that the *Lemon* test that will be reaffirmed in *Grand Rapids* and *Aguilar,* applies to and disposes of this case." And Powell's memorandum ends with the following sentence:

> Your opinion is at odds with the reasoning in *Wallace, Grand Rapids* and *Aguilar* and my concurring opinions in these cases.

Driven by the result the Court was reaching in *Aguilar,* Justice Brennan failed to respect religious observance in *Thornton v. Caldor.* Terrible as Burger's majority decision became as a result of Brennan's disagreement, it is fortunate for Justice Brennan's place in history that it will always remain only a draft opinion.

Reproductive Rights and Liberties: The Long Road to *Roe*

DAVID J. GARROW

Justice Brennan's contributions to the establishment of constitutional protections for Americans' reproductive and sexual liberties—Fourteenth Amendment due process rights that often have been addressed under the rubrics of "privacy" or "autonomy"—have been important both in cases in which Brennan authored much-cited opinions, cases such as *Eisenstadt v. Baird* (1972) and *Carey v. Population Services International* (1977), and in cases where Brennan made substantively crucial behind-the-scenes contributions to well-known opinions written by colleagues, cases such as *Griswold v. Connecticut* (1965) and *Roe v. Wade* (1973).

However, Justice Brennan's significant contributions to the "privacy" doctrine cases that reach from *Griswold* through *Eisenstadt* and *Roe* to *Carey* all rest upon a foundation created by the outcome of an earlier case, *Poe v. Ullman,* a 1961 decision in which an intensely torn Justice Brennan finally concluded that he could not vote to endorse the plaintiffs' constitutional challenge to a Connecticut criminal statute prohibiting the use or prescription of birth control devices—a statute which the Court *would* void four years later in *Griswold. Poe v. Ullman* thus was not only Justice Brennan's somewhat stressful introduction to the family of reproductive rights issues that would be most famously addressed in *Griswold, Eisenstadt,* and *Roe,* but *Poe* was also a most ironic antecedent for the subsequent contributions that William J. Brennan, Jr., would make toward constitutional protection of Americans' fundamental reproductive rights.

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The Forty-Year Crusade for Reproductive Freedom

The Supreme Court's consideration of *Poe v. Ullman* came only four years after Justice Brennan had first taken his seat on the Court. The Planned Parenthood League of Connecticut (PPLC) had been struggling for decades against the state's unique and extremely intrusive criminal law that prohibited any use of birth control devices by anyone, and that also prohibited all doctors and other medical professionals from counseling or advising patients in the use of such devices. The criminal statute was an 1870s legacy of anti-obscenity crusader P. T. Barnum—a man far better known as a nineteenth-century circus magnate than as a Connecticut state legislator.

The Barnum prohibition had stood without challenge until the 1920s, when Katharine Houghton Hepburn, one of the founders of Connecticut Planned Parenthood and the mother of the famous actress, launched the first effort to repeal the law. Hepburn and her fellow birth control proponents, working in close alliance with national birth control champion Margaret Sanger, hoped to open a network of free or low-cost clinics that could provide vaginal diaphragms to poor or working-class women who could not afford a private physician. The Barnum statute represented an explicit obstacle to their hopes.

Hepburn and her allies—a combination of early, upper-class feminists and a smattering of liberal physicians—found limited receptivity and no success in the Connecticut legislature. The growing number of Catholic legislators—representing urban districts filled with first- and second-generation Italian, Eastern European, and French-Canadian immigrants—gave vociferous voice to the Roman Catholic Church's unbending doctrinal opposition to any state authorization of "unnatural" birth control methods.

Stymied again and again with their legal reform efforts in the Connecticut legislature, Hepburn and her co-workers in the mid-1930s quietly resolved to open an initial clinic in Hartford and to expand to other Connecticut cities if prosecutors made no move to enforce the Barnum law against them. For four years, from 1935 until 1939, their initiative succeeded. A quiet expansion into Waterbury, Connecticut's most heavily Catholic city, however, generated public complaints by local Roman Catholic clergymen, resulting in the arrest and prosecution of the nurse and two young doctors who staffed the clinic.

In the wake of the Waterbury arrests, Connecticut Planned Parenthood immediately closed all its clinics and sought unsuccessfully to challenge the Barnum statute in the Connecticut Supreme Court. Two years later, following another failed push for legislative reform, Hepburn's allies mounted a constitutional challenge, *Tileston v. Ullman,* that was turned aside both by Connecticut state courts and finally by the U.S. Supreme Court as well.

Following that 1943 defeat, Connecticut's birth control proponents endured twelve more years of looking without success for some channel that would allow them to reopen their clinics. Then, in the mid-1950s, under the leadership of a new executive director, Estelle Trebert Griswold, the Connecticut women and their medical allies resolved to mount another courtroom challenge to the constitutionality of the Barnum statute. They framed a set of cases around Dr. Lee Buxton, the head of Yale University's obstetrics and gynecology department, and several of Buxton's female patients who had to avoid pregnancies for either extremely serious reasons of health or, in one particular case, a likely danger to her very life.

Dr. Buxton and the women (who chose pseudonyms like Poe and Doe to protect their privacy) sued Abraham Ullman, the same New Haven prosecutor who had held office since the 1943 litigation. The cases met with no success in Connecticut state courts. Early in 1960 Connecticut Planned Parenthood's lead attorney, well-known Yale Law School professor Fowler Harper, appealed *Poe v. Ullman* and the companion cases to the U.S. Supreme Court. In his petition, Harper challenged the Barnum law's criminalization of the *use* of birth control devices by married couples. He argued that the law represented "an unreasonable and arbitrary intrusion into the private affairs of the citizens of Connecticut. . . . When the long arm of the law reaches into the bedroom and regulates the most sacred relations between a man and his wife, it is going too far." The Poes, the Does, and their physician, Dr. Buxton, "insist that marital intercourse may not be rationed, censored, or regulated by priest, legislator, or bureaucrat. Certainly, they contend, the 'liberty' guaranteed by the due process clause includes this, among the most sacred experiences of life." In May of 1960, five members of the high court, one more than was necessary, including Justice Brennan, voted to hear Harper's appeal.

Justice Brennan Grapples with *Poe*

Not until March of 1961 was *Poe* argued before the Supreme Court. In advance of the hearing, one of Justice Brennan's young law clerks, Richard S. Arnold—later in life to be chief judge of the Eighth Circuit Court of Appeals—warned his boss that the *Poe* cases suffered from insufficient factual development in the courts below. It was not clear that the state would actually prosecute—or had even threatened to prosecute—married couples for merely *using* contraceptives. Arnold advised Brennan that "on a properly constructed record a holding of unconstitutionality would be required," but that the sparse record in *Poe* was a poor invitation for overturning such a long-standing state statute.

At argument, Justice Brennan queried Harper about whether other states had anti–birth control laws similar to Connecticut's—Massachusetts came the closest—and he questioned the state's lawyer as to whether the statute allowed for the sale or use of condoms, and was told no. Indeed, unbeknownst to either the justices or the *Poe* lawyers, that very week in the Connecticut town of Wallingford a salesman was arrested, convicted, and fined $75—along with the loss of his merchandise—for distributing condoms to service stations.

In the final moments of Harper's closing argument, Brennan pointedly asked, "Isn't the operation of clinics what's at stake here really?" When Harper answered yes, Brennan replied, "I take it that the Poes and Does can get what they need almost anyplace in Connecticut," providing that they could both find and afford a sympathetic doctor and a quietly cooperative pharmacy.

Those comments directly foreshadowed the position Brennan took when the nine justices met privately the next day to discuss and vote on how they would decide *Poe*. He told his colleagues that the cases failed to meet the constitutional requirement of representing a "case or controversy," which meant, in essence, that the plaintiffs had presented a merely theoretical dispute. Four of his colleagues—Chief Justice Warren and Justices Frankfurter, Clark, and Whittaker—felt likewise, making for a five-vote majority to turn the *Poe* challenge aside.

Three months later, in early June, Felix Frankfurter circulated an initial draft of his opinion for the *Poe* majority. But Justice Brennan now was having second thoughts about his vote. The final conference of the term was right at hand, and at that gathering he informed his fellow justices that rather than join Frankfurter, he would submit a brief separate

concurring opinion of his own before the end of the day. Formally issued three days later, Brennan's opinion took no position on the constitutional merits of the Barnum law—privately he told Arnold and fellow clerk Dan Rezneck that were he to address the merits he would vote to void the statute—but agreed with the Frankfurter quartet that the appeal should be dismissed. *Poe* failed to present "a real and substantial controversy" and was based upon "a skimpy record." The "true controversy" in Connecticut was not over the Poes' and Does' access to birth control devices, but—as in 1939—"over the opening of birth-control clinics on a large scale." Unless Connecticut made "a definite and concrete threat to enforce these laws against individual married couples," the Supreme Court could "decide the constitutional questions urged upon us when, if ever, that real controversy" over clinics "flares up again."

Brennan Develops a Right to Privacy

Connecticut Planned Parenthood immediately announced that it would take up that challenge, and less than five months after the defeat in *Poe* PPLC publicly opened a birth control clinic for married women in downtown New Haven. Local prosecutors made no immediate move against them, but a Roman Catholic layman, James G. Morris, began complaining both to the press and to elected officials that the authorities were failing to carry out their duties by declining to enforce a still-valid law. With some reluctance, two police detectives were detailed to question Estelle Griswold about the clinic's activities. Eager to launch a case that this time the Supreme Court could not duck, Mrs. Griswold enthusiastically answered their questions and agreed to find several patients who would willingly testify that Mrs. Griswold's and Dr. Buxton's assistance to them did indeed violate the anti–birth control provisions of the Barnum law. Just nine days after the clinic's opening, a local judge issued arrest warrants for Griswold and Buxton, and later that day both defendants were released on bond after turning themselves in to New Haven police.

Given Connecticut state courts' long track record of upholding the Barnum statute, no one was surprised when both Griswold and Buxton were found guilty following a one-day trial early in 1962 or when their convictions were upheld by an appellate panel and then by the Connecticut Supreme Court. Those reviews took more than two full years,

and only in September of 1964 was Fowler Harper able to appeal *Griswold v. Connecticut* to the U.S. Supreme Court. In early December the justices unanimously agreed that the case should be heard, and in late March Yale law professor Thomas Emerson—who inherited *Griswold* upon his friend Harper's death that January—argued Griswold and Buxton's appeal challenging the constitutionality of the Barnum statute before the Court. When the justices caucused privately three days later, Brennan agreed with six of his eight colleagues that Griswold and Buxton's convictions had to be reversed.

Chief Justice Warren assigned William O. Douglas to write the majority's opinion in *Griswold,* but when Douglas sent an initial draft of his handiwork to Justice Brennan's chambers, the reaction was far from enthusiastic. Brennan's clerk Paul Posner prepared a long and substantive letter of advice for Brennan to send his colleague, recommending that Douglas replace his draft's primary reliance upon a First Amendment "freedom of association" protection for the sanctity of married couples' procreative choices with a principal focus on a right to privacy argument. The Brennan letter explained:

> Instead of expanding the First Amendment right of association to include marriage, why not say that what has been done for the First Amendment can also be done for some of the other fundamental guarantees of the Bill of Rights? In other words, where fundamentals are concerned, the Bill of Rights guarantees are but expressions or examples of those rights, and do not preclude applications or extensions of those rights to situations unanticipated by the Framers. Whether, in doing for other guarantees what has been done for speech and assembly in the First Amendment, we proceed by an expansive interpretation of those guarantees or by application of the Ninth Amendment admonition that the enumeration of rights is not exhaustive, the result is the same. The guarantees of the Bill of Rights do not necessarily resist expansion to fill in the edges where the same fundamental interests are at stake.

"All that is necessary for the decision of this case," Brennan told Douglas, "is the recognition that, whatever the contours of a constitutional right to privacy, it would preclude application of the statute before us to married couples."

Three days later Douglas circulated a revised draft that fully adopted and incorporated Brennan's advice. When *Griswold v. Connecticut* was

publicly handed down some six weeks later, Douglas's majority opinion quickly became well known for its signal recognition of how the Constitution fully protected a fundamental right to privacy for married couples' choices concerning birth control. Not publicly announced or acknowledged, however, was the fact that William J. Brennan rather than William O. Douglas was indisputably the primary progenitor of *Griswold*'s famous right to privacy analysis. *Griswold*'s constitutional analysis not only overrode the evasiveness of *Poe v. Ullman* and successfully concluded the forty-year battle that Connecticut Planned Parenthood had waged against the Barnum law; *Griswold*'s privacy analysis also opened the constitutional door to an argument that prior to 1965 not a single judge or constitutional scholar had yet suggested: that the right to privacy protected by the Bill of Rights could cover a woman's decision to abort an unwanted pregnancy just as well as it could cover a married couple's choice to use contraceptives.

Brennan Paves the Road to *Roe v. Wade*

Between 1967 and 1970 a number of young attorneys, led first and foremost by the audacious, twenty-five-year-old Roy Lucas, developed and refined the constitutional argument that a *Griswold*-style right to privacy did indeed protect a pregnant woman's desire to choose abortion. One early case potentially raising that issue, *United States v. Vuitch,* was derailed by procedural questions, but in early 1971 Justice Brennan joined with four colleagues to vote in favor of hearing two right-to-abortion cases from Georgia and Texas, *Doe v. Bolton* and *Roe v. Wade.*

But less than four weeks before *Doe* and *Roe* were argued before the Court in December of 1971, the justices also had to confront a Massachusetts case that likewise was based upon *Griswold.* Freelance birth control advocate Bill Baird, a frequent speaker on the college lecture circuit, had been arrested by Boston police after finishing a speech at Boston University by distributing several packets of vaginal foam to young women from the audience. Massachusetts prosecutors alleged that Baird had thereby violated a state statute prohibiting the distribution of contraceptive items other than to married people by a physician. After a two-hour trial, Baird was found guilty, and the Massachusetts Supreme Judicial Court affirmed the constitutionality of his conviction by a 4–3 vote. Baird was then sentenced to three months' imprisonment. Fol-

lowing an initial Supreme Court refusal to hear his appeal, Baird served thirty-five days in a Boston jail before a federal appeals court ordered his release. Eighteen months later, after the appeals court had voided the state law and Massachusetts filed an appeal, *Eisenstadt v. Baird* was heard by the U.S. Supreme Court.

At the oral argument, Justice Brennan responded to Massachusetts's effort to defend its statute with a raft of questions, and finally told the state's lawyer, "I'm sorry, I just don't follow you, that's all." At conference, Brennan told his colleagues that Baird's conduct was clearly protected by "the penumbra of *Griswold,*" and one week later it was decided that Brennan would write for the majority of justices who were in agreement that Baird's conviction had to be voided.

While Brennan was preparing that *Eisenstadt* opinion, the justices also cast their initial private votes concerning *Roe* and *Doe.* Brennan believed that both Texas's anti-abortion law and Georgia's slightly more liberal abortion statute were constitutionally unacceptable. Chief Justice Warren Burger assigned preparation of the principal opinions to junior justice Harry A. Blackmun, but William O. Douglas set out to write a *Doe* opinion of his own and, as in *Griswold,* quickly shared his first draft with Bill Brennan. Agreeing with Douglas that both the Georgia and Texas statutes infringed upon the constitutional right to privacy, Brennan explained that privacy

> is a species of "liberty" . . . but I would identify three groups of fundamental freedoms that "liberty" encompasses: *first,* freedom from bodily restraint or inspection, freedom to do with one's body as one likes, and freedom to care for one's health and person; *second,* freedom of choice in the basic decisions of life, such as marriage, divorce, procreation, contraception, and the education and upbringing of children; and, *third,* autonomous control over the development and expression of one's intellect and personality.

Brennan reminded Douglas that his own discussion of *Griswold* in the initial draft of the *Eisenstadt* opinion—which he had circulated to his colleagues on the very day that *Roe* and *Doe* had been argued—"is helpful in addressing the abortion question." He concluded that "the right of privacy in the matter of abortions . . . means that the decision is that of the woman and her alone," aside from the state's authority to require that abortions be performed by physicians.

Brennan's eleven-page letter to Douglas laid out a full analysis of how the Court might persuasively decide both *Doe* and *Roe.* Twelve weeks later, when Brennan's opinion for four of the seven justices who had heard *Eisenstadt v. Baird* was publicly released, everyone could see for themselves just what Brennan had told Douglas about *Eisenstadt*'s helpfulness in extending *Griswold*'s privacy analysis to the issue of abortion. By failing to demonstrate any "rational basis" for distinguishing between married and unmarried individuals in the felony statute under which Baird had been convicted, the Massachusetts law unconstitutionally violated "the rights of single persons under the Equal Protection Clause" of the Fourteenth Amendment.

Brennan emphasized that "whatever the right of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike." He explained:

> If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. 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 intellectual 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.

No one, neither justice nor clerk nor interested attorney or journalist, could fail to note how clear the implication of that "bear or beget" sentence might well be for the constitutional question of a pregnant woman's right to choose abortion.

Justice Brennan Influences *Roe*

Two months later Harry Blackmun circulated a first draft of his *Roe* opinion. Blackmun's draft completely avoided the crucial issue, focusing instead on the question of statutory vagueness. Justice Brennan was quick to advise Blackmun that a majority of justices certainly felt that the crux of the matter had to be confronted and disposed of in both the Texas and Georgia cases. Blackmun's *Doe* draft, distributed three days

later, was considerably stronger, but after some internal disagreement the Court resolved to hold both *Doe* and *Roe* over for reargument in the fall.

Following those reargruments, in November 1972, Justice Blackmun distributed significantly revised drafts of both *Roe* and *Doe,* asking Bill Brennan, as the Court's only Roman Catholic justice, to pay particular attention to the opinions' comments about the history of Catholic religious opposition to abortion. Brennan responded by discussing the opinions privately with Blackmun. His principal suggestion to his junior colleague was that Blackmun consider extending the point in pregnancy before which intrusive state regulation of abortion would be impermissible from the end of the first trimester to some later period. Blackmun indicated his willingness to shift that "cut-off" point to the stage of fetal viability. Two days later Brennan sent Blackmun a letter suggesting that the Court should adopt a three-stage rather than two-stage view of pregnancy. "I have no objection," Brennan wrote,

> to moving the "cut-off" point (the point where regulation first becomes permissible) from the end of the first trimester (12 weeks) as it now appears to a point more closely approximating the point of viability (20 to 28 weeks), but I think our designation of such a "cut-off" point should be articulated in such a way as to coincide with the reasons for . . . creating such a "cut-off" point. . . . [R]ather than using a somewhat arbitrary point such as the end of the first trimester or a somewhat imprecise and technically inconsistent point such as "viability," could we not simply say that at that point in time where abortions become medically more complex, state regulation—reasonably related to protect the asserted state interests of safeguarding the health of the woman and of maintaining medical standards—becomes permissible? . . . Then we might go on to say that at some later stage of pregnancy (i.e. after the fetus becomes "viable") the state may well have an interest in protecting the potential life of the child and therefore a different and possibly broader scheme of state regulation would become permissible.

Blackmun welcomed Brennan's suggestions, and, as the final texts of the *Roe* and *Doe* opinions very much reflected when the decisions were handed down several weeks later, Blackmun indeed completely adopted the analytical substance of Brennan's recommendations. Just as with William O. Douglas's much-cited majority opinion in *Griswold,* much of the crucial substance of Harry Blackmun's landmark opinions in *Doe*

v. Bolton and *Roe v. Wade* likewise came without public acknowledgment or credit from the mind and pen of William J. Brennan.

Brennan Expands Reproductive Rights

Four years after *Roe* and *Doe, Carey v. Population Services International* (1977) presented the Court with a challenge to a New York law which prohibited the distribution of contraceptives by anyone other than a pharmacist and also banned any distribution to anyone under age sixteen. Speaking for a six-justice majority that voided the statute, Justice Brennan reiterated that "the teaching of *Griswold* is that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State." Access to contraceptives "is essential to exercise of the constitutionally protected right of decision in matters of childbearing that is the underlying foundation of the holdings in *Griswold, Eisenstadt v. Baird,* and *Roe v. Wade.*" Regarding the second question at issue, Brennan further held that "the right to privacy in connection with decisions affecting procreation extends to minors as well as to adults."

In cases where a majority of the Burger Court refused to acknowledge the constitutional necessity of public funding for poor women's abortions, Justice Brennan consistently wrote in dissent. Likewise, when the Burger Court refused to consider or review early challenges to state criminal statutes penalizing consensual sodomy, Brennan again repeatedly dissented. Brennan also wrote forcefully in cases where local governments penalized public employees for engaging in consensual, nonmarital intimate relationships, and in 1986 Brennan was among the minority of four justices who strongly protested the majority's constitutional affirmance of Georgia's criminal sodomy statute in *Bowers v. Hardwick.* Three years later, Brennan likewise was in dissent when a five-member majority of the Rehnquist Court threatened to void the underpinnings of *Roe v. Wade* in *Webster v. Reproductive Health Services* (1989).

But, as history's record memorably indicates, in the crucial family of cases reaching from *Griswold* and *Eisenstadt* to *Roe* and *Carey,* Justice William J. Brennan, Jr.—sometimes writing in his own name, and sometimes by dint of his extensive but publicly unacknowledged contributions to the well-known majority opinions of others—played a

landmark role in the development of constitutional protection for the reproductive and procreative rights of American citizens. Absent the Supreme Court's 5–4 rejection of *Poe v. Ullman,* the doctrinal watershed of *Griswold v. Connecticut* would not have come to pass, and, absent *Griswold,* the recognition of a woman's constitutional right to choose abortion in *Roe v. Wade* would have been an unlikely and perhaps impossible judicial development as well. Thus, beyond Justice Brennan's own statements in *Eisenstadt* and *Carey,* and beyond his crucial private contributions to *Griswold* and *Roe,* looms the paradoxical possibility that William J. Brennan, Jr.'s decisive vote in *Poe v. Ullman* may ironically have been just as significant a boon to the creation of constitutional protection for Americans' reproductive choices as were his analytical insights in *Griswold, Eisenstadt,* and *Roe.*

The Family and Responses of the Heart

ANNA QUINDLEN

It is difficult to read the Supreme Court decision in *Moore v. City of East Cleveland* (1977) without thinking in passing of the girlhood of Marjorie Leonard. She was five when her father died and eleven when her mother followed, and she was raised by her two older sisters, who shared a household with her in upstate New York and worked as schoolteachers.

In 1928 Marjorie Leonard married a young man named William J. Brennan, Jr., and almost fifty years later he would feel compelled to write a concurring opinion in *Moore,* a case that mirrored his wife's childhood. The city of East Cleveland had prosecuted a woman living with her grandsons because of zoning regulations that narrowly defined the meaning of family—defined it, in fact, in a fashion that would have prohibited Marjorie and her sisters from living together.

"I write only to underscore the cultural myopia of the arbitrary boundary drawn by the East Cleveland ordinance in light of the tradition of the American home that has been a feature of our society since our beginning as a nation," Justice Brennan wrote, "a tradition . . . 'of uncles, aunts, cousins and especially grandparents sharing a household along with parents and children. . . .' The line drawn by this ordinance displays a depressing insensitivity toward the economic and emotional needs of a very large part of our society."

Cultural myopia, insensitivity—neither afflicted Justice Brennan when he considered issues of family law during his decades as a justice of the Supreme Court. Perhaps it is a mistake to identify a great man's biography too closely with his body of work. Perhaps Justice Brennan was not especially influenced by his own family life, by his roles as son,

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