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DISPATCH FROM THE SUPREME COURT  
ARCHIVES: VAGRANCY, ABORTION, AND WHAT  
LINKS BETWEEN THEM REVEAL ABOUT THE  
HISTORY OF FUNDAMENTAL RIGHTS

Risa L. Goluboff

# ESSAY

## DISPATCH FROM THE SUPREME COURT ARCHIVES: VAGRANCY, ABORTION, AND WHAT THE LINKS BETWEEN THEM REVEAL ABOUT THE HISTORY OF FUNDAMENTAL RIGHTS

Risa L. Goluboff\*

APPENDIX .....1388

The title of this Essay is somewhat misleading. First of all, by Supreme Court archives, I do not mean the official documents of the Supreme Court as an institution. Rather, my dispatch heralds from the archives of individual Justices who have deposited their papers in a variety of institutions, most notably the Library of Congress. Second of all, I am not actually writing from those archives. With a digital camera and a lot of memory cards, I have essentially reproduced the archives on my computer. As this nifty technology allows me to read my thousands of documents pretty much anywhere, I must confess: I am not, at this very moment, in the archives.

Metaphorically speaking, however, my title is accurate. This Essay is a dispatch from the archives in the sense that I am here to share a few finds I made in the Justices' papers that I imagine will be of interest to many a scholar

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of law and history. These finds consist of (1) portions of an early draft of Justice William O. Douglas's opinion in the 1972 vagrancy case of *Papachristou v. City of Jacksonville*;<sup>1</sup> (2) memoranda between Justice Douglas and Justices William J. Brennan, Jr., and Potter Stewart about that opinion;<sup>2</sup> and (3) a memo from Brennan to Douglas about *Roe v. Wade*.<sup>3</sup> These documents—which I have reproduced below for your perusal—shed new light on several apparently disparate issues in constitutional law: the Supreme Court's use of void-for-vagueness doctrine, the social and constitutional history of vagrancy law, the possibility and contours of constitutional regulation of substantive criminal law, the relationship between *Papachristou* and *Roe*, and the development and conceptualization of fundamental rights. I am guessing that you are surprised to learn that previously untapped Supreme Court documents reveal links between this odd assortment of subjects. You are probably even more surprised to learn that the glue that holds it all together is vagrancy law. Vagrancy law, you ask? Vagrancy law, I say. But let me explain.

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Ever since Anthony Amsterdam published his pathbreaking note on the void-for-vagueness doctrine in 1960,<sup>4</sup> legal scholars have speculated about the Supreme Court's use of the doctrine. On the surface, under void-for-vagueness, judges condemn as violations of the Due Process Clause of the Fifth or Fourteenth Amendment those laws they deem unduly vague or ambiguous. As Amsterdam described it, such vagueness is constitutionally problematic for two reasons. First, vagueness fails to give fair notice to the public as to what constitutes illegal conduct. Second, vagueness fails to guide the discretion of executive officers and judges; it accordingly encourages arbitrary and potentially discriminatory arrests and criminal convictions. Vagueness thus poses problems for the principle of legality and the rule of law itself.<sup>5</sup>

Amsterdam accepted the validity of these concerns, but he was not

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1. Draft Opinion, *Papachristou v. City of Jacksonville*, No. 70-5030 (Dec. 28, 1971) (Douglas Papers, Box 1558) [hereinafter *Papachristou* Draft].

2. Memorandum from Justice William O. Douglas to Justice Potter Stewart, Re: *Papachristou v. City of Jacksonville*, No. 70-5030 (Jan. 27, 1972) (Douglas Papers, Box 1558); Memorandum from Justice William O. Douglas to Justice Potter Stewart, Re: *Papachristou v. City of Jacksonville*, No. 70-5030 (Jan. 28, 1972) (Douglas Papers, Box 1558) (handwritten notations between Justices Douglas and Stewart); Memorandum from Justice William Brennan to Justice William O. Douglas, Re: No. 70-5030—*Papachristou v. City of Jacksonville* (Dec. 30, 1971) (Brennan Papers, Box I-285).

3. Memorandum from Justice William Brennan to Justice William O. Douglas, Re: Abortion Cases (Dec. 30, 1971) (Brennan Papers, Box I-285).

4. Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

5. See John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 189, 212 (1985).

convinced that vagueness—an indefiniteness of language—was always the real problem in so-called vagueness cases. Rather, he argued that vagueness was often the Court’s way of obfuscating its commitments to particular substantive values. Vagueness was a “makeweight,” “an available instrument in the service of other more determinative judicially felt needs and pressures.”<sup>6</sup> For example, Amsterdam showed how the Court had sometimes used vagueness during the first third of the twentieth century in lieu of economic substantive due process.<sup>7</sup> Similarly, when the Court became more committed to First Amendment protections beginning in the late 1930s, it used vagueness to strike down laws that restricted free speech.<sup>8</sup>

In the decade that followed the publication of Amsterdam’s note, lawyers deemed void-for-vagueness a promising form of constitutional argument in cases involving many of the pressing social and political issues of the day. They frequently used vagueness to challenge the petty criminal convictions of civil rights protestors, Vietnam War demonstrators, and other free speakers. Vagueness also became a major issue in a raft of cases lawyers brought against vagrancy laws in the 1960s, as I will discuss in a moment. Courts often, though not always, spoke the language of vagueness when they reversed the convictions of social movement participants for vagrancy, loitering, disorderly conduct, breach of the peace, and other crimes. As scholars watched courts use vagueness to vindicate sympathetic defendants, they wondered whether, and often assumed that, vagueness was indeed a stand-in for other concerns.<sup>9</sup>

In 1972, the Supreme Court used the void-for-vagueness doctrine to strike down an archaic Florida vagrancy law in *Papachristou v. City of Jacksonville*.<sup>10</sup> The ordinance criminalized those deemed vagrants, which included, among many others, “[r]ogues and vagabonds, or dissolute persons

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6. Note, *supra* note 4, at 72, 75.

7. *Id.* at 75-85.

8. *Id.*

9. See, e.g., David B. Filvaroff, *Conspiracy and the First Amendment*, 121 U. PA. L. REV. 189, 236-37 (1972); Leonard G. Ratner, *The Function of the Due Process Clause*, 116 U. PA. L. REV. 1048, 1084-86; Beverly C. Moore, Jr., Note, *Vagrancy and Related Offenses*, 4 HARV. C.R.-C.L. L. REV. 291, 303-09 (1969); Note, *Bringing the Vagueness Doctrine on Campus*, 80 YALE L.J. 1261, 1266 (1971); Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 845 (1970); Comment, *Statutory Vagueness in Juvenile Law: The Supreme Court and Mattiello v. Connecticut*, 118 U. PA. L. REV. 143, 152 (1969).

10. 405 U.S. 156, 162, 165-68, 171 (1972). *Papachristou* remains frequently cited for vagueness in criminal law casebooks. See, e.g., RICHARD J. BONNIE ET AL., CRIMINAL LAW 50-53 (1997); PHILLIP E. JOHNSON, CRIMINAL LAW: CASES, MATERIALS AND TEXT 76-83 (3d ed. 1985); JOHN KAPLAN ET AL., CRIMINAL LAW: CASES AND MATERIALS 185-88 (3d ed. 1996); WAYNE R. LAFAVE, MODERN CRIMINAL LAW: CASES, COMMENTS AND QUESTIONS 81 (2d ed. 1988); MATTHEW LIPPMAN, CONTEMPORARY CRIMINAL LAW: CONCEPTS, CASES, AND CONTROVERSIES 28 (2007); ANDRE A. MOENSSENS ET AL., CRIMINAL LAW 243-50 (6th ed. 1998); JOHN M. SCHEB & JOHN M. SCHEB II, CRIMINAL LAW AND PROCEDURE 53 (2d ed. 1994). Even Canadian criminal law texts cite to the case. See, e.g., KENT ROACH, PATRICK HEALY & GARY TROTTER, CRIMINAL LAW AND PROCEDURE: CASES AND MATERIALS 26 (9th ed. 2004).

who go about begging, . . . persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers.”<sup>11</sup> Jacksonville police officers used the ordinance to regulate and harass any number of socially marginal groups who failed—by choice or coercion—to comply with middle-class norms of behavior. These included poor people, African Americans, anyone who violated racial norms (by, for example, dating across the color line), and other nonconformists and dissidents. Writing for a unanimous Court,<sup>12</sup> Justice William O. Douglas emphasized that the ordinance was vague both because it failed to give “fair notice” to the public about what conduct was criminal and because it encouraged “arbitrary and erratic arrests and convictions.”<sup>13</sup> These were the two hallmarks of vagueness Amsterdam had described in 1960.

But Douglas did not stop there. In addition to relying on vagueness, he discussed at length the importance of the particular activities in which the *Papachristou* defendants had been engaged when arrested. He described walking, strolling, loafing, wandering, nightwalking, and the like as “historically part of the amenities of life as we have known them.”<sup>14</sup> While Douglas acknowledged that they were “not mentioned in the Constitution or in the Bill of Rights,” he nonetheless emphasized that “[t]hese unwritten amenities have been in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity. These amenities have dignified the right of dissent and have honored the right to be nonconformists and the right to defy submissiveness.” He viewed these amenities as “hav[ing] encouraged lives of high spirits rather than hushed, suffocating silence.”<sup>15</sup> Douglas referred to the writings of such American literary luminaries as Walt Whitman and Henry David Thoreau for the depth of the American commitment to such freedoms.<sup>16</sup>

This lofty rhetoric has led scholars, lawyers, and judges in the decades since *Papachristou* to speculate about the meaning and implications of *Papachristou* specifically and void-for-vagueness doctrine more generally. In his article, *Reconceptualizing Vagueness*, for example, Professor Robert Post describes the *Papachristou* Court as “trembl[ing] at the brink of . . . a

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11. JACKSONVILLE, FLA., ORDINANCE CODE § 26-57 (1965), *quoted in Papachristou*, 405 U.S. at 156 n.1 (1972).

12. The opinion was unanimous, but only seven Justices signed onto it. William H. Rehnquist and Lewis Powell joined the Court after argument in the case but before it was decided. They accordingly took no part in the case. 405 U.S. at 156.

13. *Id.* at 162.

14. *Id.* at 164.

15. *Id.* This aspirational language drew on an essay by Douglas’s friend Charles Reich that described Reich’s many run-ins with the police over his own wanderings and urged protection for “independence, boldness, creativity, high spirits.” Charles A. Reich, *Police Questioning of Law Abiding Citizens*, 75 YALE L.J. 1161, 1172 (1966).

16. 405 U.S. at 164 & n.7.

substantive due process analysis.”<sup>17</sup> He speculates that the “Court could have argued that it was constitutionally forbidden to use judgments to impose ‘lifestyle’ norms on unwilling segments of the population.”<sup>18</sup> Because the law systematically and legitimately regulates various kinds of social outliers, however, deciding the case on those grounds would have required the Court to determine precisely when the imposition of such norms was unconstitutional. That would have been difficult.<sup>19</sup> Post suggests that instead the Court used vagueness doctrine to delineate “the kinds of judgments that can be made by government officials” in particular circumstances.<sup>20</sup> Accordingly, Post interprets the Court’s use of vagueness as “in effect, decid[ing] that it is constitutionally arbitrary and improper to use compliance with bourgeois morals as a trigger for police control.”<sup>21</sup> Building on Post’s work, Debra Livingston has noted that lower courts too have treated *Papachristou* as if it had a substantive component—as if its vagueness determination turned on “the character of prohibited conduct, rather than the clarity of the language with which it is prohibited.”<sup>22</sup>

As it turns out, the Court came closer to the brink of substantive due process than Post, Livingston, and others have realized. And here is the first of the advertised portions of this Essay: the draft opinions in the Justices’ papers did not in fact rely on vagueness alone. In addition, they relied at first on the Ninth Amendment and then on substantive due process. In one earlier draft, Douglas described the same activities listed above not as “historically part of the amenities of life as we have known them,” but rather as “historically part of the amenities of life contained in those rights ‘retained by the peopl[e]’ within the meaning of the Ninth Amendment.”<sup>23</sup> Several years earlier, in *Griswold v. Connecticut*, a few Justices had excavated the Ninth Amendment as a potential resource for the protection of individual rights.<sup>24</sup> Though Douglas had not relied heavily on that Amendment in his majority opinion in *Griswold*, it clearly remained within the universe of doctrinal possibilities he deemed worth consideration.<sup>25</sup>

Douglas’s description of these activities as Ninth Amendment “rights” was no idle throwaway. He explicitly applied the strict scrutiny standard applicable “where fundamental rights and liberties are at issue.” He granted that state

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17. Robert C. Post, *Reconceptualizing Vagueness: Legal Rules and Social Orders*, 82 CAL. L. REV. 491, 497 (1994).

18. *Id.*

19. *Id.* at 497-98.

20. *Id.* at 498.

21. *Id.*

22. Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 619 (1997).

23. *Papachristou* Draft, *supra* note 1; *see infra* app. fig.1.

24. *Griswold v. Connecticut*, 381 U.S. 479, 488-95 (1965) (Goldberg, J., concurring).

25. *Id.* at 484.

police power authorized regulation of some of the petty criminals listed in the Jacksonville ordinance—the “gamblers, thieves, pilferers, pickpockets, traders in stolen property, drunkards, railers, and brawlers.” But where Ninth Amendment rights were concerned, strict scrutiny applied. “[A]s we have often stated, laws in these sensitive areas must be narrowly drawn to meet a precise evil.” The “sensitive areas” to which his citations referred included both longstanding rights like those in the First Amendment (*Cantwell v. Connecticut*<sup>26</sup>), and those of newer vintage like rights to association (*Shelton v. Tucker*<sup>27</sup>) and voting (*Harper v. Virginia Board of Elections*<sup>28</sup> and *Kramer v. Union Free School District*<sup>29</sup>).<sup>30</sup>

In another version of the opinion, Douglas jettisoned the Ninth Amendment in favor of substantive due process.<sup>31</sup> This change is particularly revelatory not only because it is lost in the published version of the opinion but also because Douglas had long opposed protecting substantive rights under the due process clause of the Fifth and Fourteenth Amendments. An ardent New Dealer whom Franklin Roosevelt had put on the Court in 1939, Douglas had performed somersaults in a number of cases to avoid resort to the substantive due process he had abhorred during the *Lochner* era.<sup>32</sup> Though a modern revival of substantive due process had long had its champions, especially in Justice John Marshall Harlan II,<sup>33</sup> Douglas’s squeamishness was hardly unique.<sup>34</sup> With a number of the Justices disavowing economic substantive due process as late as 1963, they found the possibility of embracing new rights under the same old theory discomfiting indeed.<sup>35</sup>

Nonetheless, over the course of the 1971 Term, Douglas’s aversion to substantive due process seems to have waned some.<sup>36</sup> A revised draft of

26. 310 U.S. 296, 307 (1940).

27. 364 U.S. 479, 490 (1960).

28. 383 U.S. 663, 670 (1966).

29. 395 U.S. 621, 628, 630 (1969).

30. *Papachristou* Draft, *supra* note 1.

31. *See infra* app. fig.2.

32. *See, e.g.,* *Griswold v. Connecticut*, 381 U.S. 479, 481-82 (1965); *Skinner v. Oklahoma*, 316 U.S. 535, 538 (1942).

33. *See, e.g.,* *Poe v. Ullman*, 367 U.S. 497 (1961) (Harlan, J., dissenting).

34. *See, e.g.,* *Eisenstadt v. Baird*, 405 U.S. 438, 446-47 (1972) (relying on equal protection rather than substantive due process); *id.* at 467 (Burger, C.J., dissenting); *see also* DAVID J. GARROW, *LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE* 181-82 (1998) (discussing various Justices’ hesitance to strike down a contraception statute in 1961 due to opposition to reintroducing substantive due process). The issue continued to trouble the Court until the *Roe* decision. *See id.* at 238-55 (discussing *Griswold*).

35. *See* *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963).

36. The retirement and death of Justice Hugo Black just as the 1971 Term began may have had something to do with this shift. Black had been the Court’s staunchest critic of substantive due process. *See, e.g.,* HOWARD BALL & PHILLIP J. COOPER, *OF POWER AND RIGHT: HUGO BLACK, WILLIAM O. DOUGLAS, AND AMERICA’S CONSTITUTIONAL REVOLUTION*

*Papachristou* stated plainly, “These amenities are so basic and elemental in our scheme of values that we conclude that they are part of the ‘liberty’ of the individual that is protected by the Due Process Clause of the Fourteenth Amendment against infringement by the States.”<sup>37</sup> As he had when initially relying on the Ninth Amendment, Douglas again seemed to invoke strict scrutiny. He argued that though the police power enables states and cities to protect society, they must do so in a “narrowly drawn” way so as also “to protect the basic ‘liberty’ of the person.”<sup>38</sup> The opinion’s final paragraph vaguely condemned those practices that were “foreign to the Bill of Rights.”<sup>39</sup>

The existence of these early drafts gives some heft to the speculation that *Papachristou*’s reliance on vagueness hid substantive commitments. At least as to Douglas (and Brennan and Thurgood Marshall, as we will see in a moment), it most certainly did. Douglas initially had in mind the Ninth Amendment and substantive due process, not only vagueness. He thought that there were rights at issue in *Papachristou*, that those rights were similar to other fundamental rights, and that they triggered the Court’s most stringent level of review.

That said, the substance of the rights Douglas purported to protect in the Ninth Amendment, the due process clause, and the Bill of Rights is not entirely clear. At times, Douglas emphasized physical mobility, the pure ability to move about as one desired, to stroll, loaf, walk, and wander. Over the course of more than thirty years on the bench, Douglas had repeatedly identified such mobility as crucially important and constitutionally protected. As early as 1941 in *Edwards v. California*, Douglas rhapsodized about the “right to move freely from State to State.”<sup>40</sup> He identified American identity and some essential American spirit as bound closely with such physical mobility. In the 1965 civil rights case of *Shuttlesworth v. Birmingham*, Douglas described the United States as “a country where freedom of locomotion is honored.”<sup>41</sup> The following year, in a dissent from the dismissal of a vagrancy case, Douglas came closest to the sentiments he would express in *Papachristou*. There he rehearsed the American mythology of mobility and the expansive frontier, and he expressed his consternation at laws that interfered with such movement.<sup>42</sup>

In Douglas’s published opinion in *Papachristou*, these suggestions reached

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194-95, 200-01 (1992); HOWARD BALL, *THE VISION AND THE DREAM OF JUSTICE HUGO L. BLACK* 16-78 (1975). Though the long friendship between Black and Douglas had undergone considerable strain by the time of Black’s death, Black’s absence may have freed Douglas somewhat to reconsider substantive due process as a doctrinal resource.

37. See *infra* app. fig.2.

38. *Papachristou* Draft, *supra* note 1, at 10.

39. *Id.* at 16.

40. 314 U.S. 160, 178 (1941) (Douglas, J., concurring).

41. 382 U.S. 87, 96 (1965) (Douglas, J., concurring) (citation omitted).

42. *Hicks v. District of Columbia*, 383 U.S. 252, 256-57 (1966) (Douglas, J., dissenting). Douglas’s commitment to the freedom of locomotion was also implicated in the “stop and frisk” case of *Terry v. Ohio*, 392 U.S. 1 (1968), where he dissented alone.

their rhetorical crescendo.<sup>43</sup> Mobility was a right embodied and protected in the Constitution itself. Such mobility, both across the country and within particular places, was central not only to a common myth of America but also to Douglas's own sense of himself as a wanderer and champion of wanderers. His own (possibly apocryphal) claims to have ridden the rails with hobos as a young man pepper his many autobiographical writings.<sup>44</sup> Liberty, for Douglas, elementally required physical mobility.<sup>45</sup>

At other moments in his *Papachristou* drafts, Douglas points to rights not only to be physically on the move and out of place, but to be socially, culturally, or politically so. He suggests that the rights at issue in *Papachristou*, rights he would deem fundamental and worthy of heightened judicial protection, included rights to "dissent," "nonconformity," and defiance of "submissiveness." Four of the defendants in *Papachristou*, for example, were clearly targeted because two of them were white women, two were black men, and they were on a double date.<sup>46</sup> This was northern Florida in 1969, after all.

Much as defiance of racial hierarchies and oppression was one obvious aspect of what Douglas had in mind, his preoccupation with nonconformity did not end there. The other *Papachristou* defendants, each in his own way, were also "vaguely undesirable in the eyes of police and prosecution."<sup>47</sup> Through the vagrancy ordinance, they could "be required to comport themselves according to the life style deemed appropriate by the Jacksonville police and the courts."<sup>48</sup>

One implication of this paean to nonconformity was the protection of certain rights that were exercised in public. The cornerstone of substantive due process as we have come to know it in the decades since *Papachristou* has been "privacy." But here, in the context of vagrancy laws, Douglas appears to suggest rights to engage in unconventional behavior—or simply to be an unconventional, even "undesirable," person—precisely where others could, and

43. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 163-64 (1972).

44. WILLIAM O. DOUGLAS, *GO EAST, YOUNG MAN: THE EARLY YEARS: THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS* 76-79 (1974); WILLIAM O. DOUGLAS, *OF MEN AND MOUNTAINS* 9-16 (1950); Letter from William O. Douglas to Edward L.R. Elson (Dec. 7, 1977), in *THE DOUGLAS LETTERS: SELECTIONS FROM THE PRIVATE PAPERS OF JUSTICE WILLIAM O. DOUGLAS* 426 (Melvin I. Urofsky ed., 1987); William O. Douglas, *Vagrancy and Arrest on Suspicion*, 70 *YALE L.J.* 1, 4 (1960). For the argument that Douglas lacked credibility as a storyteller, see BRUCE ALLEN MURPHY, *WILD BILL: THE LEGEND AND LIFE OF WILLIAM O. DOUGLAS* 118-23 (2003).

45. Indeed, physical mobility has long been central to the Anglo-American conception of liberty. *See, e.g.*, 1 WILLIAM BLACKSTONE, *COMMENTARIES* \*134 (14th ed. 1803); THOMAS M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* 339 (1st ed. 1868).

46. *Papachristou*, 405 U.S. at 158-59; Brief of Petitioner at 5, *Papachristou*, 405 U.S. 156 (1972) (No. 70-5030).

47. 405 U.S. at 166 (internal quotation marks omitted).

48. *Id.* at 170.

likely would, encounter such behavior and such people.<sup>49</sup>

Much as the possibility that fundamental rights might include activities blatantly conducted in a public setting seems unlikely today, so too does Douglas's suggestion that alternative "life style[s]" might receive constitutional protection. The possibility of such protection appears, in fact, to have had some traction in the early to mid 1970s. The Supreme Court had first invoked the idea of a "lifestyle" in *Coates v. City of Cincinnati*, the year before *Papachristou*. *Coates* struck down a loitering provision that based criminality on whether the loiterers' conduct was "annoying" to passersby. In that case, the police had deemed "annoying" picketing union members and "dirty and unkempt" Antioch College students protesting the Vietnam War.<sup>50</sup> Writing for the Court, Justice Potter Stewart saw the Cincinnati provision as containing "an obvious invitation to discrimination" on the basis of, among other things, "lifestyle."<sup>51</sup> To one person, walking around "dirty and unkempt" might be annoying; to another, it might be a meaningful "lifestyle." In *Papachristou*, Douglas used the term for the second time in the Court's history. He worried about those unfortunate people whose "life style" made them particularly vulnerable to arrest: "poor people, nonconformists, dissenters, idlers."<sup>52</sup>

Douglas continued to use the term over the next few years. He used it in dissent in *Ham v. South Carolina*, a case in which the Court required a trial judge to voir dire a jury as to their racial prejudices but not as to their prejudices about what Douglas called "non-conventional hair growth" and what then-Justice William H. Rehnquist, writing for the majority, simply called a "beard." According to Douglas, with whom Marshall largely agreed, defenders of the status quo thought that such hair growth "symbolize[d] an undesirable life-style characterized by unreliability, dishonesty, lack of moral values, communal ('communist') tendencies, and the assumption of drug use."<sup>53</sup> And in his concurrence in *Roe v. Wade* and its companion case *Doe v. Bolton*—more on those in a moment—Douglas again used the term, stating that "childbirth may deprive a woman of her preferred lifestyle and force upon her a radically different and undesired future."<sup>54</sup> The use of the term in these cases

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49. Not all vagrancy cases involved public behavior, however. In the late 1960s, for example, hippies were sometimes arrested for vagrancy while sitting in their homes. *See, e.g.,* *Goldman v. Knecht*, 295 F. Supp. 897 (D. Colo. 1969). Ironically, in *Griswold*, Douglas did the opposite: he transformed the quintessentially public freedom of association into a private right by closely linking it to marriage.

50. Justice Harry A. Blackmun, Notes on Oral Argument in *Coates v. City of Cincinnati* (Jan. 11, 1971) (Blackmun Papers, Box 125).

51. *Coates v. City of Cincinnati*, 402 U.S. 611, 616 (1971).

52. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972).

53. *Ham v. South Carolina*, 409 U.S. 524, 530 (Douglas, J., concurring and dissenting) (1973).

54. *Roe v. Wade*, *Doe v. Bolton*, 401 U.S. 179, 214 (1973) (Douglas, J., dissenting). The other intervening use of the term was Chief Justice Burger's in *Yoder v. Wisconsin*. He was clearly less comfortable with it and less committed to its protection generally, though he

led even such moderate legal scholars as J. Harvie Wilkinson III (now a judge on the Fourth Circuit Court of Appeals) and G. Edward White to write a law review article on *Constitutional Protection for Personal Lifestyles* in 1977. They saw the trend toward such constitutional protection as the most significant of the moment, and they advocated some form of protection.<sup>55</sup>

Here too, Douglas's own investment in such rights drew on a deep and long-held respect for eccentricity and rebellion. Douglas's romance with the hobo and the wanderer had as much to do with lofty ideals of individual self-fulfillment and nonconformity as with physical mobility for its own sake. Thus, in Douglas's construction of his identity, he was not only a perpetual wanderer, but a perpetual rebel as well. He could see a straight line from Thoreau and Whitman through himself to the Beats and then the hippies. This perspective led him to view with sympathy young people's rejection of the entire idea of "place" within an American social hierarchy. In 1969, Douglas published a book, entitled *Points of Rebellion*, in which he railed against "the Establishment" and set himself decidedly on the side of the youth culture.<sup>56</sup>

Within this context, Douglas's early draft of *Papachristou* reads as something of an anthem for the sixties' celebration of pluralism as both equality and personal liberty. Suggesting the existence of constitutional rights to such rebellion—as the draft opinion did—would have made *Papachristou* a key legal victory for contemporary activists. Read in the context of that draft, the published opinion takes on new meaning as well. The Warren Court's various rights revolutions—pertaining to race, criminal procedure, voting, and other issues—have generated more than their share of the historical limelight. Though the Burger Court has received some glory (or infamy) for its part in the sexual revolution—in both its sex-based equal protection doctrine and its substantive due process doctrine<sup>57</sup>—*Papachristou* has not really broken into the game. Until now.

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did protect it in that case. He referred to "what we would today call 'life style'" in referring to the Amish's longstanding religious and cultural practices. 406 U.S. 205, 217 (1972). Douglas notably did not use the term a few years later in *Belle Terre v. Boraas*, when he rejected a lifestyle claim in the face of zoning authority, though Thurgood Marshall used it three times in his lone dissent. 416 U.S. 1, 16, 18 (1974) (Marshall, J., dissenting).

55. J. Harvie Wilkinson III & G. Edward White, *Constitutional Protection for Personal Lifestyles*, 62 CORNELL L. REV. 563, 563, 611 (1977).

56. WILLIAM O. DOUGLAS, POINTS OF REBELLION (1969).

57. See, e.g., David J. Garrow, *Liberty and Sexuality*, in THE BURGER COURT: COUNTER-REVOLUTION OR CONFIRMATION? 83 (Bernard Schwartz ed., 1998); Ruth Bader Ginsburg, *The Burger Court's Grapplings with Sex Discrimination*, in THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T 132 (Vincent Blasi ed., 1983); Stephanie Seymour, *Women as Constitutional Equals: The Burger Court's Overdue Evolution*, in THE BURGER COURT: COUNTER-REVOLUTION OR CONFIRMATION?, *supra*, at 66.

You may be thinking: “All this—the claim of a veritable cultural revolution, of a whole panoply of potential rights to mobility, to a lifestyle, to nonconformity, to a novel (and public) version of substantive due process—all this came out of a case about a local ordinance criminalizing vagrancy?” That is clearly the question of the moment, the answer is yes, and here is the explanation: Throughout American history and across the nation, local communities and their agents had long used vagrancy laws as a form of social control over diverse groups of people and toward a number of different ends. They employed vagrancy laws variously to regulate and extract labor from the resident poor, exclude and punish poor strangers, incapacitate apparent threats to social order, prevent the commission of incipient crime, enforce racial segregation and subordination, and discipline minorities and nonconformists of all stripes.<sup>58</sup> In each instance, police used these laws to demarcate who was out of place in a given community—who was denied full respect for their mobility, their autonomy, their lifestyle, or their beliefs. Marginal people shared a vulnerability to regulation by vagrancy law. That is, they shared a vulnerability to arrest at almost any time and place for any behavior or for no behavior at all.

For centuries, these myriad uses of vagrancy laws had had all the properties of bedrock legal principle.<sup>59</sup> Despite some changes over time—most notably the strengthening of enforcement mechanisms and broadening of liability at moments of perceived crisis—the laws remained remarkably constant.<sup>60</sup> One judge in 1970 commented that “a college English major” could read a vagrancy law still on the books as “a casting advertisement in an Elizabethan newspaper for the street scene in a drama of that era.”<sup>61</sup> That the laws persisted does not mean, of course, that vagrancy’s victims offered no resistance. Evade, complain, and chafe they did. But before the mid-twentieth century not many people had challenged their constitutionality. Those who did usually failed.<sup>62</sup> Indeed, courts and scholars viewed the laws’ historical pedigree as virtual proof of their legitimacy.<sup>63</sup>

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58. RISA GOLUBOFF, *PEOPLE OUT OF PLACE: THE SIXTIES, THE SUPREME COURT, AND VAGRANCY LAW* (forthcoming 2012).

59. Indeed, historians have identified the regulation of public morals in the name of social order as “the easy case” for the exercise of the police power in the early United States. WILLIAM J. NOVAK, *THE PEOPLE’S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* 149-89 (1996); *see also* CHRISTOPHER L. TOMLINS, *LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC* 47-48 (1993) (arguing that “the maintenance of order . . . was dependent upon ‘close attention to prescribed forms of public conduct’”).

60. GOLUBOFF, *supra* note 58.

61. *United States v. Kilgen*, 431 F.2d 627, 628 (5th Cir. 1970).

62. *See, e.g.*, *Phillips v. Municipal Court of L.A.*, 24 Cal. App. 2d 453 (Dist. Ct. App. 1938); *In re McCue*, 7 Cal. App. 765 (Ct. App. 1908); *City of New Orleans v. Postek*, 180 La. 1048 (1934). *But see* *Hawaii v. Anduha*, 48 F.2d 171 (9th Cir. 1931); *People v. Belcastro*, 190 N.E. 301 (Ill. 1934).

63. *See, e.g.*, *State v. Burgess*, 123 A. 178, 178 (Me. 1924); *Pellman v. Valentine*, 57 N.Y.S.2d 617 (Sup. Ct. 1945); *THE ENGLISH AND AMERICAN ENCYCLOPAEDIA OF LAW* 568-69 (2d ed. 1904).

In the 1950s and 1960s, however, clashes between the victims of vagrancy laws and local officialdom became more visible and more constitutionally contestable. These clashes involved representatives of most of the major social movements of the era. Communists, labor union members, civil rights demonstrators, poor people, hippies, gays and lesbians, women, Native Americans, Vietnam War protestors, young, urban, minority men, and other minorities and dissidents all contested police repression by vagrancy law.<sup>64</sup> On their own, in social movement organizations, and with the help of lawyers in courtrooms across the country, they began to insist that national constitutional norms replace local social ones, and that individual autonomy and cultural pluralism replace hierarchical and conformist social relations. The vagrancy cases that proliferated all raised similar questions about the constitutional validity of unfettered criminal regulation of people deemed somehow out of place.<sup>65</sup> The victims of vagrancy laws began to insist on either their right to make their own place, the faultiness of the whole idea of place, or both.

Understood in this way, vagrancy cases both reflected and propelled the larger culture wars of the 1960s. It was hardly a coincidence, then, that most of the social movements of the era found themselves challenging vagrancy laws. As their cases made their way to the Supreme Court, social movement participants and their lawyers schooled the Justices in the problematic uses of vagrancy laws to restrain the free speech of political radicals, civil rights demonstrators, and Vietnam War protestors.<sup>66</sup> Concerned about infringing on police departments' authority to control violent crime, the Justices struggled to find ways to constrain the beat cop from exercising his discretionary powers so as to undermine the Court's First Amendment, equal protection, civil rights, and criminal procedure revolutions.<sup>67</sup> Moreover, as postwar jurisprudence raised new questions about the appropriate contours of criminal law, the police who enforced it, and the sentences that vindicated it, lawyers argued, and the Justices gradually came to agree, that vagrancy law was out of place in a modern liberal criminal justice system.<sup>68</sup> The political, social, cultural, and intellectual currents of the 1960s thus conspired to destabilize the longstanding legitimacy of regulation by vagrancy law.

To say that *Papachristou*—as the final downfall of vagrancy laws—brought the fundamental issues of the 1960s into stark relief is not, however, to answer the question of precisely what rights Douglas meant to protect in his

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64. GOLUBOFF, *supra* note 58.

65. *Id.*

66. *Coates v. City of Cincinnati* alone emerged out of student protests against the Vietnam War, union pickets, and the Cincinnati riots of 1967. See 402 U.S. 611, 612, 616 n.6 (1971); Jurisdictional Statement at app. E, *Coates*, 402 U.S. 611 (No. 69-117); Brief of Appellant at 14-15, app. C, *Coates*, 402 U.S. 611 (No. 69-117).

67. See GOLUBOFF, *supra* note 58, at ch. 6 (discussing the relationship between vagrancy laws and stop-and-frisk laws generally, and the relationship between *Terry v. Ohio*, 392 U.S. 1 (1968), and the Court's vagrancy cases more specifically).

68. GOLUBOFF, *supra* note 58.

draft opinion. Trying to distill a single “right” from that opinion is like trying to distill a single essence out of the chaotic events of a chaotic decade. Even as vagrancy law served as something of a unifying target for the social movements of the era, each movement nonetheless retained its own separate goals for various kinds of freedom, equality, or social change. This heterogeneity of the underlying concerns of the many groups challenging vagrancy laws in the 1960s and 1970s reveals itself in the many possible rights that Douglas implicates in his draft opinion. Though Douglas meant to bring into constitutional law the fundamental challenge to place-ness, that challenge was not singular. It was layered and multifaceted, differing across individuals, movements, regions, and particular locales. It pointed variously and simultaneously toward rights to loaf and travel, to a form of First Amendment self-fulfillment and expressive activity, toward a substantive due process commitment to individual autonomy, and to a right to be free from racial and class discrimination. It is consequently no wonder that the rights Douglas referenced in *Papachristou* drew on a number of different images of individual freedom and pointed in a number of different directions.

The possible contours of the rights Douglas meant to protect to one side, the relationship between Douglas’s draft opinion in *Papachristou* and the published version is significant for at least four additional reasons. First, these documents suggest that void-for-vagueness was at least in part the “makeweight” Amsterdam had declared it to be more than twenty years earlier. Douglas clearly thought Jacksonville’s vagrancy law was problematic because it failed to specify the scope of police authority with constitutionally adequate precision. But his initial instinct about what was at stake in *Papachristou* was not vagueness. For Douglas, as well as at least Brennan and Marshall, the crux of the case involved fundamental rights protected by the Ninth Amendment, the Due Process Clause, and the Bill of Rights. Though this view did not make it into the published opinion (for reasons I discuss below), Robert Post was on the right track in *Reconceptualizing Vagueness* when he speculated that the Justices might have aimed to limit the kinds of behavior Jacksonville officials could criminalize as well as the language with which they did so.<sup>69</sup>

Second, by using vagueness in the published opinion, Douglas actually held not that any particular type of conduct was shielded from regulation, but rather that a better description of the prohibited conduct was needed. Much as Douglas waxed eloquent about the activities of the *Papachristou* defendants, they remained in the published opinion only “amenities” rather than rights protected anywhere in the Constitution itself.<sup>70</sup> The doctrinal basis for striking down the Jacksonville ordinance was not that it violated protected rights, but that it was unconstitutionally vague. In choosing one doctrinal category (vagueness) over another (fundamental rights), the Court shaped the subsequent

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69. Post, *supra* note 17, at 497-98.

70. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 164 (1972).

framing of the issues among laypeople, legislators, and legal professionals alike. To the extent that void-for-vagueness served as a mechanism for legislative oversight of police discretion, the Court essentially invited legislatures and city councils to draft more specific (less vague) laws that would constrain—but still authorize—discretion to regulate those out of place. And draft they did.<sup>71</sup> They generated new, more specific loitering laws, new laws targeting the homeless (like those prohibiting begging, panhandling, and sleeping in public), and new forms of petty criminal regulation. Many of vagrancy law's replacements—especially gang loitering ordinances, so-called quality of life laws, and the practice of broken windows policing—have provoked considerable legal, political, and constitutional controversy in their own right.<sup>72</sup>

It is difficult to say to what extent these subsequent developments would have differed had Douglas published his draft opinion. Though abstract discussion of the relative autonomy of legal doctrine is beyond the scope of this Essay, the question is certainly an important one: would the subsequent development of constitutional doctrine—not to mention the actual practices of policing public spaces—have been different if the early draft had actually been published? Even if the extent to which Supreme Court Justices themselves are constrained by their precedents remains an open question, the Court's constitutional choices frame how laypeople, scholars, lawyers, police officers, politicians, and other judges understand any given issue going forward. It seems unremarkable to suggest that a mismatch between judicial motivation and judicial explanation might affect—some might say, distort—dialogue between courts and legislatures about the limits of lawmaking. One can

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71. See, e.g., Timothy C. Gerking, Note, *Alternatives to Vagrancy Laws for Arizona*, 1973 LAW & SOC. ORDER 881, 889-901 (discussing Arizona's proposed replacement for its unconstitutional vagrancy law and canvassing alternatives); see also GOLUBOFF, *supra* note 58.

72. See, e.g., Albert W. Alschuler & Stephen J. Schulhofer, *Antiquated Procedures or Bedrock Rights?: A Response to Professors Meares and Kahan*, 1998 U. CHI. LEGAL F. 215, 215-17; David Cole, *Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship*, 87 GEO. L.J. 1059, 1083-87 (1999); Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165 (1996); Maria Foscarinis, *Downward Spiral: Homelessness and Its Criminalization*, 14 YALE L. & POL'Y REV. 1, 2 (1996); Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291, 295-97 (1998); Livingston, *supra* note 22; Tracey L. Meares & Dan M. Kahan, *The Wages of Antiquated Procedural Thinking: A Critique of Chicago v. Morales*, 1998 U. CHI. LEGAL F. 197, 198; Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775, 780 (1999); Richard C. Schragger, *The Limits of Localism*, 100 MICH. L. REV. 371, 372-73 (2001); Robert Teir, *Maintaining Safety and Civility in Public Spaces: A Constitutional Approach to Aggressive Begging*, 54 LA. L. REV. 285, 287, 322 (1993); Donald E. Baker, Comment, *'Anti-Homeless' Legislation: Unconstitutional Efforts to Punish the Homeless*, 45 U. MIAMI L. REV. 417, 437-38 (1991).

imagine that legislators, as well as both legal professionals and the general public, would make different arguments if they thought the Justices cared about rights rather than words.

Third, Douglas's *Papachristou* drafts shed new light on the extent to which constitutional doctrine was in flux in the early Burger Court years. In 1967, the Court had made clear that it would show special constitutional solicitude for racial minorities in equal protection cases.<sup>73</sup> Over the following decade, the Court waffled publicly about whether legislation concerning other groups—poor people, hippies, illegitimate children, women—would also receive heightened scrutiny.<sup>74</sup> That public waffling was only the tip of the iceberg, however. Behind the scenes, the Justices were even more openly debating such questions. In one 1975 case, Justice Harry A. Blackmun wrote a memo to himself noting that the Court had recently “been avoiding” questions of the standard of review. He felt “strongly . . . that we should do some articulating here and recognize the fact that we have been employing, inferentially at least, a middle tier approach.”<sup>75</sup> As the student of constitutional law knows, other than applying intermediate scrutiny to sex classifications, the Burger Court never followed up on Blackmun's ideas.<sup>76</sup> The Court occasionally hid behind what Gerald Gunther called rational basis review with “bite” instead of articulating a rationale for protecting some kinds of people more than others.<sup>77</sup>

This dodging of the question of who should receive greater judicial protection under the Equal Protection Clause parallels the *Papachristou* Court's avoidance of the question of what kinds of rights it would protect under substantive due process. Taken together, the Court's published opinions in both types of individual rights cases, the Justices' internal deliberations about tiers of scrutiny in equal protection cases, and Douglas's *Papachristou* drafts reveal a far more open, experimental, and conflicted Burger Court than one usually perceives. In the early- to mid-1970s, both what kinds of rights the Court would protect and who would receive special protection were considerably up for grabs.<sup>78</sup>

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73. *Loving v. Virginia*, 388 U.S. 1, 11-12 (1967).

74. *See, e.g.*, *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966) (poor people); *Griffin v. Illinois*, 351 U.S. 12, 17-18 (1956) (same); *U.S. Dept. of Agric. v. Moreno*, 413 U.S. 528 (1973) (hippies); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972) (illegitimate children); *Levy v. Louisiana*, 391 U.S. 68 (1968) (illegitimate children); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (women).

75. Memorandum from Justice Harry A. Blackmun to self at 5, *Re: Village of Belle Terre v. Boraas*, No. 73-191 (Jan. 29, 1974) (Blackmun Papers, Box 186).

76. *See Craig v. Boren*, 429 U.S. 190 (1976). The Burger Court made noises toward applying heightened scrutiny for classifications based on illegitimacy, but it was not until the Rehnquist Court that the Court explicitly applied intermediate scrutiny. *See Clark v. Jeter*, 486 U.S. 456, 461 (1988).

77. *See Gerald Gunther, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 12, 18-20 (1972).

78. *See, e.g.*, *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 651 (1974) (Powell, J.,

Fourth, Douglas's early draft of *Papachristou* is important not only for the light it sheds on void-for-vagueness and its judicial uses but also on the possible development—or lack thereof—of constitutional scrutiny of substantive criminal law. Professor William Stuntz has argued that the Warren Court's famous (or infamous, if you prefer) transformation of American criminal procedure in cases like *Mapp v. Ohio*,<sup>79</sup> *Gideon v. Wainwright*,<sup>80</sup> and *Miranda v. Arizona*<sup>81</sup> has led to perverse consequences. He has blamed the Court's constitutional oversight of state and federal criminal procedures for overcriminalization and a mismatch between actual guilt and convictions. In lieu of constitutionalizing criminal procedure, Stuntz has suggested the constitutionalization of substantive criminal law. Along with a few other cases from the 1960s and early 1970s,<sup>82</sup> *Papachristou* is the poster child for this argument. In these cases, the Court struck down criminal laws as unconstitutional, whereas in most of the Court's other criminal cases of that era, it had regulated the criminal process. Much as Stuntz praises the Court's initial forays in this direction, he laments that they did not lead to a new constitutional jurisprudence of criminal law. The Court never really followed up, and *Papachristou* and its ilk became outliers rather than trailblazers.<sup>83</sup>

Douglas's draft opinion is thus significant because it suggests that perhaps the fault lay partly in *Papachristou* itself. The draft opinion would have told legislatures what they could not do—criminalize some forms of public self-expression, nonconformity, dissent, or alternative lifestyle—without a compelling interest and narrow means. But what the actual opinion told them was that they needed to change the language with which they criminalized

concurring) (disagreeing about whether to analyze pregnancy discrimination in employment as a due process or sex discrimination problem); see also Deborah Dinner, *The Campaign Against Pregnancy Dismissal 57-71* (unpublished manuscript, on file with author) (discussing the various competing constitutional frameworks in *LaFleur*).

79. 367 U.S. 643 (1961).

80. 372 U.S. 335 (1963).

81. 384 U.S. 436 (1966).

82. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965); *Robinson v. California*, 370 U.S. 660, 666 (1962); *Lambert v. California*, 355 U.S. 225, 228 (1957).

83. William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1, 21 (1996) [hereinafter Stuntz, *Substance*]; William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 68-69 (1997) [hereinafter Stuntz, *The Uneasy Relationship*]; see Louis D. Bilionis, *Process, the Constitution, and Substantive Criminal Law*, 96 MICH. L. REV. 1269, 1319 (1998). In a separate line of cases beginning with *In re Winship*, 397 U.S. 358, 366-67 (1970), and *Mullaney v. Wilbur*, 421 U.S. 684, 694-96 (1975), the Burger Court and subsequent Courts have struggled with another way of constitutionalizing substantive criminal law: by imposing constitutional limits on the mental element required for certain crimes. See, e.g., Ronald Jay Allen, *Mullaney v. Wilbur, the Supreme Court, and the Substantive Criminal Law—An Examination of the Limits of Legitimate Intervention*, 55 TEX. L. REV. 269, 271 (1977); John Calvin Jeffries, Jr., & Paul B. Stephan III, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325, 1367 (1979); Stuntz, *Substance*, *supra*, at 30-31 (discussing scholarly debates).

those things. Perhaps the lack of traction for constitutional regulation of criminal law was due in part to the Court's failure to identify the rights that would actually limit the substance of criminal regulation.<sup>84</sup>

To the extent that Douglas's draft opinion suggested that the invalidation of vagrancy laws would place a substantive brake on what legislatures, police, and courts could do to marginal people, the vagueness basis of the published decision proceduralized the issue. It allowed for the possibility of fixing the constitutional problem through the same kinds of legislative cleverness Stuntz has blamed for the perverse consequences of the criminal procedure revolution. As Stuntz has noted, vagueness doctrine is a relatively limited way of regulating the substance of criminal law.<sup>85</sup> Perhaps, then, Douglas's draft opinion serves as the foil for what could have been. Perhaps the kind of constitutionalization of criminal law that Stuntz seeks would have had a fighting chance had it had a more substantive basis from the start.<sup>86</sup>

This saga of social regulation by vagrancy law, its demise, and the legal consequences of that demise is in itself an important story (and one I plan to tell at some length in a forthcoming book).<sup>87</sup> Douglas's early drafts in *Papachristou* reveal the critical implications of that story across a wide spectrum of issues. The drafts go a long way toward proving right court-watchers who see substantive commitments behind void-for-vagueness. They show how at least some Justices understood vagrancy laws as infringing on legal rights that correlated closely with the widespread sixties challenges to the dominant hierarchical, conformity-driven social order of postwar America. The fact that they remained draft opinions, however, also shows how the Court stepped back from fully embracing the sixties revolution in such a way. That fact also highlights the potential consequences of having chosen void-for-vagueness over rights protection in the terms the Court's opinion set for legislators and police officers who continued to refine the techniques of social control. And it potentially implicates the void-for-vagueness doctrine in the aborted effort to create a substantive constitutional criminal law. This transformation of age-old vagrancy laws from uncontroversial legitimacy to unquestionable illegitimacy, the apparent inclination to constitutionalize a whole host of rights that today seem a little wacky, and the diverse consequences of the choice to use void-for-vagueness instead, would by

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84. It may also have been due to concerns about federalism. As revealed in the 1968 case of *Powell v. Texas*, 392 U.S. 514, 535-36 (1968), at least some members of the Court believed that intervening into state substantive criminal law was a greater intrusion on a state's autonomy than regulating its criminal procedures.

85. Stuntz, *Substance*, *supra* note 83, at 6.

86. Of course, as Stuntz shows, the relationship between the substantive and the procedural is complex, nuanced, and hardly as bifurcated as the terms themselves would indicate. See, e.g., Tracey Maclin, *What Can Fourth Amendment Doctrine Learn from Vagueness Doctrine?*, 3 U. PA. J. CONST. L. 398, 404-05 (2001).

87. GOLUBOFF, *supra* note 58.

themselves be worthy of comment.<sup>88</sup>

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But wait, there is more. The reason why Douglas's opinion changed between drafting and publication suggests even broader implications for these documents and for the scope of the rights potentially protected by *Papachristou*. Douglas had apparently sent Justice William J. Brennan, Jr., a draft of the opinion before he circulated it to the rest of the conference. In response, on December 30, 1971, Brennan wrote, "As I recall[,] vagueness was the consensus ground at conference. Will the 'fundamental rights' approach scare away votes? It keys in so perfectly with my views in the abortion cases that I fervently hope not. Does the possible risk argue for holding up circulation until Harry's Texas case comes around[?]"<sup>89</sup>

To what, exactly, was Brennan referring when he mentioned "the abortion cases" and "Harry's Texas case"? In the winter of 1971? That would be the opinion Justice Harry A. Blackmun was struggling to write striking down a Texas abortion law. That would be, you guessed it, *Roe v. Wade*.<sup>90</sup> My archival finds thus go beyond *Papachristou* itself to implicate one of the most important Supreme Court cases of the twentieth century. Brennan's memo shows that he saw connections between Douglas's fundamental rights-based *Papachristou* opinion and Blackmun's forthcoming *Roe* opinion, which was to be based on the same constitutional theory. He was worried that other, more conservative, Justices would see the same connections and that they would hesitate to sign onto *Roe* for fear of broadening substantive due process to include everything in Douglas's opinion as well.

That Brennan was preoccupied with *Roe* in the winter of 1971 is hardly surprising. Think of the historical context. Behind the Court was *Griswold v. Connecticut*—that wide-ranging survey of constitutional provisions that the Justices hoped might justify judicial protection of fundamental rights. *Griswold* is the constitutional law professor's dream. The Court struck down Connecticut's law prohibiting the use of contraceptives by married couples with numerous Justices in multiple opinions transparently struggling to find protection for rights nowhere listed in the Constitution. Famously, Douglas constructed a majority opinion in which the "penumbras" of the Bill of Rights created a right to privacy that thwarted the Connecticut law.<sup>91</sup>

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88. Vagrancy cases had also been challenged on a number of other grounds—under the First, Fourth, Fifth, Eighth, and Thirteenth Amendments—that influenced the Court's doctrine in a variety of ways beyond the scope of this brief Essay. *See id.*

89. Memorandum from Justice William J. Brennan, Jr., to Justice William O. Douglas, Re: *Papachristou v. City of Jacksonville*, No. 70-5030 (Dec. 30, 1971) (Brennan Papers, Box I-274); *see infra* app. fig.3.

90. 410 U.S. 113 (1973).

91. *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965).

The Court was clearly still wrangling with such issues six years later, when it faced both *Eisenstadt v. Baird*<sup>92</sup> and *Roe v. Wade*<sup>93</sup> in 1971. In *Eisenstadt*, Brennan authored a somewhat strained plurality opinion holding that equal protection required that individuals have the same rights to contraceptives as married couples.<sup>94</sup> He thereby avoided expanding any of the substantive theories *Griswold* had propounded.

In *Roe*, Blackmun's initial impulse was also avoidance. Although the conference had voted to invalidate the abortion statute on privacy grounds, Blackmun's early draft opinion relied not on any substantive right, but on—wait for it—void-for-vagueness doctrine.<sup>95</sup> Unlike feminists' claims that abortion laws violated women's fundamental rights, doctors' claims against abortion laws often sounded in void-for-vagueness.<sup>96</sup> Under laws prohibiting all abortions but those necessary for the "life" or "health" of the mother, doctors argued that they chanced a felony every time they guessed that a particular abortion came within such exceptions. Blackmun, the former resident counsel for the Mayo Clinic, was sympathetic to these professional concerns. Moreover, he hoped that void-for-vagueness would help him to avoid the more controversial issue of when life began that he feared a fundamental rights approach would ultimately require.<sup>97</sup>

Brennan and Douglas found that approach unsatisfying. In response to Blackmun's draft, they urged Blackmun to reach "the core issue" of privacy rather than rely on vagueness.<sup>98</sup> These interchanges between Justices in *Roe* offer further support for the conclusion Amsterdam had offered a decade before—that vagueness was at least in part an avoidance mechanism, denying

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92. 405 U.S. 438 (1972).

93. *Roe*, 410 U.S. 113. Chief Justice Burger ordered reargument in *Roe* so that new Justices William H. Rehnquist and Lewis F. Powell, Jr., could take part in their consideration. Hence, the case was not decided until 1973.

94. 405 U.S. at 438, 443.

95. Justice Harry A. Blackmun, First Draft, *Roe v. Wade*, No. 70-18, at 13-14 (May 18, 1972) (Blackmun Papers, Box 151); see LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN* 87-90 (2005); BERNARD SCHWARTZ, *UNPUBLISHED OPINIONS OF THE BURGER COURT* 113-17 (1988) (quoting the first draft of *Roe v. Wade*). Vagueness had also been the main substantive issue in an abortion case the Court had decided earlier in 1971, *United States v. Vuitch*, 402 U.S. 62, 64 (1971).

96. LESLIE J. REAGAN, *WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867-1973*, at 237, 239 (1997); Reva B. Siegel, *Roe's Roots: The Women's Rights Claims That Engendered Roe* (Feb. 2009) (unpublished manuscript, on file with author); see also LINDA GREENHOUSE & REVA B. SIEGEL, *BEFORE ROE V. WADE* (forthcoming 2010).

97. Memorandum from Justice Harry A. Blackmun to Conference, Re: *Roe v. Wade*, No. 70-18 (May 18, 1972) (Blackmun Papers, Box 151); see also GREENHOUSE, *supra* note 95.

98. Memorandum from Justice William J. Brennan to Justice Harry A. Blackmun, Re: *Roe v. Wade*, No. 70-18 (May 18, 1972) (Brennan Papers, Box I-285); Memorandum from Justice William O. Douglas to Justice Harry A. Blackmun, Re: *Roe v. Wade*, No. 70-18 (May 19, 1972) (Douglas Papers, Box 1589).

and shielding the Justices' substantive commitments. Afraid to embrace fully the implications of *Griswold* and wade too deeply into the abortion issue, Blackmun thought he could escape the problem by using void-for-vagueness.

What might seem more surprising than Brennan's general preoccupation with *Roe* in the winter of 1971 was that he connected *Roe* to *Papachristou*. Thought about as privacy, sexual freedom, or reproduction cases, *Roe*, *Eisenstadt*, and *Griswold* had little in common with *Papachristou*. True, the Jacksonville police were using the city's vagrancy ordinance to regulate the sexuality of the interracial double-daters. But sexuality was not the central issue in *Papachristou*. Moreover, the acts that led to the vagrancy arrests, more so even than abortions, could hardly be considered "private."<sup>99</sup> For the most part, in fact, not only did vagrancy laws regulate people in public spaces, they usually regulated men in public spaces. The abortion cases, by contrast, largely involved the choices of women in private.

Going up a level of generality, however, the various opinions and memos in the archives make clear that the questions preoccupying much of the Court were the same in the two sets of cases: what were fundamental rights, and where in the Constitution, if anywhere, the Justices might find protection for them. In particular, an individual's right to choose his or her own "lifestyle" was at least as affected by choices about reproduction as by choices about where to live, how to dissent, and whether to shave one's facial hair. Within that context, it is less surprising that Brennan would connect *Papachristou* and *Roe*.

Indeed, the archives reveal that in thinking about how to resolve *Roe*, Brennan was then in the process of constructing a systematic framework for the "fundamental freedoms" that he deemed within the meaning of "liberty."<sup>100</sup> He viewed the first of three groups of such freedoms as including "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." For these, he cited *Terry v. Ohio*,<sup>101</sup> *Meyer v. Nebraska*,<sup>102</sup> and *Jacobson v. Massachusetts*,<sup>103</sup> among others. The second group included "freedom of choice in the basic decisions of life, such as marriage, divorce, procreation, contraception, and the education and upbringing of children." Here he relied on *Loving v. Virginia*,<sup>104</sup> *Boddie v.*

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99. Since Justice Rehnquist's dissent in the case, it has, of course, been noted that abortions and many of the activities in the sexuality cases are also not exactly private in critical ways. *Roe*, 410 U.S. at 172 (Rehnquist, J., dissenting); see John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 931-32 (1973).

100. Memorandum from Justice William J. Brennan to Justice William O. Douglas, Re: Abortion Cases (Dec. 30, 1971) (Brennan Papers, Box I-285).

101. 392 U.S. 1 (1968).

102. 262 U.S. 390 (1923).

103. 197 U.S. 11, 29 (1905).

104. 388 U.S. 1 (1967).

*Connecticut*,<sup>105</sup> *Skinner v. Oklahoma*,<sup>106</sup> *Eisenstadt v. Baird*,<sup>107</sup> *Griswold v. Connecticut*,<sup>108</sup> and others. The third group included “autonomous control over the development and expression of one’s intellect and personality.” The precedent for this last group was thinner. Brennan cited only *Stanley v. Georgia*<sup>109</sup> (protecting the possession of obscene materials in the home) and Justice Brandeis’s reference in *Olmstead v. United States* to a “right to be let alone.”<sup>110</sup> Brennan thought that the decision to have an abortion “obviously fits directly within each of the categories of fundamental freedoms,” and therefore “should be held to involve a basic individual right.”<sup>111</sup>

Brennan described this framework in a memo he wrote to Justice Douglas about *Roe* on December 30, 1971. Yes, observant reader, on the very same day Brennan had written Douglas that he was exhilarated but worried about Douglas circulating his *Papachristou* opinion before Blackmun had a chance to circulate *Roe*, Brennan had also written Douglas a separate memo about the ways in which Douglas’s *Papachristou* opinion could better support the decision in *Roe*. In a long missive to Douglas proposing the fundamental-freedoms framework described above, Brennan also told Douglas that he hoped that *Roe* would rely on the Ninth Amendment, “as in your proposed *Papachristou* opinion.”<sup>112</sup>

Neither Blackmun’s majority nor Douglas’s concurrence in *Roe* ultimately drew much on the Ninth Amendment.<sup>113</sup> By 1973, even those like Douglas who had long opposed renewing substantive due process had fallen into line.<sup>114</sup> Douglas’s concurrence in *Roe* and *Doe* did, however, largely adopt the categories of fundamental rights Brennan had identified in his memo.<sup>115</sup> Douglas’s most significant divergence from Brennan’s framework unsurprisingly involved *Papachristou*. Douglas made a more explicit connection between *Roe/Doe* and *Papachristou* than Brennan had. He added to Brennan’s “freedom to care for one’s health and person,” and “freedom from bodily restraint or compulsion,” his own “freedom to walk, stroll, or loaf.” Quoting *Papachristou*, he called “walking, strolling, and wandering”

105. 401 U.S. 371 (1971).

106. 316 U.S. 535 (1942).

107. 405 U.S. 438 (1972).

108. 381 U.S. 479 (1965).

109. 394 U.S. 557 (1969).

110. 277 U.S. 438, 478 (Brandeis, J., dissenting).

111. Memorandum from Justice William J. Brennan to Justice William O. Douglas, Re: Abortion Cases (Dec. 30, 1971) (Brennan Papers, Box I-285); see *infra* app. fig.4.

112. *Id.* at 5-6.

113. Douglas did mention the Ninth Amendment briefly. *Doe v. Bolton*, 410 U.S. 179, 211 (1973) (Douglas, J., concurring).

114. Of course, Douglas had never been particularly committed to the Ninth Amendment. Though Douglas mentioned the amendment in *Griswold*, 381 U.S. at 484, it was Goldberg’s concurrence that had most relied on it. 381 U.S. at 488-99.

115. *Doe v. Bolton*, 410 U.S. 179, 210-11 (1973) (Douglas, J., concurring).

“historically part of the amenities of life as we have known them.”<sup>116</sup> Douglas described these rights as fundamental and subject to strict scrutiny. Although the final draft of his *Papachristou* opinion had not made these rights fundamental, the earlier drafts remained alive in his reimagining and reworking of the opinion. Douglas’s opinion in *Roe/Doe* reads as if his draft opinion in *Papachristou* had actually been published.

It nonetheless remains that Justice Douglas’s draft opinion was not actually published, and the final revelation of this dispatch goes to why. In short, Brennan turned out to be right that the link between *Roe* and *Papachristou* was both cause for celebration and cause for concern. Douglas does not seem to have been deterred by Brennan’s cautionary note; it would appear that he circulated his draft to the rest of the conference with its reliance on fundamental rights intact. As Brennan predicted, he and Douglas were not alone in seeing connections between *Roe* and *Papachristou*. The constitutional understanding that *Roe* represented would be potentially deeper, more expansive, and more secure with related fundamental rights protected in *Papachristou*. That security appealed to some Justices and repelled others. Skeptics of this newfound judicial penchant for creating rights saw the connections as threatening rather than auspicious. In particular, Justice Potter Stewart thought Douglas’s opinion off the mark in its constitutional interpretation. Stewart had dissented in *Griswold*, galled by the Justices’ apparent fishing expedition to find some justification for its decision.<sup>117</sup> By 1971, however, Stewart seems to have resigned himself to the growing consensus to base privacy rights to reproduction, contraception, and abortion on a new form of substantive due process. He joined the opinions in *Eisenstadt* and *Roe*.<sup>118</sup>

Stewart nonetheless saw vagrancy as a different matter. He initially signed on to Douglas’s opinion only to the extent that it held “the ordinance before us to be unconstitutionally vague.”<sup>119</sup> Stewart held out signing onto the opinion until Douglas had eliminated all traces of a broader, rights-based argument. He even insisted on deletion of the final reference to the Bill of Rights in the last sentence of the opinion.<sup>120</sup> When Douglas removed that last sentence, Stewart finally signed onto the opinion, now limited to a void-for-vagueness holding. It was not, at this point, that Stewart opposed the whole project of judicial

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116. *Id.* at 213 (quoting *Papachristou v. City of Jacksonville*, 405 U.S. 156, 164 (1972)).

117. 381 U.S. at 527-28 (Stewart, J., dissenting).

118. 410 U.S. 113, 167 (1973) (Stewart, J., concurring); 405 U.S. 438, 439 (1972).

119. Memorandum from Justice Potter Stewart to Justice William O. Douglas, Re: *Papachristou v. City of Jacksonville*, No. 70-5030 (Jan. 25, 1972) (Douglas Papers, Box 1558); see *infra* app. fig.5.

120. Memorandum from Justice Potter Stewart to Justice William O. Douglas, Re: *Papachristou v. City of Jacksonville*, No. 70-5030 (Jan. 28, 1972) (Douglas Papers, Box 1558); see *infra* app. fig.6.

protection for fundamental rights. Nor was it that he found vagrancy and related laws constitutionally harmless. Stewart was, after all, the author of *Coates* (where he himself sympathetically used the word “lifestyle”) and a relatively aggressive participant in the invalidation of vagrancy laws as void-for-vagueness. Perhaps, having begun to dismantle vagrancy laws on the basis of vagueness, he was committed to continuing that approach. Or perhaps it was something in the nature of the rights Douglas was trying to protect—the breadth, the ambiguity, the public-ness, perhaps—and the constitutional basis Douglas offered for that protection that made Stewart balk. The surviving record makes it difficult to identify Justice Stewart’s exact concerns.

The inherent partialness of archives also obscures how much Stewart spoke for others when he preferred vagueness to rights creation in *Papachristou*. Marshall quickly signed onto Douglas’s original draft, but the remaining three members of the Court—Chief Justice Warren E. Burger, Byron White, and Harry A. Blackmun—left only silence as a guide to their views.<sup>121</sup> Perhaps Douglas changed his draft opinion because a majority of the Court truly thought vagueness was the constitutional problem with the law. It had been the consensus ground at conference, after all. To the extent that the Justices viewed the problem of vagrancy law to be one of police lawlessness, they might have thought vagueness was a more effective way of controlling the police than fundamental rights. In both methods, the Court’s control over the police was indirect: it regulated the police by regulating legislatures. But the Justices may have thought that the emphasis vagueness doctrine placed on constraining discretion was at least more pointed than the kind of analysis legislatures would undertake to comply with strict scrutiny. Or perhaps, as Post has suggested, the Justices all thought something substantive was at stake, but they had trouble identifying—or disagreed about—precisely what the substantive problem was.<sup>122</sup> In that case, there is some irony to the possibility that vagueness doctrine criticizes legislatures for failing to define precisely what they are prohibiting even while the Court finds itself unable to define precisely what it

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121. Only Thurgood Marshall signed on to Douglas’s opinion immediately after Douglas circulated it. Memorandum from Justice Thurgood Marshall to Justice William O. Douglas, Re: *Papachristou v. City of Jacksonville*, No. 70-5030 (Jan. 4, 1972) (Douglas Papers, Box 1558). The rest of the Justices, including Brennan, waited until Douglas had responded to Stewart’s comments. Memorandum from Justice Harry A. Blackmun to Justice William O. Douglas, Re: *Papachristou v. City of Jacksonville*, No. 70-5030 (Feb. 9, 1972) (Douglas Papers, Box 1558); Memorandum from Justice William J. Brennan, Jr., to Justice William O. Douglas, Re: *Papachristou v. City of Jacksonville*, No. 70-5030 (Jan. 31, 1972) (Douglas Papers, Box 1558); Memorandum from Chief Justice Warren E. Burger to Justice William O. Douglas, Re: *Papachristou v. City of Jacksonville*, No. 70-5030 (Feb. 15, 1972) (Douglas Papers, Box 1558); Memorandum from Justice Potter Stewart to Justice William O. Douglas, Re: *Papachristou v. City of Jacksonville*, No. 70-5030 (Jan. 31, 1972) (Douglas Papers, Box 1558); Memorandum from Justice Byron R. White to Justice William O. Douglas, Re: *Papachristou v. City of Jacksonville*, No. 70-5030 (Feb. 8, 1972) (Douglas Papers, Box 1558).

122. Post, *supra* note 17, at 497-98.

is protecting.<sup>123</sup>

With Douglas, Brennan, and Stewart provoking us to view *Papachristou* and *Roe* together—whether for good or ill—implications beyond those for fundamental-rights doctrine come into focus. In particular, placing the two cases in conversation provides additional fodder for Stuntz’s analysis of the relative absence of constitutional criminal law. Because we usually consider *Griswold*, *Loving*, *Eisenstadt*, *Roe*, and their ilk as substantive due process or fundamental rights (or even equal protection) cases, we fail to see them as criminal law cases.<sup>124</sup> But they were. They were all cases in which the Court was placing substantive limits on the extent to which the criminal law could be used as a mechanism of morals regulation.<sup>125</sup> By viewing such cases in the context of what the archives reveal about *Papachristou*, it would appear that the Court may have developed a somewhat more robust constitutional criminal law after all.

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So, there’s my find. Justice Douglas had initially relied on fundamental rights to strike down the vagrancy ordinance in *Papachristou*. Justice Blackmun had initially used vagueness to avoid relying on fundamental rights to strike down the law in *Roe*. But ultimately, the two cases switched places. *Roe* fessed up to its substantive right of privacy, while *Papachristou*’s reliance on vagueness masked the connections between *Papachristou* and the burgeoning fundamental rights—particularly privacy and sexual autonomy rights—that the Court was wrestling with in *Roe*.

One wonders how constitutional law would have looked if the early drafts of *Roe* and *Papachristou* had been published, if the reasoning of the two cases had not switched places. Would we have elaborated a substantive due process in which people had greater rights in public than in private? Would low-level criminal regulation of mobility have actually disappeared while legislatures

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123. With thanks to Mike Seidman for pointing out this irony.

124. Stuntz considers *Griswold* a criminal law case, and he describes how Alexander Bickel had also seen it as such. But he notes that subsequently it was treated as a privacy case rather than a criminal law case. Moreover, because Stuntz sees the 1960s, up until the Court retreated in *Powell v. Texas*, 392 U.S. 514, 535 (1968), as the moment of real possibility for a substantive constitutional intervention into criminal law, he does not consider *Roe* in his discussion. See Stuntz, *The Uneasy Relationship*, *supra* note 83, at 68-69 & n.237.

125. The Court was thus engaged in its way in ongoing scholarly discussions about the role of the criminal law in regulating morality. See, for example, the famous debates between H.L.A. Hart and Patrick Devlin. See PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* (1965); H.L.A. HART, *LAW, LIBERTY AND MORALITY* (1963); H.L.A. HART, *THE MORALITY OF THE CRIMINAL LAW* (1964); see also MODEL PENAL CODE § 207.1 cmt. at 207 (Tentative Draft No. 4, 1955) (“We deem it inappropriate for the government to attempt to control behavior that has no substantial significance except as to the morality of the actor.”).

reenacted abortion regulations sooner and with even greater teeth? Even further, one wonders how constitutional law would have looked if both *Papachristou* and *Roe* had publicly committed to a new substantive due process of public and private, of lifestyle protection writ large, of the broader and more varied understandings of liberty represented in Brennan's memo to Douglas.

In any event, the memos, the early drafts, and Douglas's published opinion in *Roe* all make clear that a number of the Justices saw important relationships between the rights potentially at issue in *Papachristou* and those potentially at issue in *Roe*. Taken together, these documents suggest that there remained considerable openness about the contours and basis of fundamental rights, even on the eve of *Roe*. They offer up a number of ways of conceptualizing what was at stake in protecting individuals against vagrancy laws, abortion laws, and contraception laws, whether under the Ninth Amendment or the Fourteenth or some other constitutional provision. My dispatch from the archive suggests some still inchoate rights to choose a lifestyle, to some basic notion of personhood, to live as one wishes in both the private and the public spheres.

Moving away from legal doctrine and particular cases, these archives offer Supreme Court junkies new fodder for the realms of judicial biography and Court history. The interchanges between Brennan and Douglas are illuminating not only for their now largely forgotten classification of fundamental rights, but also for what they say about the relationship between the two men. It is easy, in light of Douglas's eccentricities, to disregard his opinions as out of the mainstream, as a little bit crazy. Reading Douglas in *Roe*, one might wonder how he got from abortion to vagrancy. But Brennan was at the heart of the Warren Court, the brains behind the liberal transformation. And he agreed with, perhaps even initiated, that connection. These documents show Douglas and Brennan sharing memos, ideas, and drafts only with each other.<sup>126</sup> More specifically, they show Brennan literally feeding Douglas lines for his opinion.<sup>127</sup> Douglas was notoriously difficult, and Brennan famously politic. Perhaps these memos show only Brennan doing what was necessary to get his votes. Yet some scholars have identified a growing relationship between Douglas and Brennan in Douglas's later years.<sup>128</sup> Their interchanges in *Papachristou* and *Roe* require additional exploration into their relationship and perhaps a reevaluation of Douglas's place on the Court.

Moving yet further beyond the insular world of the 1971 term, these cases raise questions about the nature of, and conflicts over, fundamental rights in the Warren and Burger Courts more generally. Reading the concurring opinions in

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126. See *supra* text accompanying notes 89, 111, 114-15.

127. See *supra* text accompanying notes 114-15.

128. The most commented-upon collaboration between Douglas and Brennan occurred in *Griswold*. See, e.g., BALL & COOPER, *supra* note 36, at 287; KIM ISAAC EISLER, A JUSTICE FOR ALL: WILLIAM J. BRENNAN, JR., AND THE DECISIONS THAT TRANSFORMED AMERICA 231 (1993); MURPHY, *supra* note 44, at 385; BERNARD SCHWARTZ, ASCENT OF PRAGMATISM: THE BURGER COURT IN ACTION 296 (1990).

*Roe* with Douglas's early *Papachristou* draft in mind reveals the significant fissures that remained among the Justices on this question—fissures beyond those apparent in the published opinions alone. These opinions invite us to think both more deeply and more broadly about who was engaged in constructing the intellectual framework of modern fundamental rights, about where in the constitution such rights would be located, about what conceptions of rights were possible, what conceptions were not, and how the lines between the possible and the not possible changed over time.<sup>129</sup>

These cases also raise questions about the relationship between the Warren Court and the Burger Court that scholars have yet to mine. Though scholars in recent decades have exploded the liberal-conservative dichotomy of the two Courts—especially as to sex discrimination and substantive due process—the history of *Papachristou*, and the relationship between *Papachristou* and *Roe* that emerges from these documents, complicates that picture further. The Warren Court had repeatedly toyed with constitutionally invalidating vagrancy laws,<sup>130</sup> but it was not until Warren Burger's tenure as Chief Justice that the Court actually struck them down.<sup>131</sup> Moreover, where the Warren Court had granted police officers greater discretion to regulate people on the street in 1968's *Terry v. Ohio*, the Burger Court constrained some of that discretion—extending the boundaries of acceptable public activity—in *Papachristou*.<sup>132</sup> The documents I offer up here thus show the Burger Court years as in some ways the capstone of sixties' social transformations that the Warren Court had not entirely embraced. At the same time, they reveal the limits of those transformations. To what extent, one might ask, did the fact that it was the Burger Court that decided these cases affect their framing and their consequences for future doctrinal developments?<sup>133</sup> And further, to what extent

129. Indeed, the themes in Douglas's opinions may remain more available to legal scholars who came of age around the time of *Roe* and *Papachristou* than to those who came to constitutional law only after such possibilities had been forgotten. See, e.g., Mark Tushnet (concurring), in *WHAT ROE V. WADE SHOULD HAVE SAID* 86-91 (Jack Balkin ed., 2005).

130. Between 1953 and *Papachristou*, the Court took a number of vagrancy cases but disposed of them without determining the constitutionality of the laws at issue. See *Edelman v. California*, 344 U.S. 357, 358 (1953); *Thompson v. Louisville*, 362 U.S. 199, 204 (1960); *Arceneaux v. Louisiana*, 376 U.S. 336, 336 (1964); *Shuttlesworth v. Birmingham*, 382 U.S. 87, 90 (1965); *Hicks v. District of Columbia*, 383 U.S. 252, 257 (1966); *Johnson v. Florida*, 391 U.S. 596, 599 (1968) (White, J., dissenting); *Wainwright v. City of New Orleans*, 392 U.S. 598 (1968).

131. In addition to *Papachristou* and *Coates*, the Court also struck down a suspicious persons law in *Palmer v. City of Euclid*, 402 U.S. 544, 544-45 (1971).

132. 392 U.S. 1, 30 (1968); 405 U.S. 156 (1971).

133. There is already a substantial literature on the relationship between the Warren and Burger Courts. The first wave viewed the Burger Court as clearly more conservative than its predecessor, but subsequent revisions have complicated that picture. See, e.g., Martin H. Belsky, *The Burger Court and Criminal Justice: A Counter-Revolution in Expectations*, in *THE BURGER COURT: COUNTER-REVOLUTION OR CONFIRMATION?*, *supra* note 57, at 131. Revisionists point most frequently to the constitutional protection of women, which the Burger Court, not the Warren Court, developed. See, e.g., Ginsburg, *supra* note 57, at 132-

do the struggles of both Courts to make sense of the social life of the sixties within the legal categories available to them reveal our own categories of analysis as shifting and unstable over time?

Alas, we have moved some distance from where we began, in 1960 with Anthony Amsterdam's provocative note. It turns out that once we lift the veil of the void-for-vagueness doctrine, the revelations can be far reaching. But that is the thing about archives: we never know where they will lead.

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33; see also Yale Kamisar, *The Warren Court (Was It Really So Defense-Minded?), the Burger Court (Is It Really So Prosecution-Oriented?), and Police Investigatory Tactics*, in *THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T*, *supra* note 57, at 62-63 (discussing criminal procedure decisions of the two Courts). Though scholars have explored the relationship between the two Courts on matters of fundamental rights, there is still much to be said. See, e.g., GARROW, *supra* note 54, at 83-92; SCHWARTZ, *supra* note 128, at 297; MELVIN I. UROFSKY, *THE CONTINUITY OF CHANGE: THE SUPREME COURT AND INDIVIDUAL LIBERTIES, 1953-1986*, at 250-66 (1991).

## APPENDIX

Figure 1. Portion of Justice Douglas's Early Draft of *Papachristou v. City of Jacksonville* discussing the Ninth Amendment (Library of Congress).

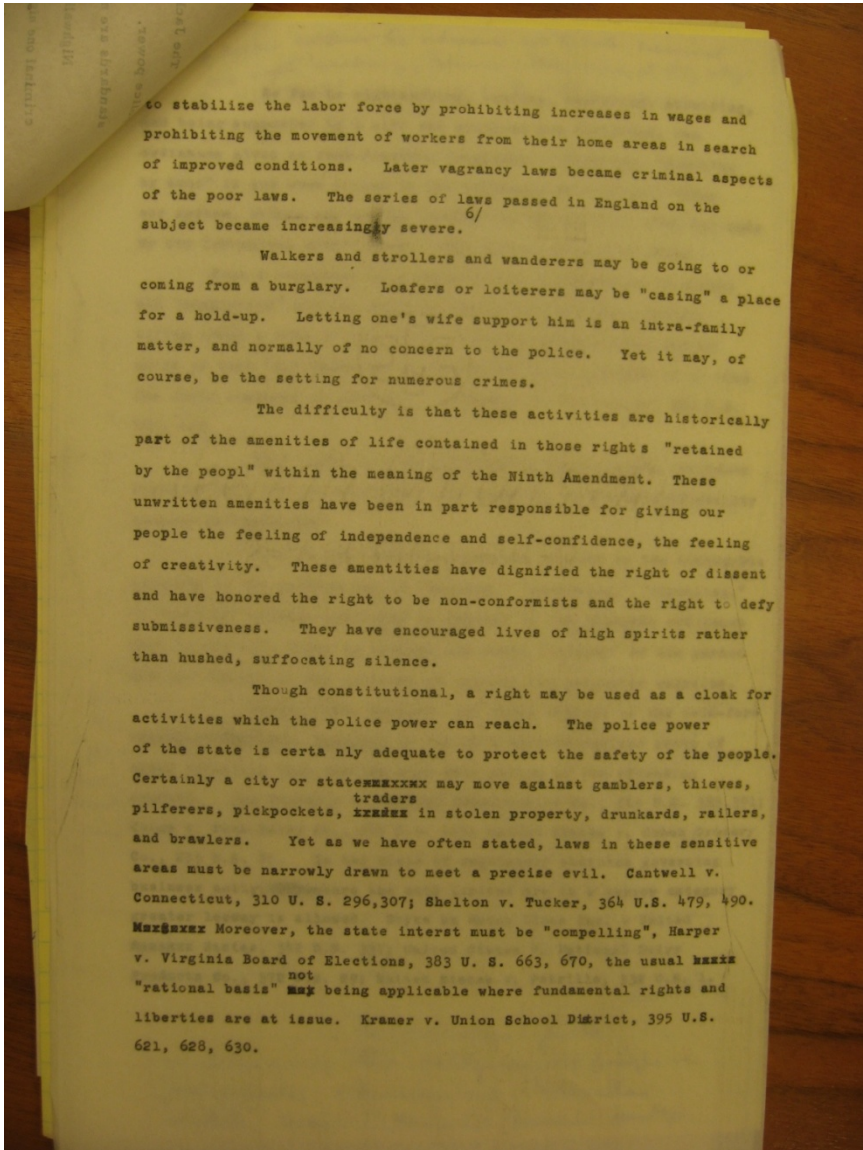


Figure 2. Portion of Justice Douglas's Early Draft in *Papachristou v. City of Jacksonville* replacing Ninth Amendment analysis with substantive due process (Library of Congress).

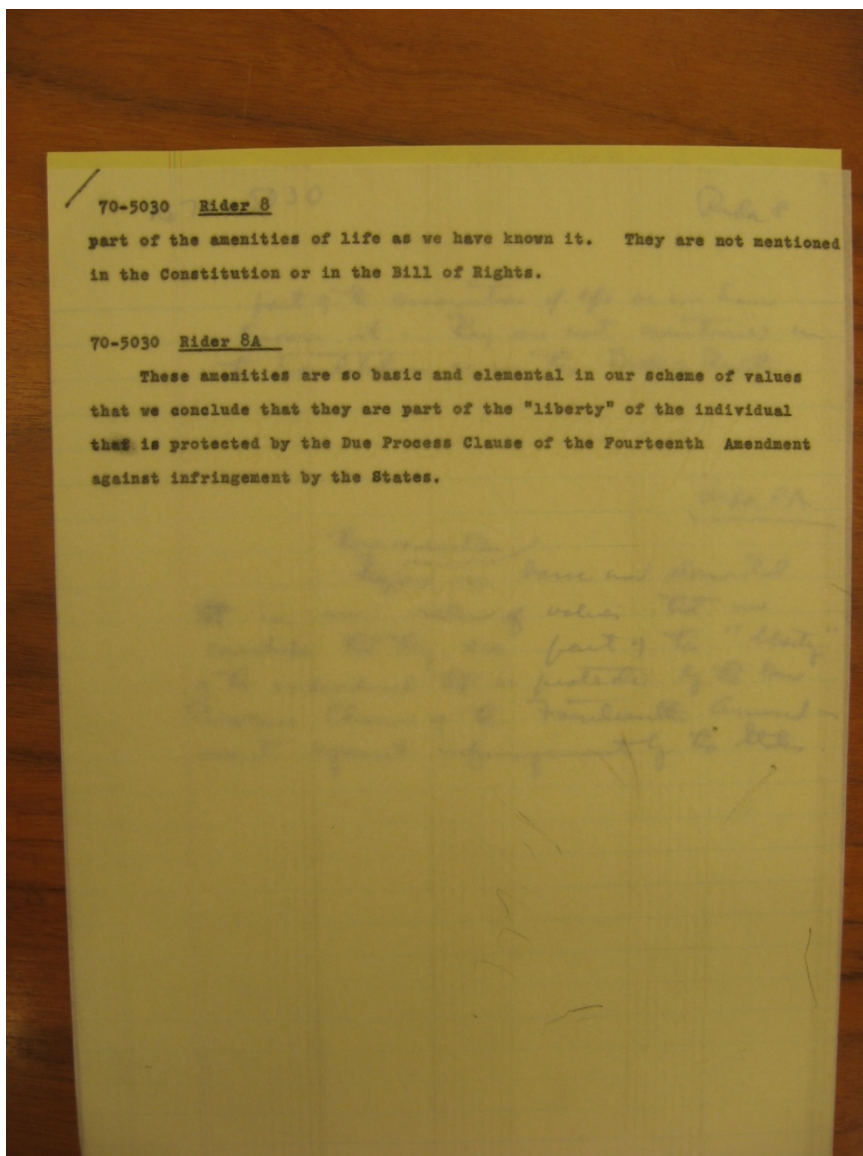


Figure 3. Memorandum from Justice Brennan to Justice Douglas about *Papachristou v. City of Jacksonville* and *Roe v. Wade*. (Library of Congress).

December 30, 1971

RE: No. 70-5030 - Papachristou v. City of Jacksonville

Dear Bill:

I think Papachristou is just fine. As I recall it vagueness was the consensus ground at conference. Will the "fundamental rights" approach scare away votes? It keys in so perfectly with my views in the abortion cases that I fervently hope not. Does the possible risk argue for holding up circulation until Harry's Texas case comes around.

One minor quibble. I've always thought the notion that people read criminal statutes before violating them is nonsense. In first full paragraph at page 11, lines 3 to 5, I'd feel more comfortable if it read:

" and we assume they would have no understanding of their meaning and impact if they read them. "

Sincerely,

Mr. Justice Douglas

Figure 4. Portion of a memorandum from Justice Brennan to Justice Douglas about *Papachristou v. City of Jacksonville* and *Roe v. Wade* (Library of Congress).

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With respect to No. 1 and No. 3, I am not sure that we have an authoritative interpretation of "health" within the meaning of the Georgia statute. (Appellees' counsel stated at the oral argument that "not judicially but as a matter of practice -- . . . health here includes mental health.") In any case, I believe that the statute infringes the right of privacy not merely because it may restrictively use "health" to mean only the mother's physical well-being, but because it limits abortions to enumerated cases. In other words, I agree with the district court that the state may not limit the number of reasons for which an abortion may be sought, since "such action unduly restricts a decision sheltered by the Constitutional right of privacy."

I guess my most significant departure from your approach is in the development of the right-of-privacy argument. I agree with you that the right is a species of "liberty" (although, as I mentioned yesterday, I think the Ninth Amendment (as in your proposed Papachristou opinion) should be brought into this problem at greater length) 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,

Figure 5. Memorandum from Justice Stewart to Justice Douglas about *Papachristou v. City of Jacksonville* (Library of Congress).

