that, "[t]he idea of the woman in control of her destiny and her place in society was less prominent in the *Roe* decision itself, which coupled with the rights of the pregnant woman the free exercise of her physician's medical

75. Rescue Army v. Municipal Court, 331 U.S. 549, 569 (1947).

76. *See* Robert A. Sedler, *The Legal Dimensions of Women's Liberation: An Overview*, 47 IND. L.J. 419, 427-30 (1972) (discussing the constitutional challenges to anti-abortion laws shortly before *Roe* was decided).

77. Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1199 (1992).

78. *Id.* (quoting Planned Parenthood v. Casey, 112 S. Ct. 2791, 2809 (1992)).

judgment."[79] Justice Ginsburg concludes that: "The *Roe* decision might have been less of a storm center had it both honed in more precisely on the women's equality dimension of the issue and, correspondingly, attempted nothing more bold at that time than the mode of decisionmaking the Court employed in the 1970s gender classification cases."[80] In those cases, a number of which, as we said, were litigated by Justice Ginsburg herself, the Court proceeded on a case by case basis, invalidating all of the traditional gender-based classifications that had disadvantaged women, and invalidating gender-based classifications disadvantaging men, except where the classification could be shown to be substantially related to overcoming the present consequences of past discrimination against women as a group.[81]

I want to relate Justice Ginsburg's concern about the absence of "the idea of the woman in control of her destiny and her place in society" in the *Roe* decision to the lawyering perspective that we have attempted to bring to that decision and to the development of the constitutional protection of personal autonomy. There is no doubt that *Roe* was litigated entirely as a case about reproductive freedom. It was not litigated at all as a case about equality and women's rights. The right of a woman, here a woman's right to reproductive freedom, was involved in *Roe* only because of the biological fact that only women get pregnant and so are in need of a safe and legal abortion in order to terminate an unwanted pregnancy. But the doctrinal basis of the challenge to anti-abortion laws in *Roe* was the interference with the woman's right to reproductive freedom, and the precedents supporting that challenge were the reproductive freedom precedents of *Skinner*, *Griswold*, and *Eisenstadt*, precedents that involved the reproductive freedom of both men and women. Thus, the fact that anti-abortion laws impacted only on women and so "interfered with [her] ability to control her own destiny and to participate equally in the economic and social life of the Nation" was logically and doctrinally irrelevant to the basis of the constitutional challenge in *Roe*. The constitutional right of reproductive freedom is, in the true sense of the term, an aspect of personal autonomy, the autonomy of *persons*, both men and women, to "control their reproductive destiny." It protects the right of both men and women to use contraception in order to prevent an unwanted pregnancy (unwanted, we will assume, by the man as well as by the woman), to avoid being subject

79. *Id.* at 1199-1200 (citations omitted).

80. *Id.* at 1200.

81. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 733-51 (4th ed. 1991) (analyzing and discussing these cases).

to compulsory sterilization, and equally to voluntarily choose to be sterilized free from governmental interference. And since only women can get pregnant, it protects the right of a pregnant woman to have a safe and legal abortion, and likewise her right not to be compelled to have an abortion.[82]

As we have said, it was only the *Griswold* decision recognizing a "constitutional right of privacy" that made it doctrinally possible to assert a constitutional challenge to state anti-abortion laws in the late 1960's. It would not have been doctrinally possible at that time - at least without establishing new constitutional doctrine in the process - to challenge those laws as constituting impermissible sex discrimination against women (which I believe them to be),[83] because constitutional protection of gender equality had not yet been recognized by the Supreme Court. It was not until *Reed v. Reed*,[84] decided in 1971, that the Court first held that the Fourteenth Amendment's equal protection clause reached gender discrimination and could be used as the doctrinal basis for challenging the constitutionality of the widespread use of gender-based classifications in American law.

But in my view, even if it would have been doctrinally possible to challenge anti-abortion laws at that time on the basis of gender discrimination, this would not be as *effective* a basis of challenge as a challenge based on the interference with reproductive freedom. Again, this is because constitutional protection of reproductive freedom as an element of constitutional protection of personal autonomy had already been established by prior decisions such as

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82. Thus, just as the state cannot give parents the right to prevent their minor daughter from having an abortion, the state cannot give parents the right to compel their minor daughter to have an abortion. Planned Parenthood v. Danforth, 428 U.S. 52 (1976).

The government's effort to compel a woman to have an abortion against her will was at issue in *Struck v. Secretary of Defense*. 460 F.2d 1372 (9th Cir. 1971), *cert. granted*, 409 U.S. 942, *vacated*, 409 U.S. 947 (1972). Captain Struck was an Air Force career officer who became pregnant in Vietnam. Her religious views precluded her from having an abortion. She declared her intention to place her child for adoption immediately after birth, and did so. At the time Air Force regulations required the discharge of any woman officer who became pregnant. Captain Struck's constitutional challenge was rejected by the lower courts, but after the Supreme Court granted certiorari, the Air Force backed off and permitted her to remain in the service. Justice Ginsburg notes that while Captain Struck asserted a personal autonomy challenge, her primary challenge was based on "Fifth Amendment equal protection," focusing on the discrimination between male officers who became fathers and female officers who became mothers, and between female officers who chose to have an abortion and female officers who chose to continue their pregnancy. *See* Ginsburg, *supra* note 77, at 1200-02. I would suggest that if Captain Struck's case arose after *Roe v. Wade* had been decided, her challenge likely would have been based entirely on the interference with her reproductive freedom and clearly would have been successful.

83. *See* Sedler, *supra* note 76, at 425-30. "[A]ntiabortion laws or laws that limit the availability of any contraceptive measure constitute an acute form of discrimination against women." *Id.* at 426 (footnote omitted).

84. 404 U.S. 71 (1971).

Skinner and *Griswold*, and by the time *Roe* came to the Supreme Court, by *Eisenstadt*. A challenge based on the interference with reproductive freedom thus would have firmer doctrinal and precedential support than a challenge based on gender equality, which would have required the Court to hold that discrimination against pregnant women, such as a prohibition on abortion, amounted to impermissible gender discrimination. To put it another way, from the standpoint of the litigating lawyer, it would be easier to analogize a prohibition against abortion to the prohibition against contraceptive use that was held unconstitutional in *Griswold* and *Eisenstadt*, than it would to the prohibitions against gender-based classifications, such as the law in *Reed* preferring men over women in the appointment of administrators of estates, that were held unconstitutional by the Supreme Court in the early 1970's.

And in fact, the Supreme Court has specifically held that discrimination on the basis of pregnancy does *not* constitute discrimination on the basis of sex for constitutional purposes. In upholding a state's exclusion of disabilities connected with normal pregnancy and childbirth from its disability scheme for state employees, the Court took the position that the law did not distinguish between men and women, but between pregnant persons, all of whom were women, and non-pregnant persons, who included men and women.[85] By the same token, an anti-abortion law could be said to distinguish not between men and women, but between pregnant persons seeking an abortion, all of whom were women, and non-pregnant persons, men and women, who would have no need for an abortion. However, when the state has imposed a burden on a woman because she has chosen to exercise her right of reproductive freedom, as when a school board required pregnant teachers to take unpaid maternity leave after the fourth month of pregnancy, this interference with the teacher's right of reproductive freedom was held to be violative of due process.[86] Nor can a state constitutionally deny unemployment compensation to a woman when she becomes unemployed during her pregnancy.[87]

My point then is that the lawyers challenging the constitutionality of state anti-abortion laws in the late 1960's should properly have based the challenge on the interference with reproductive freedom, even if it had been doctrinally possible at that time to

85. Geduldig v. Aiello, 417 U.S. 484 (1974). Following this decision, the Court also held that employment discrimination on the basis of a woman's pregnancy did not constitute discrimination on the basis of sex within the meaning of Title VII of the Civil Rights Act of 1964. In order to reach pregnancy discrimination, it was necessary for Congress to enact the Pregnancy Discrimination Act of 1978, 42 U.S.C.A. § 2000e(k) (West 1981).

86. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).

87. Turner v. Department of Employment Sec., 423 U.S. 44 (1975).

challenge those laws as constituting impermissible gender discrimination. Again, the constitutional right of reproductive freedom is a right of both men and women, and in the context of anti-abortion laws, it protects the right of a pregnant woman to obtain a safe and legal abortion.

SEXUAL FREEDOM AND THE "RIGHT TO DIE"

Leaving reproductive freedom, we will now discuss two more aspects of constitutional protection of personal autonomy, sexual freedom, and a so-called "right to die." In *Bowers v. Hardwick*,[88] decided in 1986, the Court held that sexual freedom is not a fundamental right, and so applied a rational basis standard to uphold a state law prohibiting homosexual sodomy. The rationale of that decision, which was that the state could prohibit homosexual sodomy because the state considered it to be "immoral and unacceptable," would extend to state laws prohibiting sexual relationships between unmarried heterosexual persons, which the state could also consider to be "immoral and unacceptable." For this reason, I want to analyze this case from the perspective of lawyers litigating a constitutional challenge to a hypothetical state law prohibiting any sexual relationships between unmarried persons, homosexual or heterosexual.

The crucial question in this case would be whether the Court would hold that sexual freedom is a fundamental right, so that any interference with sexual freedom must be evaluated under the exacting compelling governmental interest standard of review. If sexual freedom is not treated as a fundamental right, then the rational basis standard of review applies, and the law can be sustained as prohibiting "immoral and unacceptable" conduct. As we have said, in deciding whether or not a particular aspect of personal autonomy rises to the level of a fundamental right, the Court, whether it admits it or not, is making a value judgment about the relative importance of the individual interest in relation to the interests that the state can assert to justify interference with that interest.

The lawyer for the unmarried persons would rely on the personal autonomy value reflected in the marriage and reproductive freedom cases. The lawyer would argue, as did the dissent in *Bowers v. Hardwick*, that sexual intimacy is " 'a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality,' " and "that individuals define themselves . . . through their intimate [ ] relationships

88. 478 U.S. 186 (1986).

with others."[89] While some people may choose to define themselves through intimate relationships within the framework of marriage, others choose to define themselves through relationships outside of marriage, either with persons of the opposite sex, when the parties do not wish to marry, or with persons of the same sex, when the parties cannot legally marry. For these reasons, sexual freedom should be treated as a fundamental right, and a ban on all sexual relationships outside of marriage cannot be justified under the exacting compelling governmental interest standard of review.

The more interesting argument, I think, is the argument that should be made by the lawyer for the state, seeking to uphold the law. That argument, in my opinion, should rely on the cases holding that marriage is a fundamental right, and should develop the thesis that the state cannot recognize sexual freedom as a fundamental right, because to do so would undercut marriage as a fundamental right, or more specifically, the state's interest in maintaining and preserving marriage as the basic relational interest in American society. In other words, the lawyer for the state would be turning the other side's argument against itself, so to speak, by relying on the importance of marriage, as reflected in the Court's decisions declaring marriage to be a fundamental right, in order to justify the restrictions on sexual activity outside of marriage. Far from supporting the constitutional challenge then, the argument would be that these decisions actually operate to support the constitutionality of the challenged law.

The lawyer for the state would quote the language from these decisions recognizing the importance of marriage in American society, such as Justice Powell's observation in *Moore* that "the institution of the family is deeply rooted in this Nation's history and tradition,"[90] and Justice Douglas' ringing statement in *Griswold* that marriage is "an institution which the State not only must allow, but which always and in every age, it has fostered and protected."[91] The argument would continue along the lines that the importance of the fundamental right of marriage, as reflected in these decisions, has an obverse side and can be relied on to prohibit sexual relationships outside of marriage. Whenever the state acts to preserve the integrity of marriage as the basic relational institution in society, and the only legally recognized basis for a sexual relationship, it is advancing an interest of the "highest magnitude." The prohibition against all sexual activity outside of mar-

89. *Id.* at 205 (Blackmun, J., dissenting) (quoting Paris Adult Theatre I v. Salton, 413 U.S. 49, 63 (1973)).

90. Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977).

91. Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

riage serves to *legitimatize* marriage as the basic relational institution and the only legally recognized basis for a sexual relationship. The prohibition also serves to induce heterosexual people at least to enter into the marriage relationship. Sexual activity outside of marriage then weakens the legitimacy of marriage and may discourage people from marrying.

The lawyer for the state would conclude the argument along these lines. Because of the importance of the state's interest in maintaining marriage as the basic relational institution and the only legally recognized basis for a sexual relationship, the individual's interest in sexual freedom is correspondingly reduced. Sexual freedom cannot be recognized as an important individual interest, because to do so would undercut the importance of marriage as the basic relational interest in society; sexual freedom is inconsistent with marriage, since sexual intimacy is such an integral part of marriage. In effect, the lawyer for the state is asking the Court to make the value judgment that the individual's interest in sexual freedom is not constitutionally more important than the state's interest in maintaining marriage as the basic relational institution and the only legally recognized basis for a sexual relationship.

This is the value judgment that the Court in effect made in *Bowers v. Hardwick*, when it held that sexual freedom is not a fundamental right. And since sexual freedom is not a fundamental right, prohibitions on sexual relationships outside of marriage, heterosexual as well as homosexual, can be sustained against constitutional challenge. The constitutional protection of personal autonomy thus does not extend to personal autonomy in sexual relationships.

Finally, we will consider the so-called "right to die" in the context of the current ACLU challenge to Michigan's ban against "assisted suicide" in *Hobbins v. Attorney-General*.[92] And again, we will do so from the lawyer's perspective, here, however, my own perspective in helping to formulate the basis of the ACLU constitutional challenge in this case.

First the facts. As might be expected, the nationwide contro-

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92. Hobbins v. Attorney Gen., No. 164963 (filed but not decided).

[Since the time of the speech, this case has been decided by the court of appeals. *See* 518 N.W.2d 487 (Mich. Ct. App.), *stay denied sub nom.* People v. Kevorkian, 519 N.W.2d 890 (Mich.), *amended*, 519 N.W.2d 898 (Mich.), *appeal granted*, 521 N.W.2d 4 (Mich. 1994). *Ed.*]

In a 2-1 decision, the Michigan Court of Appeals held that the enactment of the law violated Article 4, section 24 of the Michigan Constitution. However, lining up differently, the court also held 2-1, that the law did not violate substantive due process. The Michigan Supreme Court granted leave to appeal on both issues. The case was argued before that Court on October 4, 1994, and at that time this article went to press, the case is awaiting decision.

versy over the legitimacy and legality of assisted suicide has had its most immediate impact in Michigan, the home of assisted suicide's most visible practitioner, Dr. Jack Kevorkian. In the 1992-93 session of the Michigan legislature, a number of bills dealing with assisted suicide were introduced, ranging from permitting assisted suicide in certain circumstances to completely prohibiting it in all circumstances. Faced with this politically-charged and highly controversial issue, the Michigan legislature decided to do what legislatures often do in such a situation - appoint a blue ribbon commission to study the matter. However, the day before the agreed-upon bill establishing the study commission was to be voted upon in the Michigan House, Kevorkian performed another of his now familiar assisted suicides, which as usual, received nationwide media coverage. This renewed the legislative clamor to "Stop Kevorkian," and "not let Michigan become the Nation's suicide capital." The study commission bill was then amended on the floor of the House to add a provision making assisted suicide a criminal offense. The amended bill was quickly passed by the House and the Senate and signed into law by the Governor.[93]

The enactment of the bill in this precipitous way and the combination in one bill of a provision setting up a commission to study assisted suicide along with a provision making assisted suicide a criminal offense, we argued, clearly violate Article 4, section 24 of the Michigan Constitution, which prohibits the same bill from containing more than one "object" and which prohibits a "change of purpose" of proposed legislation during its legislative journey through both houses. In order to assert this state constitutional law claim, it was necessary to bring our suit in the state courts. The trial judge in Wayne Circuit Court held the law unconstitutional on this basis,[94] and I am optimistic that her decision will be upheld by the Michigan Court of Appeals. Again, from the lawyer's perspective, this is the most effective ground of constitutional challenge, both because it is very narrow, and because it is well-supported by existing precedents dealing with "title-object" and "change of purpose." Again, the lawyer's objective is to strike the law down on whatever ground possible. This objective is as well

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93. *See* Robert A. Sedler, *The Constitution and Hastening Inevitable Death*, HASTINGS CENTER REPORT, Sept.-Oct. 1993, at 20 (discussing the events leading up to the enactment of the law).

94. Hobbins v. Attorney Gen., No. 93-306-178 (Wayne County Cir. Ct. filed May 24, 1993). *See supra* note 92.

[Since the time of the speech, this case has been decided by the court of appeals. *See* 518 N.W.2d 487 (Mich. Ct. App.), *stay denied sub nom.* People v. Kevorkian, 519 N.W.2d 890 (Mich.), *amended*, 519 N.W.2d 898 (Mich.), *appeal granted*, 521 N.W.2d 4 (Mich. 1994). *Ed.*]

served if the law is struck down on what the media call "technical grounds" as it is if it is struck down on substantive constitutional grounds. There is then simply no law interfering with "assisted suicide." The matter goes back to the legislature, and this time, as we say, "the voice of the people will be heard." Perhaps, since public opinion polls show strong support for assisted suicide at least in some circumstances, and for that matter, for Dr. Kevorkian himself, the legislature may not be able to enact any law. If it does manage to enact a law, then most surely it will not be as draconian as the present law that we are challenging. In any event, it will be time enough to mount a substantive constitutional challenge when and if a new law is enacted by the legislature.

Of course, we also asserted a substantive constitutional challenge, which I will now discuss. In this case, the nature of the constitutional challenge was directly related to the people who were asserting the challenge. The ACLU did not bring the constitutional challenge on behalf of Dr. Kevorkian or on behalf of proponents of voluntary euthanasia or on behalf of non-terminally ill persons who wish to terminate an "unbearable existence." The principal plaintiffs in the case are terminally ill cancer patients who want to have the choice to hasten their inevitable death by taking a lethal dose of physician-prescribed medications, and by physicians who want to prescribe such medications so that their patients will be able to have this choice. The sweeping ban on assisted suicide that is contained in Michigan's law prohibits physicians from prescribing lethal medications for this purpose, and makes them subject to criminal prosecution for doing so.[95]

It is clear then that we are not asserting a constitutional "right to die" or even a constitutional right to receive assistance in committing suicide. Our constitutional challenge is quite narrow. We are relying, of course, on the constitutional protection of personal autonomy. Structurally, we are asserting that the "liberty" protected by the Fourteenth Amendment's due process clause embraces the right of a terminally ill person to hasten inevitable death, and that the ban on the use of physician-prescribed medications for this purpose that is contained in the Michigan law is unconstitutional because it imposes an "undue burden" on this right.

In formulating our substantive constitutional challenge, of course, we had to look to existing Supreme Court doctrine and precedent, and the principal case on which we are relying is *Casey*.[96] First, the Court in *Casey* gave a broad definition of the meaning of personal autonomy, quite similar to the definition given some sev-

95. *See* Sedler, *supra* note 93, at 21-22.

96. Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992).

enty years ago by Justice McReynolds in *Meyer*.[97] The *Casey* Court stated:

> It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter. . . .
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> . . . .
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> . . . It is settled now . . . that the Constitution places limits on a State's right to interfere with a person's most basic decisions about family and parenthood, as well as bodily integrity. . . .
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> . . . .
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> . . . At the heart of liberty is the right to define one's own concept of existence, of [the] meaning of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under the compulsion of the State.[98]

We rely on this language in *Casey* to support our contention that the "liberty" protected by the Fourteenth Amendment's due process clause embraces the right of a terminally ill person to hasten inevitable death. We also rely on other Supreme Court decisions, such as the so-called "right to die" case, *Cruzan v. Director, Missouri Department of Health*,[99] holding that a person's entitlement to bodily integrity and control over one's own body protects a person's right to refuse unwanted medical treatment, including the right of a competent adult to make the personal decision to discontinue lifesaving medical treatment. Finally, we rely on *Roe v. Wade* and *Casey* themselves and the predecessor cases of *Griswold* and *Eisenstadt*. In this vein, we argue that for the same reasons as people have a right to refuse unwanted medical treatment even if this results in their death, a right to have an abortion, and a right to use contraception, a terminally ill person's right to control over that person's own body must include the right to make the decision to hasten inevitable death.[100]

Second, we argue that the undue burden formulation of *Casey*[101] is the proper standard under which to evaluate the constitutionality of Michigan's ban on assisted suicide, as it is the proper standard under which to evaluate the constitutionality of a restriction on abortion. And paraphrasing language in *Casey*, we argue

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97. Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

98. *Casey*, 112 S. Ct. at 2805-07 (citations omitted).

99. 497 U.S. 261 (1990).

100. Brief of Plaintiffs-Appellees/Cross-Appellants at 19-23, Hobbins v. Attorney Gen., (No. 16493). *See* Sedler, *supra*, note 93 at 23-24 (summarizing these constitutional arguments); Robert A. Sedler, *Constitutional Challenges to Bans on "Assisted Suicide:" The View from Without and Within*, 21 HASTINGS CONST. L.Q. 777 (1994) (developing these arguments more fully).

101. *Casey*, 112 S. Ct. at 2820-21.

that, "To say the least, a ban on the use of physician-prescribed medications, obviously places a substantial obstacle in the path of a terminally ill person seeking to hasten that person's inevitable death." As we conclude: Indeed "[a] more extreme undue burden on the exercise of that right cannot be imagined, and for this reason the ban on the use of physician-prescribed medications is unconstitutional."[102]

The narrowness of our constitutional challenge, limiting it to the ban on the use of physician-prescribed medications by terminally ill persons to hasten inevitable death, makes the state's task of justifying the ban all the more difficult. The state has tried to justify the ban as being necessary to "preserve life," or as Professor Yale Kamisar, a strong opponent of what he calls "assisted suicide," has put it, in preventing the disregard for life that he sees resulting from a "suicide permissive society."[103] To which our reply is simply, "But there can be no valid interest in 'preserving life' when there is no 'life left to preserve.' " Thus, we argue that: A ban on the use of physician-prescribed medications by a terminally ill person to hasten inevitable death does not advance any conceivable interest in 'preserving life.' "Quite to the contrary, it does nothing more than force a terminally ill person to undergo continued unbearable . . . suffering" until death mercifully intervenes.[104] If and when a court is ever called upon to resolve this substantive constitutional challenge, the effectiveness of our argument will receive its crucial empirical test - will it be accepted by the court, and will we prevail.

CONCLUSION

It is on this point that we may appropriately end this lecture. As in other areas of law, in constitutional litigation, it is the lawyer who performs the crucial role of formulating the issues and of developing the constitutional arguments that are the basis of challenge and defense. I hope that I have succeeded in persuading you of the vital role that the lawyer plays in constitutional litigation and that perhaps you may have gained some insights about the lawyer's role in the development of the constitutional protection of personal autonomy.

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102. Brief of Plaintiffs-Appellees/Cross-Appellants at 23-24, *Hobbins* (No. 164963).

103. Yale Kamisar, *Are Laws against Assisted Suicide Unconstitutional?*, HASTINGS CENTER REP., May-June 1993 at 32, 37.

104. Brief of Plaintiffs-Appellees/Cross-Appellants at 28, *Hobbins* (No. 164963).