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What's a Lower Court to Do? Limiting *Lawrence v. Texas* and the Right to Sexual Autonomy

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WHAT'S A LOWER COURT TO DO? LIMITING LAWRENCE V. TEXAS AND THE RIGHT TO SEXUAL AUTONOMY

*John Tuskey**

I. INTRODUCTION

Sibling incest has long been taboo in western culture. That taboo apparently did not concern Allen Muth and his younger sister Patricia when they married and had three children together. When Allen and Patricia abandoned one of the children, who was disabled, the State of Wisconsin terminated their parental rights. Eventually, both Allen and Patricia were convicted of incest in Wisconsin state court.¹

On appeal in the Wisconsin courts, Allen argued that the Wisconsin incest statute violated his constitutional right to privacy. The Wisconsin Court of Appeals rejected that argument.² After exhausting his remedies in the Wisconsin courts, Muth filed a

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¹ *Muth v. Frank*, 412 F.3d 808, 810-12 (7th Cir. 2005). Allen and Patricia were convicted for violating WIS. STAT. § 944.06 (2005), which provides:

Whoever marries or has non-marital sexual intercourse with a person he or she knows is a blood relative and such relative is in fact related in a degree within which the marriage of the parties is prohibited by the law of this state is guilty of a Class F felony.

² *Muth*, 412 F.3d at 812.

petition for a writ of habeas corpus in United States District Court, alleging that his confinement was unconstitutional because the Wisconsin incest statute was unconstitutional.³

While Muth's habeas petition was pending, the United States Supreme Court decided *Lawrence v. Texas*.⁴ In *Lawrence*, the Court held that a Texas statute making it a crime to engage in same-sex sodomy was unconstitutional as applied to private conduct by consenting adults.⁵ *Lawrence* relied in large part on a very broad notion of due process liberty as personal autonomy and held that Texas had no legitimate interest that could justify criminally punishing the decision of two consenting adults with regard to how they privately expressed their sexuality in the context of a personal relationship.⁶

Eventually, Muth's case reached the Seventh Circuit. There, Muth argued, quite logically, that if consenting adults have the right to engage in sodomy in private, consenting adult siblings should have a right to express their relationship sexually in private. As the appellate panel saw things, the ultimate question it had to decide was "whether Muth was a beneficiary of the rule *Lawrence* announced."⁷ Put another way, the question the panel saw before it was whether *Lawrence*, although it involved only same-sex sodomy, announced a broader right to engage in private sexual activity that would include (among other activities) a right to engage in incest.

³ *Id.*

⁴ 539 U.S. 558 (2003).

⁵ *Id.* at 578.

⁶ *Id.* at 574, 578. See *infra* notes 137-56 and accompanying text.

⁷ *Muth*, 412 F.3d at 817.

The Seventh Circuit held that *Lawrence* did not announce such a broad rule. The panel reasoned that *Lawrence* focused on why the Court found it necessary to overrule its earlier decision in *Bowers v. Hardwick*⁸ that had upheld a Georgia statute prohibiting sodomy. *Lawrence* did not address or even mention incest prohibitions.⁹ Moreover, the Seventh Circuit found that *Lawrence* had not announced a fundamental right for adults to engage in private sexual conduct: the *Lawrence* majority did not conduct the analysis the Court previously had conducted to determine whether an alleged substantive due process right is fundamental,¹⁰ or subject the Texas statute to strict scrutiny, the standard of review typically employed in determining whether a state law that restricts a fundamental right violates substantive due process.¹¹

The Seventh Circuit's decision that *Lawrence* did not announce a general right for adults to engage in private sexual conduct, including incest, has engendered criticism from surprising sources—Matthew Franck and Gerard Bradley, two scholars who both would probably be considered, in common political parlance, “conservative”¹² and who both, I am certain, “recoil[] from the

⁸ 478 U.S. 187 (1986).

⁹ See *Muth*, 412 F.3d at 817.

¹⁰ *Id.* at 817-18. The analysis set out in *Washington v. Glucksberg*, 521 U.S. 702 (1997), required the Court to carefully define the alleged right at issue and to determine whether that right, as carefully defined, was “deeply rooted in this Nation’s history and tradition” “and implicit in the concept of ordered liberty.” See *id.* at 720-21. I discuss this analysis in more depth. See *infra* text accompanying notes 120-27. For now, I note that I agree with the Seventh Circuit that the *Lawrence* majority did not conduct this analysis. I disagree, however, that this logically leads to the conclusion that *Lawrence* did not announce a rule broad enough to cover consenting adult incest.

¹¹ See *Muth*, 412 U.S. at 818.

¹² I am not asserting that either Professor Franck or Professor Bradley would claim that label for themselves.

absurdity that the Constitution protects incest.”¹³ Franck and Bradley did not disagree with the proposition that the Constitution as written does not protect any right to incest. Rather, their criticism was, in Franck’s words, that “a fair reading of *Lawrence* makes it hard to avoid the conclusion that the Supreme Court’s version of the Constitution does indeed protect incest” and that the Seventh Circuit’s explanation for its contrary conclusion missed the mark.¹⁴

There is merit to Franck’s and Bradley’s criticism of *Muth*. *Lawrence*’s reasoning for holding that the Constitution protected same-sex sodomy was broad. Indeed, as I will explain, Justice Kennedy’s opinion in *Lawrence* reads like a paean to autonomy in sexual matters.¹⁵ *Lawrence* relied on a notion of due process liberty—the right to act on one’s self-defined “concept of existence, of meaning, of the universe, and of the mystery of human life”¹⁶ — that is certainly broad enough to include the decision of consenting adult siblings to engage in sexual relations. To distinguish incest from sodomy requires making moral judgments that this broad notion of liberty seems to foreclose. It is true that *Lawrence* did not purport to announce any “fundamental right” that required the state to justify any restriction by demonstrating a compelling interest for the

¹³ Matthew J. Franck, *Kissing Sibs – Could the Supreme Court Embrace Incest?*, NAT’L REV. ONLINE (Aug. 4, 2005), available at <http://www.nationalreview.com/comment/franck200508040812.asp>. See also Gerard Bradley, *Taboos*, NAT’L REV. ONLINE, Bench Memos (Aug. 4, 2004), available at <http://bench.nationalreview.com/archives/072039.asp>. Bradley opined that *Muth*’s author “is too decent a guy to draw out the foul implications of *Lawrence*. Let the Supreme Court foul its own nest, I guess.” *Id.*

¹⁴ Franck, *supra* note 13, at 2; Bradley, *supra* note 13.

¹⁵ See *infra* text accompanying notes 137-54.

¹⁶ *Lawrence*, 539 U.S. at 588 (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992)). See *infra* Part II for further discussion of this point.

restriction. But *Lawrence* did hold that Texas had no legitimate interest at all—compelling or otherwise—that could justify making consensual private sodomy between adults a crime. As Franck explained:

States enforcing one of Western Civilization's most ancient prohibitions on sexual deviancy have been declared by the Supreme Court to be acting irrationally, with no conceivable legitimacy granted to any conceivable argument they care to advance. They cannot pass [the Court's] easiest test. What would we call a right that is so obvious, so unquestionable, that laws prohibiting its exercise are declared incapable of clearing the lowest hurdle the Court sets for any public policy? . . . Perhaps "super-important fundamental right" would be appropriate. The case for homosexual sodomy . . . under the Court's . . . [reasoning] . . . is *strong*. Hence the argument is very powerful, on logical grounds, for an expansive interpretation of its meaning and scope, which lends support to [Allen] Muth's view that the right should encompass consensual adult incest as well.¹⁷

While I agree that *Lawrence's* reasoning is broad enough to extend to adult incest, I think perhaps that Franck, and to a lesser extent Bradley, were being a bit too hard on the Seventh Circuit panel that decided *Muth*.¹⁸ The panel faced a real problem: how to deal with Supreme Court precedent that has no basis in the Constitution's text or our nation's legal history yet presents reasons for its decision

¹⁷ Franck, *supra* note 13, at 9.

¹⁸ Here I must admit a bias on my part: I am a former law clerk for *Muth's* author. It goes without saying that I agree wholeheartedly with Bradley's assessment that *Muth's* author "is a most capable jurist and . . . is possessed of a sound moral sense." Bradley, *supra* note 13.

that are so broad they practically command extension to similar but not identical factual scenarios (extension that itself would have no basis in constitutional text or tradition). In such a situation, what is a lower court to do?

One option is to demonstrate the consequences of the Supreme Court's reasoning by extending that reasoning as its logic leads. That, however, hardly seems an option for a conscientious lower court judge who takes seriously his oath to uphold the Constitution and is convinced the Court's decision has no legitimate basis in the Constitution.

Another option is what Michael Paulsen has called "underruling"¹⁹ the Supreme Court's decision. The option of underruling—or, in other words, refusing to follow the Court's decision—arises from the very justification for judicial review of federal and state statutes by federal courts: judges are to prefer the Constitution (the superior source of positive law in our system) to other sources of law; where other sources of law (for example, statutes) conflict with the Constitution, the Constitution controls.²⁰ Lower court judges take an oath to support the Constitution, not

¹⁹ See Michael Stokes Paulsen, *Accusing Justice: Some Variation on the Themes of Robert M. Cover's Justice Accused*, 7 J.L. & RELIGION 33, 82 (1989) ("[W]hen push comes to shove, the [lower court] judge may . . . in effect, 'overrule' (or, perhaps a better term, given the relationships of the courts, 'underrule') [lawless precedent].") [hereinafter Paulsen, *Accusing Justice*]; see also Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, 101 MICH. L. REV. 2706, 2734 (2003) [hereinafter Paulsen, *The Irrepressible Myth*].

²⁰ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-80 (1803). See also Paulsen, *The Irrepressible Myth*, *supra* note 19, at 2733 ("*Marbury* says the Constitution is supreme; that departures from it are not binding; that the Constitution supplies a rule for the government of courts; and that the oath [taken by judges] requires that its takers be guided by their best understanding of the Constitution and not pliantly accede to deviations perpetrated by others. All of these points apply to lower court judges . . . who are called upon to decide cases arising under the Constitution and swear Article VI's mandated oath to

decisions interpreting the Constitution. “There is nothing morally disingenuous in taking the oath and disobeying ‘controlling’ precedent” if that precedent is inconsistent with the Constitution the judge swore to uphold.²¹

The anticipated complaint about lower courts underruling Supreme Court decisions is that underruling would undermine the rule of law. Because the Constitution is the supreme source of law in our system, this is true only if the Constitution requires lower court judges to follow Supreme Court constitutional decisions even if those decisions wrongly interpret, or even ignore, the Constitution. One might infer from the designation in Article III of one “Supreme” and other “inferior Courts”²² that Article III requires lower courts to accede to Supreme Court decisions. Paulsen argues (persuasively, in my view) that this designation does not “necessarily imply anything more than a hierarchy in which a higher court may review and reverse the judgment of a lower court, and [does] not transform such lower court judges into mere law clerks or potted plants.”²³ If Paulsen is correct, the “rule of law” objection to underruling reduces to the proposition that Supreme Court opinions are the law of the land equal in stature to the Constitution itself (no matter how badly the decision mangles the Constitution).²⁴ While the Court (or at least a

support it.”).

²¹ Paulsen, *Accusing Justice*, *supra* note 19, at 82-83.

²² U.S. CONST. art. III, § 1 (“The Judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”).

²³ Paulsen, *The Irrepressible Myth*, *supra* note 19, at 2733-34; *see* Paulsen, *Accusing Justice*, *supra* note 19, at 83-86 (detailing the reasons for this conclusion).

²⁴ *See* *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (“[T]he federal judiciary is supreme in the exposition of the law of the Constitution It follows that the interpretation [of the

majority of Justices) agrees with this proposition, if Paulsen is correct, nothing in the Constitution itself supports this proposition, and such a proposition is inconsistent with the justification for judicial review—that courts are to prefer the Constitution to other sources of law because the Constitution is superior to those other sources.²⁵

Still, as indicated above, the Court does not take kindly to lower courts second-guessing, much less refusing to apply, the Court's decisions.²⁶ And it is easy for me sitting in my law school office to write how a lower court should refuse to apply Supreme Court precedent. I do not have to worry about the Court reviewing what I write and rejecting it (with a stern lecture telling me how I am subverting the “rule of law”). Nor do I have to worry that those who oppose my conclusions regarding the proper exercise of judicial power will be waiting to have me removed from office, with the Supreme Court's opinion chastising me for being “lawless” as Exhibit 1 of the evidence supporting my removal.²⁷

Constitution] enunciated by this Court . . . is the supreme law of the land . . .”).

²⁵ See John Tuskey, *Do As We Say and Not (Necessarily) As We Do: The Constitution, Federalism, and The Supreme Court's Exercise of Judicial Review*, 34 CAP. U. L. REV. (forthcoming).

²⁶ See, e.g., *Hubbard v. United States*, 514 U.S. 695, 713 (1995) (“[I]t [is] self-evident that the lower courts must adhere to our precedents.”); *Hicks v. Miranda*, 422 U.S. 332, 344-45 (“[T]he lower courts are bound by summary decisions by this Court ‘until such time as the Court informs (them) that (they) are not.’”).

²⁷ I agree with Paulsen's conclusion that underruling “is not constitutionally insubordinate . . . [nor] categorically improper.” Paulsen, *Accusing Justice*, *supra* note 19, at 85. Therefore, in theory, underruling, when grounds exist for it, should not be appropriate grounds for impeaching lower federal court judges. I would think that such underruling is not appropriate grounds for removing state court judges by state removal procedures either. But as a practical matter, the Court's view of its role as the Constitution's ultimate interpreter whose decisions are as binding as the Constitution itself (at least until the Court changes its mind) likely holds enough sway in the public, in Congress, and in state bodies responsible for judicial discipline that removal for underruling is a realistic threat.

The upshot of this is that while vertical stare decisis (that is, the rule that lower courts must follow higher court decisions) may have some theoretical weaknesses, it is a very real practical doctrine.²⁸ Refusing to follow Supreme Court decisions they find inconsistent with the Constitution carries very real potential costs to the judges who choose to underrule, along with the systemic costs that can result from reversal and remand. And in any event, most lower court judges probably hold the notion that Supreme Court decisions bind lower courts and would disagree with me about the propriety of underruling. Therefore, while I think underruling *Lawrence* would have been an appropriate option for the Seventh Circuit in *Muth*, I would not realistically expect any lower court to exercise that option.

If underruling is not a practical option, only one alternative to applying the Court's broad reasoning remains for a lower court. This is the option that *Muth* ultimately followed: read the Supreme Court precedent as narrowly as possible to avoid extending its extra-constitutional reach. *Muth* read *Lawrence* to hold only that statutes criminalizing private adult consensual same-sex sodomy violated substantive due process. In other words, *Muth* confined *Lawrence* to its facts. Nobody should find this startling. "The device of compartmentalizing precedent is an old jurisprudential strategy for limiting unruly doctrines."²⁹ And such compartmentalizing is

²⁸ See *id.* at 83-84 ("[T]he obligation to follow controlling precedent is . . . an observed regularity attributable to the practical operating reality of a hierarchical system Judges obey 'controlling' precedent because they can be reversed if they do not.").

²⁹ Yale Kamisar, *Against Assisted Suicide – Even in a Very Limited Form*, 72 U. DET. MERCY L. REV. 735, 764 (1995).

probably more palatable to a lower court judge than outright underruling.

But one could characterize such compartmentalizing by a lower court judge as just a milder form of underruling. As Franck noted, “[t]he law proceeds not by the replication of old cases by new ones, but by the logical extension of principles abstracted from old cases to situations in new cases.”³⁰ Determining whether decision A controls case B despite case B’s slightly different facts depends upon whether the factual differences between A and B warrant treating the cases differently in light of the reasons underlying the decision in case A. To illustrate, suppose in case A, a court held a dog owner liable for damages for a bite inflicted by his big, black, unrestrained dog that the owner knew had bitten people before. The court reasoned that people who fail to restrain big dogs with a known history of biting people should pay damages to people if the dog bites. Case B involves the same facts, except the dog was white. Should the court treat case A as precedent for case B despite the factual difference? Of course it should: there is no good reason why the dogs’ different colors in case A and case B should warrant treating the two cases differently. If the court in case B stated, “case A does not apply because the dog in case A was black, not white,” the court would just be refusing to apply case A.

Franck in effect argues that *Muth* really refused to apply case A (*Lawrence*) to a case involving a white dog (incest) rather than a black dog (sodomy). But even if refusing to extend *Lawrence*

³⁰ Franck, *supra* note 13, at 2.

beyond its facts in that way amounts to a mild form of underruling, I do not think the panel in *Muth* acted inappropriately because I think expressly underruling *Lawrence* would have been appropriate in any event.³¹ In fact, I do not think the panel in *Muth* did anything (ultimately) the Supreme Court itself would not have done. I suspect that if the Court were faced with the question whether a law making private consensual incest a crime violates substantive due process, the Court would hold it does not. In other words, I suspect that like most people, at least five Supreme Court Justices (which would include at least one who joined in the *Lawrence* majority opinion) would, “recoil[] from the absurdity that the Constitution protects incest,”³² and find a way to distinguish *Lawrence*.

Like Franck and Bradley, I think *Lawrence*’s reasoning extends to consensual adult incest. But ultimately, I do not share Franck’s confidence that “the Supreme Court’s version of the Constitution does indeed protect incest.”³³ He may turn out to be correct, but as noted above, I suspect the Court would not extend *Lawrence* to incest. That is because “the Supreme Court’s version of the Constitution” with regard to sexuality and the meaning and extent of due process liberty generally is really a blank slate that the Court fills in based on its own value and policy judgments—the type of

³¹ It probably would have been better if the panel stopped after saying *Lawrence* involved sodomy, not incest, rather than going on to discuss how *Lawrence* had not created any fundamental right (which is true, but which is a reason that I think does not sufficiently deflect the fact that *Lawrence*’s reasoning extends to incest). Ideally, it might have been best for the panel to acknowledge expressly the breadth of *Lawrence*’s reasoning before limiting *Lawrence* to its facts. I recognize, however, that is much easier for me to suggest from my ivory tower than it is for a lower federal court judge to write in an opinion.

³² Franck, *supra* note 13, at 2.

³³ *Id.*

value and policy judgments the Court did not allow Texas to enforce in *Lawrence*. True, *Lawrence*'s reasoning logically extends to incest. But the definition of liberty the Court minted in *Planned Parenthood v. Casey*³⁴ and relied on in *Lawrence* logically leads to the conclusion that people should have a right to suicide. Yet, the Court has specifically refused to recognize a right to suicide and in fact found the same definition of liberty relied upon in *Casey* and *Lawrence* to be irrelevant to the question.³⁵ That type of incoherence invites lower courts to do as the Seventh Circuit essentially did in *Muth*—treat *Lawrence* as “an exercise of raw judicial power”³⁶ fundamentally divorced from its own reasoning, reasoning that serves simply to adorn a value or policy judgment. It follows that if *Lawrence* is divorced from its reasoning, there is no need for lower courts to extend that reasoning beyond *Lawrence*'s facts.

The rest of this Article considers *Lawrence*'s incoherent jurisprudence and the possibility of limiting its holding. Part II explores how the understanding of liberty underlying *Lawrence*, a notion most strongly expressed in the joint opinion in *Planned Parenthood v. Casey*,³⁷ is not supported by the constitutional text and how therefore decisions based on this notion of liberty are inconsistent with the Court's power of judicial review. Part II also explores how *Lawrence*'s understanding of liberty is inconsistent with the early Twentieth Century precedent in which it allegedly is

³⁴ 508 U.S. 833, 851 (1992).

³⁵ *Washington v. Glucksberg*, 521 U.S. 702, 726-27 (1997). See *infra* notes 114-38 and accompanying text.

³⁶ *Doe v. Bolton*, 410 U.S. 179, 222 (1973) (White, J., dissenting).

³⁷ 505 U.S. 833 (1992).

rooted. Part III focuses on the different analyses of due process claims used by the Court in *Casey* and *Lawrence*, and in *Washington v. Glucksberg*, to explore how the Court has inconsistently applied the *Casey/Lawrence* understanding of liberty. Part III also explores how *Glucksberg* differs with *Lawrence* and *Casey* in its treatment of state moral judgments as a basis for prohibiting individual conduct. Part IV explores arguments for not applying *Lawrence* to other private consensual sexual acts and concludes that those attempts would be inconsistent with *Lawrence's* broad reasoning. In particular, Part IV argues that refusing to extend *Lawrence* to activities like prostitution, as I believe the Court would do, depends on the type of moral judgments that *Lawrence* refused to allow Texas to embody in its law with regard to sodomy.

II. THE CASEY JOINT OPINION AND DUE PROCESS LIBERTY

The decision in *Lawrence* was based in large part on a broad notion of due process liberty that was best expressed in the joint opinion of Justices O'Connor, Kennedy, and Souter in *Planned Parenthood v. Casey*.³⁸ In *Casey*, the Court was asked to reconsider its decision in *Roe v. Wade*³⁹ that the Constitution protects a woman's right to decide whether to have an abortion. In their joint opinion, Justices O'Connor, Kennedy, and Souter decided that *Roe* (or at least what the joint authors termed *Roe's* "central holding"⁴⁰) should not

³⁸ *Id.*

³⁹ 410 U.S. 113 (1973).

⁴⁰ *Casey*, 505 U.S. at 853 (joint opinion) ("[T]he reservations any of us may have in reaffirming the central holding of *Roe* are outweighed by the explication of individual liberty we have given combined with the force of *stare decisis*."); see also *id.* at 846 ("[T]he

be overruled. The joint authors based their conclusion on an expansive understanding of due process liberty coupled with “the force of stare decisis.”⁴¹

I have argued elsewhere that in their discussion and application of stare decisis, the joint authors essentially equated the rule of law with the rule of Supreme Court decisions,⁴² and, thus equated the Court’s opinions with the Constitution itself. This is so even if the Court’s decision to be applied has misconstrued the Constitution; in the joint authors’ view, a decision by the Court is binding law until the Court overrules that decision.⁴³

While I have argued that the Court is wrong to equate its decisions to the Constitution,⁴⁴ the notion that the Court’s constitutional decisions are the law (until the Court decides otherwise) might be easier to accept if the Court’s constitutional decisions reflected an attempt to discern the meaning of constitutional provisions and apply that meaning (and the legal principles derived from that meaning) to concrete factual situations. Even in cases in which the Court arguably gets the answer wrong, a stronger case could be made for accepting the Court’s answer based on considerations of stability and institutional competence (the Justices being men and women who presumably have the specialized technical and legal training and expertise to interpret legal documents

essential holding of *Roe v. Wade* should be retained and once again reaffirmed.”); *id.* at 855 (referring to *Roe*’s “central rule”); *id.* at 869 (referring to *Roe*’s “essential holding”).

⁴¹ *Id.* at 853.

⁴² See Tuskey, *supra* note 25 (forthcoming).

⁴³ See *id.*

⁴⁴ See *id.*

and—perhaps more important—a practical day-to-day familiarity with the task of interpreting and applying law that is not necessarily shared by other government actors). At least, one could posit that honest attempts at interpretation by a body composed of presumably skilled interpreters should be entitled to a very strong presumption of correctness.

The problem with *Casey* (and like cases) is that the Court's "constitutional" decision-making was divorced from any serious semblance of constitutional interpretation. John Hart Ely trenchantly wrote of *Roe v. Wade* that "*Roe* is bad because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be."⁴⁵ That comment is as true of *Casey* as it is of *Roe* (except, perhaps, that the *Casey* joint authors tried harder to make their opinion look like it was based in the Constitution).

Casey, like *Roe*, employed the doctrine of substantive due process.⁴⁶ As the majority in *Casey* (including the joint authors) saw things, laws prohibiting or unduly burdening the decision to abort deprived women of liberty without due process of law.⁴⁷ But as John

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

⁴⁶ Actually, although *Roe* is best categorized as a substantive due process case, the Court in *Roe* did not find it necessary to pin down precisely which constitutional provision protected the right to abort. See *Roe*, 410 U.S. at 153 ("This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty . . . as we feel it is . . . or in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether [to abort].").

⁴⁷ *Casey*, 505 U.S. at 846 (joint opinion) ("Constitutional protection of the woman's decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment The controlling word [in the clause] in the cases before us is 'liberty.' "). Justices Stevens and Blackman joined this part of the joint opinion. See *id.* at 843 (noting that this section of the joint opinion was the opinion of the Court).

Harrison demonstrated, the Court has never explained how the constitutional text, which prohibits deprivations of “life, liberty, or property without due process of law,”⁴⁸ supports substantive due process doctrine.⁴⁹ In fact, the Court has admitted the textual difficulty with the doctrine:

Although the Court regularly proceeds on the assumption that the Due Process Clause has more than a procedural dimension, we must always bear in mind that the substantive content of the Clause is suggested neither by its language nor by preconstitutional history; that content is nothing more than the accumulated product of judicial interpretation of the Fifth and Fourteenth Amendments.⁵⁰

Casey, like *Roe*, made no attempt to justify textually the Court’s substantive due process jurisprudence. Even if there is historical support for some form of substantive due process (a debatable point),⁵¹ the *Casey* joint authors made no attempt to justify textually the specific application of substantive due process doctrine

⁴⁸ U.S. CONST. amend. XIV, § 1.

⁴⁹ John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 504 (1997) (“[A]s far as I know, the Supreme Court of the United States has never explained why its understanding of the language is a good account of the text.”). A review by my research assistant of all substantive due process cases decided after Professor Harrison published his article confirmed that his conclusion still holds.

⁵⁰ *Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214, 225-26 (1985) (White, J., dissenting) (quoting *Moore v. East Cleveland*, 431 U.S. 494, 543-44 (1977)).

⁵¹ See James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMENT. 315 (1999). Professor Ely argued that the basis for substantive due process exists in early American understandings of English precursors to the due process clauses and in antebellum state court cases applying state due process provisions (or their equivalents). *Id.* The substantive due process tradition Professor Ely wrote about was concerned primarily with well-established economic liberties and with preventing discriminatory legislation. *Id.* at 345. It was a doctrine bearing little resemblance to the modern court’s free-wheeling brand of personal autonomy substantive due process like that applied in *Casey* and *Lawrence*.

to protect the right to abort. Notably absent from *Casey* was any serious analysis of the due process clauses'⁵² text or their placement in the Constitution as a whole, the clauses' history, or the framers' and ratifiers' likely understanding of the terms "due process" and "liberty" in those clauses or in their historical precursors.⁵³

Instead, *Casey*'s authors relied on "reasoned judgment"⁵⁴ and previous Court decisions⁵⁵ rather than the more standard tools of textual interpretation to mint a definition of liberty that can fairly be called the mother of all "majestic generalities."⁵⁶ That definition is contained in what Justice Scalia has referred to as *Casey*'s "sweet-mystery-of-life passage"⁵⁷:

Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. Our cases recognize 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

⁵² U.S. CONST. amend XIV, § 1; *id.*, amend V, cl. 4.

⁵³ See, e.g., CHRISTOPHER WOLFE, THE RISE OF MODERN JUDICIAL REVIEW 131-38 (rev. ed. 1994); Andrew T. Heyman, *The Little Word "Due,"* 38 AKRON L. REV. 1, 1-23 (2004); Frank Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 90-100; Robert P. Reeder, *The Due Process Clauses and the Substance of Individual Rights*, 58 U. PA. L. REV. 191, 210 (1910); Charles E. Shattuck, *The True Meaning of the Term "Liberty" in Those Clauses in the Federal and State Constitutions Which Protect Life, Liberty, and Property*, 4 HARV. L. REV. 365 (1891), for extended discussion of these points. All these sources support the proposition that substantive due process doctrine has no support in the Constitution's text. *But see* Ely, *supra* note 51.

⁵⁴ *Casey*, 505 U.S. at 849 ("[A]djudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment.").

⁵⁵ See *id.* at 846-51.

⁵⁶ The reference to "majestic generalities" comes from Justice Jackson's concurring opinion in *Board of Education v. Barnett*, 319 U.S. 624, 639 (1943).

⁵⁷ *Lawrence v. Texas*, 539 U.S. 558, 588 (Scalia, J., dissenting). For ease of reference, I will shorten Justice Scalia's label to "mystery passage."

whether to bear or beget a child. Our precedents have respected the realm of family life which the state cannot enter. *These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about those matters could not define the attributes of personhood were they formed under the compulsion of the State.*⁵⁸

To examine what the joint authors are saying, let us focus on the italicized portion of the passage. That portion begins by asserting that the Due Process Clause protects certain personal *choices* but then proceeds to assert that the “heart of liberty” is the “right to define one’s own concept of existence” and so forth because “beliefs about these matters could not define the attributes of personhood were they formed under the compulsion of the State.”⁵⁹ The passage thus equates choosing to perform an act (which, in context, must be transparent for actually performing that act⁶⁰) with forming and holding mental concepts and beliefs about the act one desires to perform. In other words, the mystery passage asserts that to legally coerce a person to refrain from doing something (such as performing

⁵⁸ *Casey*, 505 U.S. at 851 (citations and quotations omitted) (emphasis added, except for the word “individual”). Authorship of the section of *Casey* containing the mystery passage has been credibly attributed to Justice Kennedy. See JAMES F. SIMON, *THE CENTER HOLDS* 163-65 (1995).

⁵⁹ *Casey*, 505 U.S. at 851.

⁶⁰ After all, the Pennsylvania statute restricted action, not thought or belief. That is, the statute restricted a doctor’s ability to perform abortions (and thus restricted a women’s ability to act to have an abortion performed on her).

or having an abortion) is to coerce that person to believe what the state wants that person to believe about that activity.

To equate prohibiting choice with compelling belief is to suggest—intentionally, perhaps—the specter of government thought control; thus, the passage suggests that states should not be allowed to prohibit abortions because the realm of thought and belief is sacred and beyond government's authority to regulate. It is safe to say that most Americans would find the idea of government thought control abhorrent. But whatever its value rhetorically, the joint opinion's equation of prohibiting choice with compelling belief is specious. True, law is often a teacher, and one of law's objects is to shape belief about the morality or desirability of certain activity.⁶¹ Moreover, belief often forms the motivation or justification for acting. But law does not and cannot punish mere belief—it punishes the action that belief motivates or justifies. A law prohibiting murder, for instance does not prohibit a person from believing that certain human beings are not persons and can licitly be killed. A person cannot legally be punished for murder unless he intentionally kills another person. Conversely, a person can legally be punished for murder if he intentionally kills, even if he believes fervently in the sanctity of life.

Prohibiting choice is not the same as compelling belief, but equating the two makes the mystery passage's final sentence

⁶¹ See, e.g., ROBERT P. GEORGE, *MAKING MEN MORAL* 1 (1993) (explaining that traditionally "laws forbidding certain powerful seductive corrupting vices can help people establish and preserve a virtuous character by . . . [among other things] educating people about moral right and wrong.").

(“[b]eliefs about these matters could not define the attributes of personhood if they were formed under the compulsion of the State”⁶²) equivalent to the proposition that the ability to choose freely “defines the attributes of personhood.” This, in essence, is the existentialist philosophy of Jean-Paul Sartre, a point that David Smolin has explained in more detail.⁶³

Put another way, if the joint authors were serious about their definition of liberty—if liberty means, as a general rule, the right to make legally uncompelled choices consistent with “one’s own concept of existence, of meaning, of the universe, and of the mystery of human life”—then what the joint authors established in *Casey* is a constitutional right to create and live in one’s own moral universe.⁶⁴ In fact, the word “autonomy”, which the mystery passage expressly ties to the liberty protected by the Due Process Clauses⁶⁵ “derives from the Greek ‘auto’ for self and ‘nomos’ for law, so that it can be literally defined as being a law for, or unto, oneself.”⁶⁶

Despite their observation that “[o]ur obligation is to define the

⁶² *Casey*, 505 U.S. at 851.

⁶³ David M. Smolin, *The Jurisprudence of Privacy in a Splintered Supreme Court*, 75 MARQ. L. REV. 975, 980-84 (1992). Briefly, the existentialists held that a human person creates and defines himself by the choices he makes. *Id.* at 981. Freedom “is characterized by a constantly renewed obligation to remake the *Self*,” an obligation fulfilled by making self-defining and self-creating choices. See JEAN-PAUL SARTRE, BEING AND NOTHINGNESS 34-35 (Hazel E. Barnes trans. (1956)); see generally Smolin, *supra* at 980-84.

⁶⁴ I say “create and live in one’s own moral universe” to make clear that the mystery passage does not assert an interest merely in forming and holding beliefs; it asserts an interest in acting on those beliefs. *Casey* did not uphold a right to believe or even to proclaim publicly that abortion is a legitimate choice for women to make; *Casey* upheld a right to act on that belief, that is, to have an abortion.

⁶⁵ See *Casey*, 505 U.S. at 851 (“These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and *autonomy*, are central to the liberty protected by the Fourteenth Amendment.”) (emphasis added).

⁶⁶ Smolin, *supra* note 63, at 981 (citing OXFORD ENGLISH DICTIONARY 807 (Clarendon Press, 2d ed. 1969)).

liberty of all, not to mandate our own moral code,”⁶⁷ the joint authors adopted a definition of liberty that purports to impose a controversial moral philosophy—call it existentialism or radical autonomy—on the states. A state whose people conclude that human fetuses deserve legal protection similar to those who are born is not free to enact that moral judgment into law because the Court has ruled that women must be allowed to make autonomous choices regarding abortion lest they be unable to “define the attributes of [their] personhood.”⁶⁸ The joint authors imposed this moral philosophy on the states without explaining why the Due Process Clause requires it—or (to expand on what Justice Holmes wrote in his dissent in *Lochner v. New York*)—without explaining why that text enacts M. Jean-Paul Sartre’s *Existentialism* as the nation’s governing moral philosophy any more than that text enacts “Mr. Herbert Spencer’s Social Statics”⁶⁹ as the nation’s governing economic philosophy.

As the mystery passage definition of liberty provided the rationale for upholding a constitutional right to abort, and the mystery passage notion of liberty is not fairly found in the constitutional text, *Casey* imposed on states restrictions on that power beyond those the Constitution itself imposes. *Casey* therefore is inconsistent with the Court’s implied power of constitutional judicial review. As noted earlier, the justification for implying that power of judicial review (a power nowhere expressly granted to federal courts in the

⁶⁷ *Casey*, 505 U.S. at 850.

⁶⁸ *Id.* at 851.

⁶⁹ *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (“The Fourteenth Amendment does not enact Mr. Herbert Spencer’s Social Statics.”).

Constitution) was the fundamental premise that the Constitution is the supreme law in our legal system. Any law (for example, a statute) that conflicts with the Constitution must give way.⁷⁰ Since the rationale for saying that a law restricting abortion violates the Constitution is not fairly found in the Constitution's text (or, at least, the Court has not explained how that rationale is found in the text), it follows that the Court has not established that laws restricting abortion are contrary to the Constitution. Therefore, the essential condition for judicial review (demonstrated inconsistency with the Constitution) has not been met, and the Court was acting outside its legitimate authority in invalidating state abortion laws.

Casey is inconsistent with the power of judicial review in another way. In *McCulloch v. Maryland*,⁷¹ the Supreme Court emphatically rejected the notion that questions of degree are appropriate for judicial review.⁷² This logically follows from the justification for judicial review. The Constitution does not provide answers to questions like "How necessary is necessary enough?" Where a statute's alleged invalidity cannot be found in the Constitution, there is no real basis for saying the allegedly invalid act is inconsistent with the Constitution.

⁷⁰ See Tuskey, *supra* note 25 (forthcoming).

⁷¹ 17 U.S. 316 (1819).

⁷² *Id.* at 423 ("[T]he degree of . . . necessity [of a Congressional act premised on the Necessary and Proper Clause] . . . is to be discussed in another place. . . . [T]o inquire into the degree of . . . [a law's] necessity, would be to pass the line which circumscribes the judicial department and to tread on legislative ground. This court disclaims all pretensions to such a power."). *Id.* at 430 ("[W]hat degree of [state] taxation [of a federal entity] is the legitimate use, and what degree may amount to the abuse of the power" is a "perplexing inquiry, so unfit for the judicial department."). I examine this at greater length in Tuskey, *supra* note 25 (forthcoming).

In *Casey*, despite the mystery passage's broad language, the joint authors did not find that the abortion right is absolute or that all state abortion regulation violates due process:

The woman's liberty is not so unlimited, however, that from the outset the State cannot show its concern for the life of the unborn, and at a later point in fetal development the State's interest in life has sufficient force so that the right of the woman to terminate the pregnancy can be restricted.⁷³

Of course, the joint authors left it for the Court, not the states, to decide when the state's admitted interest in protecting unborn life is sufficient to allow the state to restrict abortion and to decide how much "concern" for the unborn, states may show before that point, and how states may manifest that concern. Since the Constitution itself does not answer these questions, *Casey* demonstrates the inevitable result of treating constitutional provisions as broad generalities: to limit the reach of these generalities, the Court must decide which state actions pass muster based on policy considerations, not the Constitution. The joint authors seem to have admitted as much. After noting the state's interest in protecting unborn human life, the joint opinion continued:

That brings us, of course, to the point where much criticism has been directed at *Roe*, a criticism that always inheres when the Court draws a specific rule from what in the Constitution is but a general standard. We conclude, however, that the urgent claims of the woman to retain the ultimate control over her destiny and her body, claims implicit in the meaning of liberty, require us to perform that function.

⁷³ *Casey*, 505 U.S. at 869.

. . . [I]t falls to us to give some real substance to the woman's liberty to determine whether to carry her pregnancy to full term.⁷⁴

As to what point in pregnancy a state may restrict abortion, the joint authors decided that "the line should be drawn at viability, so that before that time the woman has a right to choose to terminate her pregnancy."⁷⁵ The joint authors offered three reasons for drawing the line at viability: "reason and fairness" established viability as the point at which the state's interest in protecting the unborn could justify restricting abortion; viability provided the most "workable" line; and finally, *Roe* had drawn the line at viability.⁷⁶

The joint authors' reasons are pure policy judgment mixed with fealty to a precedent that itself had no basis in the Constitution. Assuming viability provides a workable line, it is not a line found in the Constitution. Moreover, viability provides no more "workable" a line than conception. Drawing the line for allowing restriction at conception would provide an easily applicable bright line: states could decide to prohibit abortion, allow abortion, or otherwise regulate it as they see fit.

Of course, drawing the line at conception would be inconsistent with the joint authors' conclusion that a woman's interest in having an abortion "in reason and fairness" trumps the state's interest in protecting unborn life before viability. But why

⁷⁴ *Id.*

⁷⁵ *Id.* at 870.

⁷⁶ *Id.* at 870-71.

should the woman's interest in having an abortion trump the interest in protecting unborn life? From before the Fourteenth Amendment's ratification until *Roe*, many if not most states had premised their laws prohibiting or restricting abortion on the judgments that a human fetus is a human being and that protecting human beings' lives is a paramount state interest.⁷⁷ Why were those states wrong? The joint authors could provide no answer to this question from the Constitution's text. All the joint authors had to offer for overriding the conclusions of state legislatures were their own ideas of reason and fairness—in short, a policy judgment (influenced by their fealty to *Roe*) that women should be allowed to abort rather freely, up to the point of viability.

While the joint authors believed that “reason and fairness” supported *Roe*'s conclusion that states could not prohibit abortion before viability, the joint authors concluded that the states' interest in protecting unborn life should allow states more leeway to regulate abortion before viability than *Roe* and its progeny had allowed.⁷⁸ Of course, the most direct (and obvious) way for states to vindicate their interest in protecting unborn life would be to prohibit abortion (just as states vindicate their interest in protecting post-natal life by prohibiting homicide). But as noted above, that would be inconsistent with the joint authors' judgment that “reason and fairness” do not support pre-viability prohibition. To reconcile their

⁷⁷ Charles Rice and I have discussed late 19th Century state anti-abortion legislation and the reasons for that legislation. See Charles E. Rice & John P. Tuskey, *The Legality and Morality of Using Deadly Force to Protect Unborn Children from Abortionists*, 5 REGENT U. L. REV. 83, 126-27 (1995).

⁷⁸ See generally *Casey*, 505 U.S. at 871-79.

conclusion that states may attempt to protect unborn life before viability but may only prohibit abortion after viability, the joint authors decided that states could regulate abortion so long as the regulation does not impose an undue burden on the woman's right to abort.⁷⁹

According to the joint authors, a state abortion regulation imposes an undue burden on a woman's right to abort before viability if it has the "purpose or effect of placing a substantial obstacle" in the way of a woman's exercising that right.⁸⁰ This explanation is less than helpful.⁸¹ But be that as it may, the more important point is that the undue burden standard subjects all state pre-viability abortion regulation to federal judicial second-guessing on purely policy grounds. For instance, suppose that a state law requires that a doctor show a woman a sonogram of her fetus and that the woman must wait 24 hours after viewing the sonogram to have an abortion. That regulation will impose an obstacle to exercising the right to abort: women might not want to view the sonogram for fear of psychological discomfort, or losing their nerve, or any number of other reasons, and the waiting period may well add expense and inconvenience for a great many women. But even though the regulation in question leaves the ultimate decision to abort with the woman, the question for a court considering whether the regulation complies with *Casey* would be whether the obstacles imposed are

⁷⁹ *Id.* at 876-77.

⁸⁰ *Id.* at 877.

⁸¹ *Id.* at 986-87 (Scalia, J., dissenting) (explaining why, in his view, the undue burden standard is "inherently manipulable and . . . hopelessly unworkable").

substantial, or, in other words, whether the regulation goes too far or makes it too difficult to exercise the right to abort.

These are precisely the type of questions that the Court in *McCulloch* said were inappropriate for judicial review. Nothing in the Constitution's text tells a court how to answer these questions. Whether a regulation making it more difficult than it would otherwise be to procure an abortion makes it *too* difficult is a question of policy: what amount of difficulty is acceptable given the interests the regulation serves? It would be one thing if the Constitution clearly directed courts to answer these types of questions; but, as explained earlier, the joint authors provided no real reason why the Constitution even protects a right to abortion, much less that only "undue burdens" on that right are impermissible.

Besides being ungrounded in the Constitution and inconsistent with the power of judicial review, the mystery passage definition of liberty is inconsistent with the jurisprudential tradition of familial privacy on which the mystery passage purported to rely, at least as that tradition existed until the late 1960s. *Casey* quoted the Court's earlier decision in *Prince v. Massachusetts*⁸² for the proposition that the Court's precedents had "respected the private realm of family life which the state cannot enter."⁸³ This passage, in the joint authors' view, supported the mystery passage's definition of liberty as existential autonomy. But compare the key sentence of the mystery passage—"At the heart of liberty is the right to define one's

⁸² 321 U.S. 158 (1944).

⁸³ *Casey*, 505 U.S. at 851 (quoting *Prince*, 321 U.S. at 166).

own concept of existence, of meaning, of the universe, and of the mystery of human life”⁸⁴—with the entire passage in *Pierce* from which the *Casey* joint authors quoted:

It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. And *it is in recognition of this* that these decisions have respected the private realm of family life which the state cannot enter.⁸⁵

Pierce v. Society of Sisters,⁸⁶ which *Prince* cited, made the same point: “The child is not the mere creature of 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.”⁸⁷

As the italicized language from *Prince* indicated, the tradition of familial privacy arose “in recognition of” the fact that parents had the obligation to raise their children and prepare them to meet the obligations they would meet later in life. This was in the Court’s view an obligation the state could not fulfill and that overly intrusive government interference could hinder. Parental rights were correlative to parental duties—both to their children and to the greater society.⁸⁸ The focus of familial privacy was relational, not

⁸⁴ *Id.*

⁸⁵ *Prince*, 321 U.S. at 166 (citation omitted) (emphasis added).

⁸⁶ 268 U.S. 510 (1925) (holding unconstitutional an Oregon statute requiring children to attend public schools).

⁸⁷ *Id.* at 535.

⁸⁸ See David Wagner, *The Family and American Constitutional Law*, 1 LIBERTY, LIFE, and FAM. 145, 164 (1994).

[Justice] McReynolds [in *Pierce*] coupled parents’ rights with the parents’ duties, and specifically held that this package of rights and duties is oriented towards preparing the child for “additional

individual.

This jurisprudential tradition began to unravel in the 1960s when in *Griswold v. Connecticut*,⁸⁹ the Court held unconstitutional as applied to married couples a Connecticut law prohibiting the use of contraceptives. By decoupling sex from procreation as a matter of constitutional law, *Griswold* helped decouple familial privacy rights from parents' obligations to children. Even so, *Griswold* was not a ringing endorsement of individual autonomy in sexual matters. *Griswold* did not premise its decision on the primacy of individual choice. Instead, *Griswold* is best read as premising its decision on the intrinsic value of marriage as an institution and as a relationship and on the damage that laws forbidding contraceptive use by married couples could have on the marital relationship.⁹⁰ Thus, *Griswold* described marriage as "a coming together for better or for worse, hopefully enduring, and intimate to the point of being sacred."⁹¹ The Connecticut law, in the majority's view, was bad because it sought "to achieve its goals by means having a maximum destructive impact upon [the marital] relationship Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to notions of

obligations." He does not specify those obligations, but from the very fact that he views those terms as self-explanatory, it is a safe guess that he means the ordinary obligations of life in a democratic republic: being a good friend and neighbor, participating in civic life, pulling one's own weight economically, taking care of one's own family, and so forth.

Id.

⁸⁹ 381 U.S. 479 (1965).

⁹⁰ *Id.* at 485-86. See also Gerard V. Bradley, *Life's Dominion: A Review Essay*, 69 NOTRE DAME L. REV. 329, 351-53 (1993); Wagner, *supra* note 88, at 161 ("Griswold can be read as an opinion on marital privacy.").

⁹¹ *Griswold*, 381 U.S. at 486.

privacy surrounding the marriage relationship.”⁹²

In premising its decision on the sanctity of the marital relationship, *Griswold* was fully consistent with Justice Harlan’s dissenting opinion in *Poe v. Ullman*,⁹³ an earlier case dealing with the Connecticut contraception statute.⁹⁴ The joint authors also purported to rely on Justice Harlan’s *Poe* dissent to support their definition of liberty,⁹⁵ but that dissent no more supports the mystery passage than does *Griswold*. Justice Harlan made clear that a state has a legitimate interest in “concerning itself with the moral soundness of its people.”⁹⁶ And in a passage that is especially relevant in light of the Court’s subsequent decision in *Lawrence*, Justice Harlan also made clear that states have a legitimate interest in promoting marriage as the exclusive relationship in which sexual activity is to occur:

[T]o attempt a line between public behavior and that which is purely consensual or solitary would be to withdraw from community concern a range of subjects with which every society in civilized times has found it necessary to deal. The laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up, as well as laws forbidding adultery, fornication, and homosexual practices which express the negative of the proposition, confining sexuality to lawful marriage, form a pattern so deeply pressed into the substance of

⁹² *Id.* at 485-86.

⁹³ 367 U.S. 497, 522 (1961).

⁹⁴ The Court dismissed the case for lack of a justiciable case or controversy. *Id.* at 509 (Brennan, J., concurring).

⁹⁵ See *Casey*, 505 U.S. at 848-50 (joint opinion).

⁹⁶ *Poe*, 367 U.S. at 546 (Harlan, J., dissenting).

our social life that any Constitutional doctrine in this area must build upon that basis.⁹⁷

Despite the state's legitimate interest in its citizens' moral welfare, Justice Harlan reasoned—as the Court later would in *Griswold*—that the Connecticut statute was unconstitutional because of its serious intrusion on the most intimate aspect of the marital relationship.⁹⁸ But again, Justice Harlan was careful to distinguish the state's intrusion on marital privacy from state laws forbidding other sexual activities:

Adultery, homosexuality, and the like are sexual intimacies which the State forbids altogether, but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected. It is one thing when the State exerts its power either to forbid extra-marital sexual activity altogether . . . but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy.

In sum even though the State has determined that the use of contraceptives is as iniquitous as any act of extra-marital sexual immorality, the intrusion of the whole machinery of the criminal law into the very heart of marital privacy . . . is surely a very different thing indeed from punishing those who establish intimacies which the law has always forbidden and

⁹⁷ *Id.*; see also *id.* at 552 (“The right of privacy . . . is not . . . absolute. Thus, I would not suggest that adultery, homosexuality, fornication and incest are immune from criminal enquiry, however privately practiced.”).

⁹⁸ *Id.* at 554. In his dissenting opinion, Justice Harlan remarked that Connecticut did not justify “the obnoxiously intrusive means it has chosen to effectuate” its judgment that contraception is immoral. *Id.*

which can have no claim to social protection.⁹⁹

Both *Griswold* and Justice Harlan's dissent in *Poe* depend upon a pre-existing moral premise that the authors of those opinions seem to assume their readers will grasp: marriage, the union between a man and a woman, is good. Marriage and sexual union within marriage is distinct from and serves goods that other relationships and sexual activities do not or cannot serve. It is from this premise that both opinions went on to make the prudential judgment that whatever good laws prohibiting marital contraception use might serve, that good is outweighed by the harm these laws cause to the marital relationship by intruding on that relationship's most intimate aspect.¹⁰⁰

It was not until seven years after *Griswold* that the Court shifted the traditional familial privacy jurisprudence's focus on

⁹⁹ *Id.* at 553. See also *Griswold*, 381 U.S. at 498-99 (Goldberg, J., concurring) (“[T]he Court’s holding today . . . in no way interferes with a State’s proper regulation of sexual promiscuity or misconduct.”) (citing the passage from *Poe*, 367 U.S. at 553, quoted in the text).

¹⁰⁰ See Bradley, *supra* note 90, at 352.

[A]s the Justices repeatedly indicated [in *Griswold*] . . . there are many goods of marital intimacy . . . which are damaged by exposure to others. These goods are damaged particularly by involuntary exposures to public authority. . . . A responsible but firmly anticontraceptive public official might well conclude that, all things considered, a ban [on contraception] would do more harm than good.

Id. Bradley went on to state “[t]his kind of prudential decision is not obviously committed in our constitutional system to judges, particularly to federal judges.” *Id.* at 353. I agree and have criticized *Griswold* on the ground that it exceeded the Justices’ authority. See Tuskey, *supra* note 25 (forthcoming). But as Bradley went on to note, “that is a matter of jurisdiction, not the meaning of an opinion which presupposes jurisdiction.” Bradley, *supra* note 90, at 353. My purpose here has been to examine what *Griswold* said about marriage and privacy rights, even if the Court in *Griswold* (as I believe) exceeds its authority in saying

relationships to a focus on the individual. In *Eisenstadt v. Baird*,¹⁰¹ the Court held that a Massachusetts law prohibiting the distribution of contraceptives to unmarried persons violated the Equal Protection Clause.¹⁰² *Eisenstadt* reasoned that if under *Griswold* the distribution of contraceptives to married people could not be prohibited, a ban on distribution to unmarried persons would be equally impermissible.¹⁰³ *Eisenstadt* based this conclusion on a view of marriage and familial privacy that stood in stark contrast to the traditional view (including the view upon which *Griswold* was premised):

It is true that in *Griswold*, the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellect and emotional makeup. If 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.¹⁰⁴

So much for marriage as “a coming together for better or worse, hopefully enduring, and intimate to the degree of being sacred.”¹⁰⁵ To the Court in *Eisenstadt*, marriage involved no true union; rather, marriage has value only in so far as it represents the choice of individuals involved to associate in the common

¹⁰¹ 405 U.S. 438 (1972).

¹⁰² *Id.* at 453.

¹⁰³ *Id.*

¹⁰⁴ *Id.* (citations omitted).

¹⁰⁵ *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

undertaking. *Eisenstadt* “affirmed the continuing legal and metaphysical separateness of spouses.”¹⁰⁶ *Eisenstadt* also effaced the distinction between marriage and other “intimate associations,”¹⁰⁷ a distinction that had formed the premise for the decisions in *Pierce* and *Griswold* as well as Justice Harlan’s dissent in *Poe*. And in effacing the distinction between marriage and other intimate associations, *Eisenstadt* effaced the distinction between marital and non-marital sexual activity, thus setting the stage for arguments (such as the one that carried the day in *Lawrence*) that state regulation of any private sexual activity violates the Constitution.

After *Eisenstadt*, of course, came *Roe v. Wade*, in which the Court held that the constitutional right to privacy was broad enough to encompass a woman’s right to have an abortion.¹⁰⁸ This right to privacy was allegedly the same right to privacy that the Court held the state violated in *Pierce*.¹⁰⁹ However, the familial privacy violated in *Pierce* and the privacy supposedly violated in *Roe* were two different things. In *Pierce*, the right was premised on the marital relationship and the responsibility that parents have to their children and society. By the time *Roe* was decided, that allegedly same right had transmogrified into a right held by individuals to avoid the foreseen consequences of sexual activity and the responsibilities of parenthood, even if it was necessary to “terminate” the offspring that

¹⁰⁶ Wagner, *supra* note 88, at 161.

¹⁰⁷ See Kenneth L. Karst, *The Freedom of Intimate Associations*, 89 YALE L.J. 624, 641 (1980).

¹⁰⁸ *Roe v. Wade*, 410 U.S. 113, 153 (1973).

¹⁰⁹ See *id.* at 152-53 (citing *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923)).

resulted from one's sexual activity.

It was left to the joint authors in *Casey* to formulate for the Court a rationale to tie together these two disparate privacy rights. The joint authors' ribbon was the mystery passage's conception of liberty as personal autonomy to make "intimate and personal" choices based upon "one's own concept of existence, of meaning, of the universe, and of the mystery of human life."¹¹⁰ But only by ignoring their reasoning and recasting them as decisions protecting autonomous individual choice (something they assuredly were not) were the joint authors able to lump together cases like *Pierce* and (even) *Griswold* with *Roe*.

By ignoring the underlying rationale of decisions like *Pierce* and *Griswold* (and Justice Harlan's dissent in *Poe*), the *Casey* joint authors repudiated the pre-existing moral premise about the good of marriage and marital sexual union upon which those decisions depended. *Casey* replaced that premise with an alternative premise: the good life is one in which the autonomous individual creates himself by his unencumbered choices, and relationships have value to the extent that they are and continue to be freely chosen. That is every bit as much a moral claim—that is, a claim about the good—as the moral claim implicit in *Pierce* and *Griswold* and puts the lie to the joint authors' claim that "[o]ur obligation is . . . not to mandate our own moral code."¹¹¹ The *Casey* joint authors simply substituted the moral code they preferred for the moral code that underlay the

¹¹⁰ *Casey*, 505 U.S. at 851; see also Bradley, *supra* note 90, at 372.

¹¹¹ *Casey*, 505 U.S. at 850.

earlier familial privacy cases. As Part III explores, however, the Court (including the joint authors) has been far from consistent in applying that moral code.

III. COMPARING CASEY, GLUCKSBERG, AND LAWRENCE—THE JURISPRUDENCE OF INCONSISTENCY

Taken to its logical extreme, the mystery passage's pronouncement of a right to create and live in one's own moral universe would obliterate much of the state's lawmaking power. We have seen, however, how *Casey's* joint authors tempered the mystery passage by allowing states to regulate abortion before viability while reserving to the Court the right to determine ultimately if state regulations constitute an undue burden on the right to abort—or, in other words, whether state regulations regulate abortion too much. That determination is not guided by the Constitution but by the Justices' policy and value judgments.

Thus, one may say that rather than positing an absolute right to create and live in one's own moral universe, *Casey* posited a presumptive right to create and live in one's own moral universe. That presumptive right may conceivably be restricted subject to the Court's determination of whether state regulation of the activity the autonomous individual wants to pursue intrudes "too much" on the person's right to autonomy.

Still, the underlying autonomy right exists, and it would seem that right is broad enough to disable the states from prohibiting a myriad of activity (even if the state can regulate somewhere short of prohibition). Certainly it would seem that a right to make "intimate

and personal choices” based on “one’s own concept of existence, of meaning, of the universe, and of the mystery of human life”¹¹² would include a right to commit suicide and even to have another’s assistance in committing suicide. After all, the fundamental question any person would face in defining his own “concept of existence” is “to be or not to be”¹¹³ —that is, whether to exist at all. In *Compassion in Dying v. Washington*,¹¹⁴ an en banc panel of the Ninth Circuit held that a Washington statute prohibiting assisted suicide violated substantive due process when applied to competent, terminally-ill patients.¹¹⁵ The Ninth Circuit’s decision was based in large part on *Casey* and, in particular, the mystery passage. The court reasoned that like the decision to abort, the decision of how and when to die was one of “ ‘the most intimate and personal choices a person may make in a lifetime,’ [and is] a choice ‘central to personal dignity

¹¹² *Id.* at 851 (joint opinion).

¹¹³ William Shakespeare, *Hamlet*, Act 3, Sc. 1 in Elizabethan Drama Marlowe-Shakespeare 144 (Harvard Classics, Charles W. Elliott ed. 1938). In his soliloquy, Hamlet seems to be engaging in precisely the type of self-definition that *Casey* said the Due Process clause protects:

To be, or not to be, that is the question
 Whether ‘tis nobler in the mind to suffer
 The slings and arrows of outrageous fortune
 Or to take arms against a sea of troubles
 And by opposing end them. To die: to sleep;
 No more; and by a sleep to say we end
 The heart-ache and the thousand natural shocks
 That flesh is heir to, ‘tis a consummation
 Devoutly to be wish’d to die; to sleep . . .

Id.

¹¹⁴ 79 F.3d 790 (9th Cir. 1996) (en banc), *rev’d sub nom.* *Washington v. Glucksberg*, 521 U.S. 702 (1997).

¹¹⁵ *Id.* at 838.

and autonomy.’ ”¹¹⁶ The court observed “no decision is more painful, delicate, personal, important, or final than the decision how and when one’s life shall end.”¹¹⁷

That language nicely parallels language in *Casey* that the joint authors wrote to justify leaving the decision to abort to the woman because of the unique nature of her suffering:

[T]he liberty of the woman is at stake in a sense unique to the human condition and so unique to law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. . . . Her suffering is too intimate and personal for the State to insist . . . upon its own vision of the woman’s role¹¹⁸

Moreover, like the joint authors in *Casey*, the Ninth Circuit in *Compassion for Dying* distinguished between prohibition and regulation. After balancing what it perceived to be the state’s various interests against the interests of terminally-ill patients seeking to die, the court decided that one reason the state could not prohibit

¹¹⁶ *Id.* at 813-14 (quoting *Casey*, 505 U.S. at 851 (joint opinion)). The court went on to note:

A competent terminally ill adult, having lived nearly the full measure of his life, has a strong liberty interest in choosing a dignified and humane death rather than being reduced at the end of his existence to a childlike state of helplessness, diapered, sedated, incontinent. How a person dies not only determines the nature of the final period of his existence, but in many cases, the enduring memories held by those who love him.

Id. See also *id.* at 814 (holding that for patients “wracked by pain and deprived of all pleasure, a state-enforced prohibition on hastening their deaths condemns them to unrelieved misery or torture[;] . . . [s]urely, a person’s decision whether to endure or avoid such an existence constitutes one of the most . . . ‘intimate and personal choices a person may make in a life-time,’ a choice that is ‘central to personal dignity and autonomy.’ ” (quoting *Casey*, 505 U.S. at 851)).

¹¹⁷ *Id.* at 837.

¹¹⁸ *Casey*, 505 U.S. at 852.

physician-assisted suicide for terminally-ill patients was because the state could sufficiently further its legitimate interests by regulating the practice¹¹⁹ (just as the joint authors had concluded that a state could sufficiently further its interest in protecting unborn life before viability by “due” regulation).

Despite the strong parallel between the decision to abort and the decision to end one’s life (especially when taken in the context of a purported right to make self-defining intimate and personal decisions), and despite the Ninth Circuit’s apparent fidelity to *Casey*, the Supreme Court unanimously reversed. Not only did the Court reverse, but the majority, which included Justices Kennedy and O’Connor (two of *Casey*’s joint authors), rejected the Ninth Circuit’s reliance on *Casey* and applied an entirely different analysis.¹²⁰ The majority distinguished between non-fundamental rights and fundamental rights (that is, those that are “deeply rooted in this Nation’s history and tradition”¹²¹ and “implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed”¹²²). In determining which rights are fundamental, the majority insisted that the right at issue be described precisely, not generally.¹²³ The majority found the suggested formulations “right to die,” “right to determine the time and manner of one’s own death” (the Ninth Circuit’s formulation), “liberty to

¹¹⁹ *Compassion in Dying*, 79 F.3d at 832-33, 836-37.

¹²⁰ *Washington v. Glucksberg*, 521 U.S. 702 (1997).

¹²¹ *Id.* at 721 (quoting *Moore v. Cleveland*, 431 U.S. 494, 503 (1977)).

¹²² *Id.* (internal quotation omitted).

¹²³ *Id.* (“[W]e have required in substantive-due-process cases a ‘careful description’ of the asserted fundamental liberty interest.”) (citation omitted).

choose how to die,” “right to control of one’s final days,” “right to choose a humane dignified death,” and “the liberty to shape death” to be too imprecise.¹²⁴ Instead, the majority found that the specific right at issue was the “right to commit suicide which itself includes a right to assistance in doing so.”¹²⁵

The *Glucksberg* majority found that the right to commit suicide flunked the history and tradition test and was thus not fundamental.¹²⁶ Therefore, the state would not have to run the gauntlet of strict scrutiny and demonstrate that prohibiting assisted suicide was the least restrictive means of serving a compelling state interest.¹²⁷ The majority upheld the Washington statute under rational basis scrutiny, finding that the statute was rationally related to several legitimate state interests (for example, preserving human life, protecting vulnerable people from being coerced to commit suicide and from prejudice and unfair stereotypes, and avoiding the path to euthanasia).¹²⁸ The majority expressly refused to “weigh . . . the relative strengths of [the state’s] various interests” as the Ninth Circuit had done.¹²⁹ It was sufficient for the majority that the interests were “important and legitimate” and that prohibiting assisted suicide could be seen as reasonably related to promoting those

¹²⁴ See *id.* at 722-23.

¹²⁵ *Glucksberg*, 521 U.S. at 723.

¹²⁶ See *id.* at 710-19; see also *id.* at 723 (“[W]e are confronted with a consistent and almost universal tradition that has long rejected the asserted right . . .”).

¹²⁷ See *id.* at 728; see also *id.* at 721 (explaining that states may not infringe fundamental rights “unless the infringement is narrowly tailored to serve a compelling state interest”).

¹²⁸ See generally *id.* at 728-36.

¹²⁹ *Id.* at 735.

interests.¹³⁰

The majority essentially gave the back of its hand to the Ninth Circuit's reliance on *Casey* and did so in a way that cast doubt on whether the mystery passage's definition of liberty would ever again figure prominently in substantive due process decisions. The majority explained that despite the mystery passage's broad and general language, *Casey* merely "described, in a general way and in light of [the Court's] prior cases, those personal activities and decisions" that the Court previously had decided were sufficiently fundamental to be protected by the Fourteenth Amendment.¹³¹ The majority added: "That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected"¹³² So, taking *Glucksberg* at face value, in the view of the majority (which, again, included Justices O'Connor and Kennedy), the mystery passage was just a summary of the specific rights specially protected by substantive due process.

Now contrast *Glucksberg* with *Lawrence*. *Lawrence* overruled the Court's previous decision in *Bowers v. Hardwick*,¹³³ in which the Court held that a Georgia statute prohibiting same-sex sodomy did not violate substantive due process. *Bowers* had employed essentially the same methodology that the Court employed

¹³⁰ *Glucksberg*, 521 U.S. at 735.

¹³¹ *Id.* at 727.

¹³² *Id.* (citation omitted).

¹³³ 478 U.S. 186 (1986), overruled by *Lawrence v. Texas*, 539 U.S. 558 (2003).

in *Glucksberg*. *Bowers* narrowly defined the asserted right at issue as the right to engage in same-sex sodomy.¹³⁴ The *Bowers* majority then determined that nothing in this country's history or legal tradition indicated that the right to engage in same-sex sodomy was fundamental.¹³⁵ Finally, the majority held that it was rational for Georgia to prohibit same-sex sodomy based on the apparent conclusion of the people of Georgia that same-sex sodomy is immoral.¹³⁶

Justice Kennedy's opinion in *Lawrence* took a completely different tack. The opinion did feint toward applying a *Bowers-Glucksberg* style "history and tradition" analysis by discussing how Anglo-American law historically treated sodomy. The opinion criticized *Bowers*' historical analysis on the ground that sodomy statutes had, until recently, prohibited sodomy in general rather than singling out same-sex sodomy.¹³⁷ But *Lawrence*'s historical analysis was beside the point. *Bowers* had discussed the law's historical treatment of sodomy (as *Glucksberg* had discussed the law's historical treatment of suicide) to determine whether a right to engage in same-sex sodomy was a fundamental right "deeply rooted in this Nation's history and tradition."¹³⁸ The *Lawrence* majority, however, did not trouble itself with any distinction between fundamental and non-fundamental rights and did not even pretend to find that a right to

¹³⁴ *Id.* at 190 ("The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy . . .").

¹³⁵ *Id.* at 190-96.

¹³⁶ *Id.* at 196.

¹³⁷ *Lawrence v. Texas*, 539 U.S. 558, 568-71 (2003).

¹³⁸ *Bowers*, 478 U.S. at 194; see generally *id.* at 192-94.

engage in same-sex sodomy was “deeply rooted” in American legal tradition. More to the point, *Lawrence* did not take issue with *Bowers*’ conclusion that Anglo-American law had prohibited sodomy generally. Since sodomy historically had been considered a crime, it would have been odd to hold that any right to engage in sodomy—whether with a person of the same or different sex—was a fundamental right “deeply rooted in this Nation’s history and tradition.”¹³⁹ Perhaps this is why *Lawrence* avoided any explicit mention of *Glucksberg*-style fundamental rights analysis.

Finally, while much of Justice Kennedy’s opinion focused on what the majority perceived to be the specific effects on homosexuals of prohibiting sodomy,¹⁴⁰ the opinion can be fairly read to hold that laws prohibiting sodomy generally violate substantive due process. Three elements of the opinion support this conclusion. The first is the broad language the majority used to characterize the right at issue (an issue I will discuss shortly). The second is the majority’s explanation for why it chose to rely on due process rather than equal protection (as had Justice O’Connor)¹⁴¹ to hold the Texas law unconstitutional: “Were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if

¹³⁹ *Glucksberg*, 521 U.S. at 721 (quoting *Moore v. City of East Cleveland*, 431 U.S. 494 (1977)). It also would have been odd to say that any right to engage in sodomy—a practice that is, at least, morally controversial, and has been historically treated as a crime—is “‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if they were sacrificed.’” *Id.* (quoting *Palko v. Connecticut*, 320 U.S. 319, 325-26 (1937)). Does anybody seriously think that liberty and justice would cease to exist in this country if states continued to prohibit sodomy in their criminal laws?

¹⁴⁰ See *Lawrence*, 539 U.S. at 575-76, (asserting that prohibiting sodomy stigmatizes homosexuals, exposes them to discrimination, and demeans their lives).

¹⁴¹ *Id.* at 580 (O’Connor, J. concurring).

drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants.”¹⁴² The third is the majority’s express reliance on Justice Stevens’ dissenting opinion in *Bowers*.¹⁴³ In his *Bowers* dissent, Justice Stevens stated two conclusions that the *Bowers* majority quoted as “controlling”¹⁴⁴:

First, 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 Second, individual decisions by married persons, concerning the intimacies of their physical relationship . . . are a form of “liberty” protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons.¹⁴⁵

Justice Stevens went on to state that “our prior cases . . . establish that a State may not prohibit sodomy [between married persons] . . . or, indeed, between unmarried heterosexual adults.”¹⁴⁶ That statement formed the essential premise for Justice Stevens’ conclusion that prohibiting only same-sex sodomy violated the Constitution: in his view, the state had no good reason for distinguishing heterosexual from same-sex sodomy, so if the state could not prohibit heterosexual sodomy, it could not prohibit same-sex sodomy.¹⁴⁷

Given that the majority in *Lawrence* did not dispute *Bowers*’

¹⁴² *Id.* at 575 (emphasis added).

¹⁴³ *Id.* at 577-78 (citing *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting)).

¹⁴⁴ *Id.* at 578 (“Justice Stevens’ analysis, in our view, should have been controlling in *Bowers* and should control here.”).

¹⁴⁵ *Lawrence*, 539 U.S. at 577-78 (citing *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting)).

¹⁴⁶ *Bowers*, 478 U.S. at 218 (citation omitted).

¹⁴⁷ *See id.* at 218-20.

conclusion that Anglo-American law historically had prohibited sodomy generally, the majority's conclusion that prohibiting heterosexual sodomy as well as same-sex sodomy would violate substantive due process demonstrates that *Lawrence's* sojourn into the history of sodomy laws in this country was mere window dressing. The majority's historical conclusions had little if anything to do with the majority's ultimate legal conclusion.

Instead, the *Lawrence* majority stated that “[i]n all events we think that our laws and traditions in the past half century are of most relevance here.”¹⁴⁸ According to Justice Kennedy, the past half-century revealed “an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives *in matters pertaining to sex*.”¹⁴⁹ What was at stake, according to Justice Kennedy, was not merely the narrow right to

¹⁴⁸ *Lawrence*, 539 U.S. at 571-72.

¹⁴⁹ *Id.* at 572 (emphasis added). Note how the italicized language refers generally to “matters pertaining to sex” and not just to same-sex sodomy. This is a strong starting point for any argument that *Lawrence* extends beyond same-sex sodomy.

The emerging awareness which *Lawrence* found was evidenced by: 1) the 1955 draft Model Penal Code (MPC) that recommended no “criminal penalties for consensual sexual relations conducted in private,” *id.*; 2) the fact that several states changed their laws to conform to the MPC, *id.*; 3) the fact that many states did not enforce (or only rarely enforced) their statutes, *id.*; 4) the 1957 Wolfenden Report that advised the British Parliament to repeal laws punishing homosexual conduct and Parliament’s eventual adoption of that recommendation, *id.*; 5) the Court’s decisions in *Planned Parenthood v. Casey*, 505 U.S. 533 (1992), (which I will address in more detail in the text) and *Romer v. Evans*, 517 U.S. 620 (1996), *Lawrence*, 539 U.S. at 573-74; 6) decisions by the European Court of Human Rights holding that laws prohibiting homosexual conduct violated the European Convention on human rights, *id.* at 573, 576; and 7) actions taken in other nations that affirmed the right to engage in homosexual conduct, *id.* at 576-77.

To engage each of these bits of evidence of the “emerging awareness” cited in *Lawrence* would require another article. It suffices for now to note that none of this evidence tells us anything about the meaning of “liberty” in the due process clause as originally understood and that none of this evidence establishes that the right to commit sodomy (or any non-marital sexual acts, for that matter) is “deeply rooted” in this nation’s history and tradition.

engage in same-sex sodomy but the broader interest in deciding how to order one's intimate personal relationships and to express one's sexuality in the context of those relationships.¹⁵⁰ In the majority's view, the Texas law sought "to control a personal relationship that . . . is within the liberty of persons to choose without being punished as criminals."¹⁵¹ States, as a general rule, have no business "defin[ing] the meaning of the relationship or . . . set[ting] its boundaries absent injury to a person or abuse of an institution the law protects."¹⁵² Far from preventing injury to those committing sodomy, laws prohibiting same-sex sodomy "demean[] the lives of homosexual persons."¹⁵³ Thus, because the statute "further[ed] no legitimate state interest which can justify its intrusion into the personal and private life of the individual," the majority held that the Texas statute violated the Due Process Clause.¹⁵⁴

Justice Kennedy's paean to autonomy in sexual matters represents a wholesale rejection of the pre-*Eisenstadt* jurisprudential tradition regarding familial privacy. That tradition protected such privacy because of the unique value of the marital and familial relationship, and distinguished marital sexual activity from non-marital sexual activity.¹⁵⁵ *Lawrence* substituted individual autonomy as the new organizing principal for privacy in sexual matters. The

¹⁵⁰ See *Lawrence*, 539 U.S. at 567.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ See *id.* at 575 ("[*Bowers*'] continuance as precedent demeans the lives of homosexuals"); *id.* at 578 (explaining that "[t]he State cannot demean [the] existence or control [the] destiny" of those who engage in homosexual activity).

¹⁵⁴ *Id.* at 578.

¹⁵⁵ See *supra* text accompanying notes 82-100.

Casey mystery passage, which appeared to have been consigned to obscurity in *Glucksberg*, has made a triumphant return in *Lawrence*.¹⁵⁶ And if the mystery passage really does state the definition of due process liberty, it is difficult to argue that a definition of liberty as the right to make “intimate and personal choices” consistent with one’s self-defined “concept of existence, of meaning, of the universe, and of the mystery of human life” is not broad enough to include a right to engage in private consensual sexual activity such as sodomy.

But if due process liberty really is the right to make “intimate and personal choices” consistent with one’s self-defined “concept of existence, of meaning, of the universe, and of the mystery of human life,” that liberty would seem to be broad enough to encompass a right to end one’s own life. The Ninth Circuit’s opinion in *Compassion in Dying* made a strong argument that the decision how and when to end one’s own life is every bit as “intimate and personal” as the decision to end another living (and arguably human) being’s life or to perform a sexual act with another person.

Yet, the Court in *Glucksberg* found *Casey*’s mystery passage irrelevant to whether the Due Process Clause protected a right to assisted suicide, while the joint opinion in *Casey* minted the mystery passage to uphold a right to abortion, and the majority in *Lawrence* embraced the mystery passage in holding that the clause protected a right to engage in sodomy (heterosexual or same-sex). Why the different treatment of the mystery passage (and thus, the different

¹⁵⁶ See *Lawrence*, 539 U.S. at 573-574 (quoting *Casey*, 505 U.S. at 851).

definition of due process liberty) in these cases? Why did the Court employ a completely different analysis in *Casey* and *Lawrence* than it did in *Glucksberg*?

One can attempt to reconcile *Casey* and *Glucksberg* on the ground that the real reason for *Casey*'s decision to preserve *Roe*'s "central holding" was the "force of stare decisis,"¹⁵⁷ while no precedent existed recognizing any right to suicide. But that ground cannot reconcile *Glucksberg* with *Lawrence*, which could only reach its result by overruling the Court's prior decision in *Bowers*. So that still leaves the question: Why the different treatment and application of the mystery passage?

One could attempt to reconcile *Glucksberg* and *Lawrence* by noting that in the end both cases ultimately applied (or purported to apply) rational basis analysis. *Glucksberg*, after finding no fundamental right to assisted suicide, went on to find that prohibiting assisted suicide was reasonably related to promoting several legitimate state interests.¹⁵⁸ *Lawrence*, on the other hand, after all was said and done, merely found that prohibiting sodomy advanced no legitimate state interest¹⁵⁹ and therefore flunked the rational basis test, a test that requires that a law be rationally related to a legitimate state interest.

This attempted reconciliation fails. The rational basis

¹⁵⁷ *Casey*, 505 U.S. at 854. See *Compassion in Dying v. Washington*, 79 F.3d 790, 849 (9th Cir. 1996), *rev'd sub nom. Washington v. Glucksberg*, 521 U.S. 702 (1997) (Beezer, C.J., dissenting) (arguing that "[t]he abortion right's strength rests on *stare decisis*" and that "liberty alone would be insufficient to support a new fundamental right to abortion"). See Tuskey, *supra* note 25 (forthcoming), where I discuss *Casey*'s reliance on stare decisis.

¹⁵⁸ See *Glucksberg*, 521 U.S. at 735.

¹⁵⁹ See *Lawrence*, 539 U.S. at 578.

analysis the Court conducted in *Glucksberg* was not the same analysis the Court conducted in *Lawrence*. The Court in *Glucksberg* was expressly mindful of not overstepping its role and taking the question of whether to allow assisted suicide “outside the arena of public debate and legislative action” without express warrant from the Constitution or significant historical pedigree.¹⁶⁰ Its rational basis analysis reflected this mindfulness. The *Glucksberg* majority found that so long as the assisted suicide ban was “at least reasonably related” to advancing a legitimate state interest, no need existed to “weigh exactly the relative strengths of [the] various interests.”¹⁶¹

The *Glucksberg* Court found the state’s asserted interests “unquestionably important and legitimate.”¹⁶² Significantly, all those interests were premised upon a moral judgment concerning the value of human life and upon a prudential judgment (which is also a moral judgment since it concerns how to advance the common good) concerning how best to instantiate that moral judgment in the community. Take, for instance, the state’s “ ‘unqualified interest in the preservation of human life.’ ”¹⁶³ The Court rejected the Ninth Circuit’s holding that this interest must be discounted by “ ‘the medical condition and the wishes of the person whose life is at stake,’ ”¹⁶⁴ and instead reaffirmed that states “ ‘may properly decline to make judgments about the ‘quality’ of life that a particular

¹⁶⁰ See *Glucksberg*, 521 U.S. at 720.

¹⁶¹ *Id.* at 735.

¹⁶² *Id.*

¹⁶³ *Id.* at 728 (quoting *Cruzan v. Director, Missouri Dep’t. of Health*, 497 U.S. 261, 282 (1990)).

¹⁶⁴ *Glucksberg*, 521 U.S. at 729 (quoting *Compassion in Dying*, 79 F.3d at 817).

individual may enjoy.’ ”¹⁶⁵ In other words, *Glucksberg* held that with regard to suicide laws, states may reject an ethic that places relative values on human life in favor of an ethic that places an absolute value on human life.

The *Glucksberg* majority reiterated this conclusion when it discussed Washington’s interest in protecting vulnerable groups such as “the poor, the elderly, and the disabled . . . from abuse, neglect, mistakes,” and coercion.¹⁶⁶ The majority noted that Washington’s assisted suicide ban “reflects and reinforces its policy that the lives of terminally ill, disabled, and elderly people must be no less valued than the lives of the young and healthy.”¹⁶⁷

In short, the majority in *Glucksberg* endorsed a state’s legitimate authority to embody in its laws a moral proposition, that is, that human life, even at its end, and even when it involves serious pain, suffering, and disability, is a human good that is worthy of state protection. *Glucksberg* also endorsed a state’s legitimate authority to impose this moral proposition on those who disagree and who would prefer to act contrary to it without directly harming anybody else—that is, those who are enduring intense pain and suffering and wish to end that suffering by ending their own lives. *Glucksberg* is a ringing endorsement of the state’s authority to premise criminal prohibition of individual choices on a moral judgment.

Compare the treatment of state interests in *Glucksberg* with that in *Lawrence*. *Lawrence* could be said to be “consistent” with

¹⁶⁵ *Id.* at 729-30 (quoting *Cruzan*, 497 U.S. 261).

¹⁶⁶ *Id.* at 731-32.

¹⁶⁷ *Id.* at 732.

Glucksberg in that the *Lawrence* majority also saw no need to “weigh exactly” the state’s interests. But that is because *Lawrence* accorded those interests no weight at all.

While the *Lawrence* majority acknowledged that “for centuries” homosexual conduct had been condemned by “powerful voices” as immoral,¹⁶⁸ the majority held that Texas could not embody that moral judgment in a law prohibiting private consensual sodomy.¹⁶⁹ The Court did not, however, explain why the Constitution’s text made illegitimate a centuries-old legal and philosophical tradition¹⁷⁰ implementing and defending morals-based criminal prohibitions (such as the Texas law). Nor did the Court explain why judges, such as Justice Harlan, misconstrued the Constitution when they reasoned that states have legitimate interests in the “moral soundness” of their people and in “confining sexuality to lawful marriage,” and that the Constitution allows states to embody those interests in “laws forbidding adultery, fornication, and homosexual practices.”¹⁷¹ The majority also did not explain why the Constitution allowed the morals-based prohibition of assisted suicide in *Glucksberg* but not morals-based prohibition of abortion or sodomy.

¹⁶⁸ *Lawrence*, 539 U.S. at 571 (“It must be acknowledged, of course, that the Court in *Bowers* was making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral.”).

¹⁶⁹ See *id.* at 577 (“[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice” (quoting *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting))).

¹⁷⁰ See GEORGE, *supra* note 61 for a thorough discussion and defense of the Western legal and philosophical tradition regarding laws prohibiting conduct because it is immoral, and the contemporary debate among legal philosophers over such laws’ legitimacy.

¹⁷¹ See *Poe v. Ullman*, 367 U.S. 497, 546 (1961) (Harlan, J., dissenting); *supra* text accompanying notes 93-100.

One might suggest that *Lawrence* involved private consensual conduct and *Glucksberg* did not. But this distinction fails. For one thing, this distinction cannot be gleaned from the Constitution's text. But putting that aside, there is another problem: those seeking assisted suicide by definition would be consenting to their deaths. One could respond that prohibiting assisted suicide served the interest of preventing a slide to involuntary euthanasia.¹⁷² But as the Ninth Circuit noted, the state could address this concern through regulation—for example, procedural safeguards and evidentiary standards¹⁷³—rather than prohibition, just as the Court in *Casey* had required states to address their interests in fetal life and maternal health before viability by regulation rather than prohibition. The Court in *Glucksberg*, however, rejected the Ninth Circuit's reasoning and held that the State could embody its moral choice concerning the value of human life in a law prohibiting assisted suicide.

That still leaves privacy as a possible distinction. Again, this distinction is not based in constitutional text. But even so, assuming privacy distinguishes *Glucksberg* from *Lawrence*, it does not distinguish *Glucksberg* from *Casey*. Abortion is no more private than assisted suicide: both involve medical personnel, and it is probably more likely that assisted suicide would occur in the home than would abortion. If by “privacy” one means “autonomy to make self-

¹⁷² See *Glucksberg*, 521 U.S. at 732-35.

¹⁷³ See *Compassion in Dying*, 79 F.3d at 832-33; see also *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 279-87 (1990). Even assuming a due process right of a competent person to decline medical treatment, a state could insist on requiring clear and convincing evidence of the person's intent before allowing a surrogate to assert that right after the person becomes incompetent. *Id.* at 284 (“[W]e conclude that a State may apply a clear and convincing evidence standard in proceedings where a guardian seeks to discontinue

defining intimate and personal choices,” that just begs the question: why does one properly have (or the Constitution requires one have) the autonomy to abort one’s fetus or engage in sodomy, but not the autonomy to consent to assistance in suicide? This is the question *Lawrence* failed to answer.

Perhaps the answer is that consensual sodomy does not cause physical injury while assisted suicide, by definition, causes death. Again (not to be a broken record), this is not a textually-based distinction, but put that aside. In *Lawrence*, amici argued that same-sex sodomy does cause health risks to those who participate in it and to others as well.¹⁷⁴ The majority responded to this argument by essentially ignoring it. The *Lawrence* majority never discussed the asserted health risks associated with sodomy.¹⁷⁵

Instead, the *Lawrence* majority simply asserted that “[t]he Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.”¹⁷⁶ Since the majority never explained why a state could not reasonably conclude that sodomy can cause physical injury or health risk, or why the statute does not reasonably further the goal of preventing physical

nutrition and hydration of a person diagnosed to be in a persistent vegetative state.”).

¹⁷⁴ See Brief for Tex. Physicians Res. Council as Amici Curiae Supporting Respondent, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102), 2003 WL 367566, at *7-24 (citing the risks of sexually transmitted diseases as a result of same sex sodomy and arguing that same sex sodomy is more harmful to the public health than opposite-sex sodomy).

¹⁷⁵ See *Lawrence*, 539 U.S. at 567 (“[T]he State, or a court, [should not] define the meaning of [a] relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects.”). *Lawrence* seems to have simply assumed that sodomy does not cause injury. *Id.* See also *id.* at 578 (finding that the case did not “involve persons who might be injured”). Apparently, Justice Kennedy and the rest of the majority have never heard of AIDS or sexually-transmitted diseases.

¹⁷⁶ *Id.* at 578.

injury or health risk, it must be that for the majority the threat of any physical injury from sodomy is irrelevant. Even if sodomy can reasonably be thought to cause physical injury, and even if prohibiting sodomy furthers the goal of preventing that injury, the state, in the majority's view, has no business prohibiting private consensual sodomy.

That conclusion makes perfect sense in the context of due process liberty defined as the right to make "intimate and personal choices" based on one's self-defined "concept of existence, of meaning, of the universe, and of the mystery of human life." If one's self-defined concept of these matters leads one to conclude that he should bear whatever health risks (including possible death) that might attend the sexual activities he desires to engage in, the mystery passage definition of liberty ineluctably leads to the conclusion that he has the right to engage in those activities. But that takes us back to square one: Why should not the same reasoning apply to one whose self-defined concept of existence and the mystery of human life lead him to conclude that he should end his existence? And why did the Supreme Court not only treat people's rights to act upon their self-defined concepts with regard to sex and death differently, but also employ entirely different analyses and conceptions of liberty in deciding these cases?

Nothing in the Constitution's text answers those questions. Nothing about the mystery passage's definition of liberty answers those questions. Nothing that arguably distinguishes *Glucksberg* from *Casey* or *Lawrence* answers those questions. And nothing in

the jurisprudential tradition—the tradition of familial privacy embodied in cases like *Pierce*, *Griswold*, and Justice Harlan's dissent in *Poe*—answers those questions. From all appearances, the answers to those questions come from the policy judgment of the Justices that states should be able to prohibit assisted suicide but not prohibit abortion or private consensual sodomy.

The mystery passage is just a means to the end of enforcing these policy preferences. Under the history and tradition analysis as employed in *Glucksberg*, and applying rational basis analysis as applied in *Glucksberg*, *Lawrence* would not have recognized any right to engage in sodomy. Likewise, under a controlling definition of liberty as the right to make “personal and intimate” choices consistent with one's self-defined “concept of existence . . . and of the mystery of human life,” *Glucksberg* should have recognized a right to assisted suicide. The mystery passage is thus nothing more than a trump card for the Court to play when necessary to hold unconstitutional state laws of which a majority of Justices disapprove.

In the end, the mystery passage definition of liberty allows judicial second-guessing—based not on the Constitution, but on policy and value judgments—of any state regulation that arguably restricts “intimate and personal” activity. Since the mystery passage itself contains no inherent limiting principal (other than the proviso that it protects only “intimate and personal matters”), the mystery passage must almost necessarily lead to incoherent decision-making. *Casey*, *Glucksberg*, and *Lawrence* demonstrate that.

IV. LIMITING LAWRENCE?

In *Lawrence's* aftermath, state and federal courts have had to decide cases seeking to extend *Lawrence* to such activities as fornication,¹⁷⁷ consensual sadomasochism and bondage,¹⁷⁸ prostitution,¹⁷⁹ possession of child pornography,¹⁸⁰ the sale of sex toys,¹⁸¹ and as noted in the introduction of this article, incest.¹⁸² This should not be surprising, since *Lawrence's* broad language about sexual autonomy and its reliance on the mystery passage definition of due process liberty invites such claims. And claims involving sexual activity are not the only claims *Lawrence* has invited: recently, a man who was arrested and detained for being drunk in a friend's home filed a suit claiming a constitutional right under the Due Process Clause to be drunk on private property.¹⁸³

¹⁷⁷ *Martin v. Zihler*, 607 S.E.2d 367, 371 (Va. 2005) (applying the reasoning in *Lawrence* to find that Virginia's fortification statute was unconstitutional because it subjected private consensual sexual conduct to criminal penalties).

¹⁷⁸ *State v. Van*, 688 N.W.2d 600, 613-15 (Neb. 2004) (finding that the application of Nebraska's assault statute to consensual sadomasochism and bondage was constitutional because *Lawrence's* holding did not apply to any consensual conduct in a sexual relationship, only to conduct that was inappropriate absent any injury to a person or abuse of an institution).

¹⁷⁹ *State v. Thomas*, 891 So. 2d 1233, 1238 (La. 2005) (holding that Louisiana's prostitution statute was constitutional because *Lawrence* did not address prostitution).

¹⁸⁰ *State v. Senters*, 699 N.W.2d 810, 817 (Neb. 2005) (finding that Nebraska's law prohibiting consensual child pornography was constitutional because *Lawrence's* holding did not apply to child pornography).

¹⁸¹ *Williams v. Att'y Gen. of Ala.*, 378 F.3d 1232, 1238 (11th Cir. 2004) (finding Alabama's law prohibiting the sale of sex toys was constitutional because *Lawrence's* holding did not extend a fundamental right to sexual privacy, triggering strict scrutiny).

¹⁸² *Muth v. Frank*, 412 F.3d 808, 817 (7th Cir. 2004) (deciding that *Lawrence* did not address a fundamental right for all adults to engage in consensual sexual conduct, including incest).

¹⁸³ Shelly Murphy, *Lawsuit Asserts Right to Get Drunk on Private Property*, Boston

While the Virginia Supreme Court held that a state statute prohibiting fornication was unconstitutional,¹⁸⁴ most lower courts, like the Seventh Circuit in *Muth*, have essentially limited *Lawrence* to its facts (private consensual same-sex sodomy) and refused to find in *Lawrence* any broader right to sexual autonomy.¹⁸⁵ I agree with these courts that the Constitution does not protect, for example, any right to buy and use sex toys, to have sex with a prostitute, to engage in bondage or sadomasochism, or to engage in incest—even if the people engaging in those activities are adults who have fully consented to the acts and are engaging in them in private. My agreement does not necessarily result from any agreement that states *should* prohibit these activities; rather, it stems from the fact that nothing in the Constitution (despite what the Supreme Court has said)

Globe, July 8, 2005, at A1.

¹⁸⁴ *Martin*, 607 S.E.2d at 371 (“[T]he reasoning of *Lawrence* . . . leads us to conclude” that [the fornication statute] is unconstitutional as applied to private sexual conduct between two consenting adults.”). *Martin* was a straightforward application of *Lawrence*; given *Lawrence*’s statement that due process protects “decisions . . . concerning the intimacies of their physical relationship . . . by unmarried . . . persons,” *Lawrence*, 539 U.S. at 578. The Virginia Court could hardly have reached any other conclusion. *Martin*, however, demonstrates that there are costs (other than moral costs) involved in the sexual license *Lawrence* recognized as a constitutional principle. *Martin* involved a suit by a woman seeking damages from a former boyfriend for knowingly infecting her with herpes without her knowledge. *Martin*, 607 S.E.2d. at 368. The defendant argued that under Virginia tort law the plaintiff could not be awarded damages because her injuries were caused by her participation in an illegal act (fornication). *Id.* The Virginia Supreme Court held that because the fornication statute was unconstitutional (per *Lawrence*), the defense had to be struck and the case could proceed. *Id.* at 371. So the plaintiff may still have her day in court, but, unfortunately, she also still has herpes.

¹⁸⁵ See *Van*, 688 N.W. at 613-15 (deciding that *Lawrence* does not make state assault statutes unconstitutional as applied to private consensual bondage and sadomasochism); *Thomas*, 891 So. 2d. at 1234 (refusing to extend *Lawrence* to solicitation for prostitution); *Senters*, 699 N.W.2d at 814-18 (finding no right, under *Lawrence*, to be free from prosecution for possessing videotape of one’s own consensual sex with a 17-year old); *Williams*, 378 F.3d at 1238 (finding an Alabama law prohibiting the advertising and sale of sex toys constitutional under *Lawrence*; *Lawrence* does not protect any right to use sex toys).

disables states from prohibiting them.¹⁸⁶

The problem, as Matthew Franck noted in his criticism of the Seventh Circuit's decision in *Muth*, is that "a fair reading of *Lawrence* makes it hard to avoid the conclusion that" *Lawrence*'s reasoning does protect many other private consensual sexual acts.¹⁸⁷ This is not to say that I think the Supreme Court would find that the Constitution protects, for example, private consensual incest by adults. But to avoid that conclusion, the Court will have to do some fancy footwork around its decisions in *Lawrence* and *Casey*. In other words, to avoid extending *Lawrence* to other private consensual sexual activities that the Justices find less palatable than sodomy, the Court will have to introduce the same kind of incoherence and arbitrariness that marked the difference between its treatment of the mystery passage in *Casey*, *Lawrence*, and *Glucksberg*. Moreover, the Court will have to make the kind of moral judgments, or allow the states to premise criminal prohibitions on the kind of moral judgments that the Court refused to allow Texas to advance by prohibiting same-sex sodomy.

¹⁸⁶ For what it is worth, my view is that bondage and sadomasochism technically constitute assault or battery and should be treated in law like any other assault or battery. But whether to prohibit using sex toys, or prostitution, or sodomy, or any other private consensual sexual activity is a prudential decision that depends upon evaluating any number of contingencies (for example, the moral message the law sends by allowing or prohibiting the act, the moral and physical risks to the participants in the activity and to the public, the possibility and costs—both economic and non-economic—of enforcing a prohibition, the dangers to human development of overweening paternalism, and so forth) to determine whether prohibition best serves the common good. See GEORGE, *supra* note 61, at 40-47, for a good brief discussion of this point. My primary point is that these are value and policy questions not answered by the Constitution and therefore, left to legislatures rather than courts.

¹⁸⁷ See Franck, *supra* note 13, at 2.

One could use any number of examples of private sexual activity to illustrate this point. I will use two examples—prostitution, an activity the *Lawrence* majority stated was not involved in that case and thus seemed to be trying to distinguish—and bestiality, an activity that I have no doubt the Court would not recognize a right to engage in.

First, take prostitution. *Lawrence* purported to limit its holding by saying that the case did “not involve . . . prostitution.”¹⁸⁸ But the Court shortly went on to state that *Lawrence* did “involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle.”¹⁸⁹ Change “homosexual” to “heterosexual” and you have just described fornication (or, perhaps, heterosexual sodomy).

There can be little doubt that the Court would extend its holding in *Lawrence* to fornication and heterosexual sodomy.¹⁹⁰ So why would that holding not extend to prostitution (at least where all sexual acts are performed in private)? After all, depending on the act one pays for, prostitution merely amounts to engaging in fornication or sodomy in exchange for money. Under *Lawrence*, there seems to be no reason why the exchange of money should bring prostitution within the state’s power to prohibit. After all, suppose that one of the petitioners in *Lawrence* had been a prostitute. Would or should the

¹⁸⁸ *Lawrence*, 539 U.S. at 578.

¹⁸⁹ *Id.*

¹⁹⁰ See *id.* at 577-78 (finding that due process liberty “extends to intimate choices by unmarried” persons); see also *supra* text accompanying notes 140-147 (explaining how *Lawrence* extends to heterosexual sodomy); *Martin*, 607 S.E.2d at 369-71 (applying *Lawrence* to invalidate Virginia’s fornication statute).

petitioners' right to engage in sodomy have been any different? The sodomy was still private, and it was still consensual.

Several distinctions suggest themselves, but they all fail. The fact that prostitution typically involves a one-time liaison rather than an ongoing relationship should not matter. True, *Lawrence* did state that “[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring.”¹⁹¹ But *Lawrence* did not hinge its holding on the fact that the petitioners were involved in any ongoing relationship. The Court did not mention the relationship's status in its recitation of the case's facts; the Court merely described the incident that began the case, the procedural history, and the fact that the petitioners were adults who engaged in their act of sodomy in a private home.¹⁹² Nor did the Court mention the relationship's status anywhere else in the opinion. For all we know from the Court's opinion, the petitioners could have been involved in a one-time liaison. *Lawrence's* paean to the value of intimate contact in enduring relationships is irrelevant. *Lawrence*, on its face, protects the participants in a one-night stand every bit as much as it protects two long-time committed lovers involved in an “enduring relationship.”

This conclusion also eliminates solicitation as a ground for distinguishing private acts of prostitution. Solicitation is just a fancy word for approaching a person to enquire about engaging in sexual

¹⁹¹ *Lawrence*, 539 U.S. at 567.

¹⁹² *Id.* at 562-64.

acts. That being the case, it is probable that most casual (and perhaps many less casual) sexual liaisons begin with “solicitation.” If, for example, a man desires to have sex with a woman he meets in a bar, at some point he will have to broach the subject with her, either verbally or non-verbally. The fact that solicitation of or by a prostitute involves negotiation of a monetary payment should not be significant. Is there really a constitutional distinction between, “Will you have sex with me?” and “Will you have sex with me for \$100?”? To suggest such a distinction trivializes constitutional law.

In any event, to distinguish prostitution from non-compensated private sexual activity would be inconsistent with the mystery passage’s (and *Lawrence*’s) definition of liberty as the right to make “intimate and personal decisions” based on one’s self-defined concept of existence, and so forth. Moreover, the distinction would depend on a judgment about the good in sexual relations and how best to instantiate that good in the culture through the law. One might posit that compensated sex—sex as a business transaction—is not sufficiently “intimate and personal” to fall within the mystery passage’s protection. But is paying a prostitute for a one-time liaison any less “intimate and personal” than “hooking up” with another person for a one-time liaison that does not involve compensation? To attempt to answer this question is to attempt “to define the meaning of the relationship [between the prostitute and her customer and] to set its boundaries.”¹⁹³ To tell the prostitute and her customer by criminal prohibition that it is wrong for them to engage in sexual

¹⁹³ *Lawrence*, 539 U.S. at 567.

relations for compensation is to impose on them a conception of what constitutes a good life with regard to sexual intimacy that they apparently do not agree with, and to punish them for acting on their own self-defined concepts. This is precisely what *Lawrence* held states could not do with regard to sodomy.

Now let us examine bestiality. I am fairly confident that the Supreme Court never would recognize any constitutional right to bestiality. But in light of the mystery passage's definition of liberty, why not? If Timmy's concept of existence, of meaning, of the universe and of the mystery of human life leads him to "define the attributes of his personhood"¹⁹⁴ by consorting sexually with Lassie (in private, of course), what in the mystery passage's definition of liberty as essentially the right to create and live in one's own moral universe—the definition adopted in *Lawrence*—would allow a state to question Timmy's choice?

Perhaps the state may act to prevent harm to Timmy. But if we are talking about moral harm, *Lawrence* purports to prohibit states from imposing their view of morality to limit people's private sexual conduct. If we are talking about physical harm, the *Lawrence* majority ignored health risk as an interest sufficient to allow the state to prohibit sodomy. If the state cannot prohibit two people from consenting to engage in sexual activity that may well harm their health and others' health,¹⁹⁵ why should health concerns justify the state in prohibiting Timmy's activity with Lassie?

¹⁹⁴ *Casey*, 505 U.S. at 851.

¹⁹⁵ See *supra* notes 173-177 and accompanying text.

Perhaps the state could act to prevent harm to the animals involved. This seems like a good reason in that to say otherwise could very well put state animal cruelty laws at risk (unless abusing animals for sexual gratification is somehow privileged in a way abusing animals for other reasons is not). Of course, the reader might agree: “the Court would never recognize a right to abuse animals in private.”

I agree. But assuming I am correct as to how the Court would treat a claimed right to abuse animals, note how that conclusion runs headlong into the Court’s abortion jurisprudence. In *Roe*, one of the reasons the Court gave for deciding that women should have a constitutional right to abort was that “the unborn have never been recognized in the law as persons in the whole sense.”¹⁹⁶ Responding to this reasoning, John Hart Ely wrote in 1973 that “[d]ogs are not ‘persons in the whole sense’ nor have they constitutional rights, but that does not mean the state cannot prohibit killing [or harming] them.”¹⁹⁷ By allowing states to prohibit animal cruelty but not allowing states to prohibit abortion, the Court is imposing a (to say the least) controversial moral value judgment: states may value the well being of animals in their law more than they may value the lives of human fetuses. States may instantiate in their law concern for animal well-being by prohibiting animal cruelty but may not instantiate in their law concern for fetal life by prohibiting abortion. The Court may have what it thinks are good reasons for not allowing

¹⁹⁶ *Roe*, 410 U.S. at 162.

¹⁹⁷ Ely, *supra* note 45, at 926.

states to prohibit abortion, but in the end the decision not to allow states to prohibit abortion is based on what is ultimately a moral judgment: all things considered, it best serves the good of pregnant women and the common good (however the Justices define those terms) to allow pregnant women to decide for themselves whether to abort.¹⁹⁸

This leaves one other reason for excluding bestiality from the ambit of *Lawrence's* broad definition of liberty. The mystery passage purports to protect only the most “intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy.”¹⁹⁹ The Court could well conclude that the choice to engage in bestiality is not sufficiently “intimate and personal” or “central to personal dignity and autonomy” to qualify for protection under the mystery passage’s definition of liberty.

But the mystery passage itself states that the very “heart of liberty is the right to define one’s *own* concept of existence” and so forth. Why limit this liberty only to matters that a majority of Justices consider to be sufficiently “intimate and personal” and “central to personal dignity and autonomy” to merit protection? This in itself is a value judgment. Moreover, by what metric does the Court decide what is sufficiently “intimate and personal” or “central?” The Constitution provides no guidance for that decision.

¹⁹⁸ Any argument that the states should be able to prohibit bestiality because animals cannot consent similarly runs into the Court’s abortion jurisprudence. Fetuses do not consent to being aborted, yet according to the Court abortion is a constitutionally-protected right.

¹⁹⁹ *Lawrence*, 539 U.S. at 574 (quoting *Casey*, 505 U.S. at 851).

The question invites decision by reference to the Justices' value preferences.

One could respond that the mystery passage is limited by reference to the matters stated in the first sentence of the paragraph in which it appears: "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education."²⁰⁰ But after *Lawrence*, that cannot be taken to be an exclusive list. The list does not include sodomy—in fact, the Court in *Bowers* had specifically held that there was no right to engage in sodomy—yet *Lawrence* relied on the mystery passage to find that due process does not allow states to make private consensual sodomy a crime. Sodomy, therefore, must be included within the ambit of mystery passage liberty because it is *like* those other activities in a relevant way. So what is the relevant similarity? Perhaps the relevant similarity is that the decision to engage in sodomy is sufficiently "intimate and personal" and "central to personal dignity and autonomy" to be worthy of protection. But that begs the question: why is the decision sufficiently intimate and personal and central?

Another possibility is that sodomy is relevantly similar to the activities *Casey* listed because it has something to do with sex (or the use of the sexual organs or dealing with the consequences of sexual relations or the fetuses or born children who result from sexual relations). Putting aside the rather loose connection here, one may question why sex (or activity somehow related to sex or use of the

²⁰⁰*Id.* (citing *Casey*, 505 U.S. at 851).

sexual organs) merits special constitutional status. Moreover, bestiality is related to use of the sexual organs as well. So why should bestiality not share this special status?

Perhaps the distinction is that the mystery passage really protects the relationships of which sexual activity is a part. But *Casey* (following *Eisenstadt*) purports to protect the rights of individuals, not relational units.²⁰¹ *Casey* itself held that a state cannot require that a husband be informed of (and thus have any say-so over) his wife's decision to abort.²⁰² If the right of the individual to define himself through his choices is what the mystery passage protects, there is no basis to distinguish a right to engage in sexual activity with another from a right to engage in solitary sexual activity. Does anybody seriously believe that *Lawrence* would not extend to a state law prohibiting private masturbation?

In the end, the only way to exclude an activity like bestiality from *Lawrence's* reach is to decide that bestiality is not worthy of protection because the state can conclude it is wrong and that to prohibit it serves the common good. Those are sound moral decisions, but they are moral decisions. *Lawrence* purports to disable the states from instantiating moral decisions with regard to sexual activity by prohibiting the activity, but the only way to avoid extending *Lawrence* to activities the Justices find less palatable than sodomy is to make those very moral decisions *Lawrence* purports to disallow.

²⁰¹ See *supra* notes 101-111 and accompanying text.

²⁰² See *Casey*, 505 U.S. at 887-98; see also *Planned Parenthood v. Danforth*, 428 U.S. 52 (1975) (holding unconstitutional a Missouri statute requiring a wife to receive her husband's

V. CONCLUSION

The Court's decision in *Lawrence*, with its adoption of *Casey*'s mystery passage as its definition of due process liberty, and its expansive language about the right of autonomous individuals to order their personal relationships and define themselves through private consensual sexual activity, has invited claims in lower courts seeking to extend *Lawrence*'s holding to sexual (and other) activity beyond the same-sex sodomy involved in *Lawrence*. *Casey* and *Lawrence* thus have created a dilemma for lower court judges. Those judges, believing themselves bound by Supreme Court precedent, and facing real costs to themselves if they do not follow that precedent, must decide how to apply those two cases—cases that have no basis in the Constitution's text or the jurisprudential tradition (familial privacy) they claim to be rooted in and whose reasoning, if consistently applied, would call for invalidating state statutes that until recently, nobody would have thought to be unconstitutional.

Despite *Lawrence*'s broad reasoning, lower courts have declined to extend *Lawrence* beyond its facts, opting instead to read *Lawrence* more narrowly than its language would seem to allow. But given the Court's own treatment of the definition of liberty on which *Lawrence* is based, one can hardly blame those lower courts. The Court has applied the mystery passage definition of liberty arbitrarily, in effect exposing the passage as a trump card to play when necessary to hold unconstitutional, without any real basis in the Constitution, statutes a majority of Justices find objectionable. It should not be

surprising, then, or objectionable, if lower courts decline to extend *Lawrence* and instead let the Supreme Court decide if and when it wants to play its mystery passage joker.