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INTRODUCTION: OBSERVATIONS ON TEACHING *GRISWOLD*

*Hugh C. Macgill**

THE *Connecticut Law Review* Symposium, held last Spring at the University of Connecticut School of Law to mark the twenty-fifth anniversary of *Griswold v. Connecticut*,¹ began with remarks by Catherine Roraback, who represented Mrs. Griswold and Dr. Buxton throughout the litigation and in the larger battle in defense of family counseling clinics in Connecticut. Those who were present learned a great deal about the human context out of which the case arose, and the strategic judgments that permitted the decision to emerge as it did. The life of that decision, both in theory and as it variously does or does not apply to some of the more problematic contemporary aspects of the human condition, was the principal subject of the articles now published here.

In between the social genesis of the original legal dispute and the broad theoretical implications of the decision rendered, *Griswold* is a

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1. 381 U.S. 479 (1965).

case to be taught and to be learned from in the classroom. Every course in the curriculum has its kaleidoscopic cases—those that never look quite the same two years in a row, that yield new patterns and possibilities each time they are held to the light. The teacher who tires of playing with them and reflecting upon them should move into another field. *Griswold* is one of the kaleidoscopes of constitutional law. I can best illustrate the point by describing one year's encounter with it in class.

Preparing for that class, I had stuffed into my mind about all it could hold for the day—the failure of the earlier attempts to put the constitutionality of the Connecticut statute² before the Court, the theoretical approaches available to challenge the constitutionality of the statute, the way these approaches are reflected in the opinions of the justices, Justice Douglas's artful evasions, the narrow reading, the broad reading, the road to *Roe*³ and so forth. I was as ready as I was going to get, but still had twenty minutes before my class. Trying to keep the pieces from falling out of place, or out altogether, I paced the hall. I played one more time with the notion of penumbras and found myself laughing out loud. The entire Douglas opinion suddenly seemed too ridiculous a piece of work to take seriously, still less to teach. I put my head into the office of a colleague, Loftus Becker, and announced my unwelcome epiphany. He gazed at me with reassuring solemnity and remarked that he thought it might well be the best opinion Justice Douglas ever wrote: Given the result the majority had settled upon, how better could it have been accomplished? That begged, as I shall beg, the great question—why *did* the majority settle upon that result—but it gave me food for fortifying reflection in the five minutes that remained.

The class proceeded along lines familiar to anyone who has taught or taken a course in constitutional law. The Court's prior opportunities to review the constitutionality of the Connecticut statute, and its resourceful avoidance of them, were canvassed. Due attention was paid to the doctrinal alternatives available to the Court in 1965 and the pitfalls of each, so that everyone could appreciate the delicacy with which Justice Douglas slalomed among them, the elegance with which he forged the penumbral link between a concept of privacy and a text that does not contain the word. Balls were hidden, balls were found. There came

2. CONN. GEN. STAT. § 53-32 (1958).

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

the moment, though, as inevitably it will do in any classroom discussion of *Griswold*, when an enthusiast asked, "But what of the Goldberg opinion? Would not this all be much simpler and more forthright if done through an interpretation of the ninth amendment?"

One cannot, in that situation, simply declare *ex cathedra* that no decision of the Court before or since has ever turned on that amendment. Nor may one caution that the Goldberg concurrence is its apogee to date, or declare that though reliance on the ninth amendment does not lead directly to disbarment, a ninth amendment argument may raise questions under the sixth amendment. Something more searching must be said. Unfortunately, this moment arose toward the end of an evening class, and whatever searching insight might have come to me earlier in the day, I felt like a tenor whose voice has failed with two scenes to go before the curtain. In one of those flashes of inspiration that teachers always must guard against, I realized that the answer was to be found in fishing.

Let us suppose that privacy is the fish to be caught—constitutionally. If the fisherman is out for dinner rather than sport, a stick of dynamite tossed into a rustic pond will do very well. The fish float to the surface in large numbers and need only be scooped up. If the fisherman is either terribly hungry or not terribly sporting, the choice will be spinning gear—an inexpensive rod, a technically ingenious reel invented (unsurprisingly) in France, and an assortment of artificial lures, usually made of metal, that a relative novice can plunk on the desired spot with very little practice. Nothing further is required except a stout line and a strong arm. But the fisherman who is sporting and not hungry at all will resort to neither of these crude techniques. If she is serious about her business, she will fish with a dry fly, or not at all.

To do so she must make a considerable investment. The rod will be very expensive and possibly quite beautiful. She will have an array of flies, some in little tin boxes kept in the numerous pockets of her fishing vest, others stuck in the fleece hatband that is made for this purpose. She will have spent winter evenings tying these flies herself, using pheasant feathers, deer hair, and other arcane components sold at a store so specialized that it is difficult to find in the yellow pages. She will have filed the barbs off the hooks so that even a fish that is caught will have a chance to escape. She will have studied the flow of water in streams and the ways of the fish that live in them. She will have a keen eye not only for the characteristics peculiar to the stream where she

fishes, but also to the weather and the light. She will choose the fly that best matches whatever insect her prey is most likely to feed upon, in that weather, in that stream, at that moment. She will tie that fly to a line so fragile that any fish could snap it when it is taut. She will stand for hours in frigid water wearing high rubber boots, picking her way over slippery stones, knowing that if she falls, her boots may fill and she may drown. She will cast the fly, not with the spin-fisherman's negligent flick of the wrist, but with well-practiced movements that others working the stream recognize as those of experience and skill—long arcs of graceful backward-looping yards of line, worked back and forth until the fly is "presented" at the perfect spot, in the perfect way. If a fish strikes, she will play it slowly, with enough pressure to bring it closer after its first run, but not so much that the line snaps, nor so little that the barbless hook will not hold. And if the skill and patience are there, and the fish does not run the line under a log or around a rock, and if she gets her net under it at exactly the right moment of exhaustion, she will have caught her fish.

But she will have done more than that. The competition in which she has triumphed will have given the fish its chance. The "agony," in an etymologically important sense, will have been hers as well as the fish's. She will have demonstrated complex technical mastery over that part of fishing which is craft, and she will have met the aesthetic requirements of form that make fishing, for some, an art. She will not only have caught her fish; she will have earned it.

The attraction of the ninth amendment lies in its openness. There is no body of case law to supply the constraints that the text so conspicuously lacks. That same openness, however, accounts for the court's refusal to rely upon the amendment. Without constraints, craftsmanship is impossible and art unthinkable. Had Douglas based his opinion solely on the ninth amendment, with its language that does not constrain, he would, in effect, have tossed a stick of dynamite into the pond. Having power and the will to use it (assuming four more votes), he simply would have applied the ninth amendment to the task at hand. The dynamite would have sufficed, if the only task was the killing of a fish. Such is the essence of legislation. But adjudication, especially in constitutional cases, calls for more than power and will. Legitimacy, the difference between the fish caught and the fish earned, is essential, and power and will alone cannot confer it.

The legitimacy of the Douglas opinion in *Griswold* lies in its apparent respect for the accepted forms of constitutional interpretation.

Merely following the forms is not remarkable, nor is the naked proclamation of a novel result. To bring forth something new under the constitutional sun while maintaining appearances,⁴ however, is an artist's work. Douglas did not do "as lazy judges do who win the game by sweeping all the chessmen off the table."⁵ In the elegance of his grappling with a problem that is as much aesthetic as it is technical or intellectual lies the agonistic quality that decisively distinguishes adjudication from legislation.⁶ That quality confers upon *Griswold* the legitimacy denied, for example, to *Roe v. Wade*,⁷ and that cannot be attained in reliance upon the ninth amendment.

The students who remained awake at this point were gazing alternately at the clock, in hope, and at me, in something like horror. The clock did save us all, and since then I have tried to rely somewhat more on preparation than inspiration in teaching *Griswold*.

Nonetheless, I remain indebted to my colleague for pointing me in the proper direction, and I remain enormously respectful of Douglas's achievement in *Griswold*. His opinion stands as a great example of Coke's distinction between natural reason and the artificial reason of lawyers, for lack of which James I was incompetent to render justice in his own court. It is more valuable as an instance of many of the qualities Charles Black described in his essay, "Law as an Art."⁸ The aesthetic dimension of legitimacy in constitutional interpretation still is not sufficiently grasped and, though I continue to believe that form and ritual are as essential to legitimacy in fishing as in judging, I will not again tax my students' tolerance with the analogy.

In fact, no finite set of analogies can capture the essence of a case like *Griswold*. The articles published here, against the background of the recollections of counsel that preceded their delivery, remind us of the contingent character of constitutional doctrine, and its sometimes

4. It was, after all, "[t]he *image* of a free constitution [that] was preserved with decent reverence" in Rome on the eve of its decline. 1 E. GIBBON, *THE DECLINE AND FALL OF THE ROMAN EMPIRE* 1 (4th ed. 1877) (emphasis added).

5. Hand, *Mr. Justice Cardozo*, 52 HARV. L. REV. 361, 362 (1939), 48 YALE L.J. 379, 380 (1939), 39 COLUM. L. REV. 9, 11 (1939) (article published simultaneously in all three journals).

6. See Huizinga's essay, *Play and Law*, where he wrote of the agonistic nature of juridical process, and of "the playful and the contending, lifted on to the plane of that sacred seriousness which every society demands for its justice. . . ." J. Huizinga, *HOMO LUDENS: A STUDY OF THE PLAY ELEMENT IN CULTURE* 76 (1955). As between the contending parties, of course, the judge is a neutral arbiter. When she comes to write the opinion in a constitutional case, however, and must wrestle with the text and all the glosses on it, she too contends, in "sacred seriousness."

7. 410 U.S. 113 (1973).

8. See C. BLACK, *THE HUMANE IMAGINATION* 17 (1987).

short half-life. The arguments presented to the Court by counsel were not dictated by a priori commitments to abstract propositions of constitutional theory. The arguments arose from the perceived immediate and imperative need to relieve the suffering and indignity imposed on women in New Haven by a statute that made it impossible lawfully to obtain medical advice and assistance in avoiding pregnancy. No established doctrine of federal constitutional law promised relief. New doctrine was needed. It was immaterial to counsel and to client alike whether a court would strike the statute down in reliance upon *Lochner v. New York*,⁹ the first amendment, the ninth amendment, any clause of the fourteenth amendment, or all clauses of the fourteenth amendment, or none.

"Doctrine" on a given day is a contingent amalgam of need, opportunity and choice. The doctrines available in any legal taxonomy reflect the accommodations already reached between an enduring text and previous exigencies. The task, for counsel and court alike, is to so refine and deploy the available categories of thought that a judicial decision that responds adequately to the demands of the pending case is possible.

The litigators' task in *Griswold*, as in any other case, was to press the facts upon the Supreme Court in a way that would make the justices want to decide in their clients' favor,¹⁰ and to offer theories that would ease their way toward doing so. They placed their main bet on privacy, per Warren and Brandeis¹¹ and the literature that had grown up around the concept, whether keyed to equal protection or due process, and hedged late in the game with a ninth amendment option presented in case a then-recent article had prepared the Court for that approach.¹² To the litigant, any theory is good if it yields the right result. Choice and elaboration of doctrine and theory lie with the Court. The justices, once a decision is reached, face practical problems of their own in writing an opinion. They may pick from the menu offered by counsel, or range beyond as circumstances and small-group politics appear to require. After the decision is rendered and released,

9. 198 U.S. 45 (1905).

10. This was achieved in *Griswold* by deciding not to mention in the factual stipulation that the Planned Parenthood clinic was open to single as well as married women, and in fact had served some of the former. Inclusion of that fact would have had a profound effect on the Court's opinion, if not on its decision.

11. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

12. Redlich, *Are There "Certain . . . Retained by the People?"*, 37 N.Y.U. L. REV. 787 (1962).

the bar may assess the impact of the combined labors of the litigants and the justices on the law as it previously stood, and the academy can project the rationale of the opinion on the large screen of theory. The connection between the theories spun out of an opinion and the raw, specific facts of human misery to which the opinion was at least nominally addressed quickly becomes attenuated. Soon the specifics are entirely lost; only doctrine and theory remain, progressively reified. Whether the Court continues to recognize its own work in the theoretical discussions that ensue is one question. Whether the specific contours of the next litigant's suffering can be addressed adequately through doctrine the Court now owns, or through theoretical elaborations of that doctrine that penetrate into the common legal culture is a different one.

Catherine Roraback spoke eloquently of the human condition that gave rise to *Griswold*. Professor Schnably offers an extended, highly theoretical treatment of the implications of what the Supreme Court wrote in response to Ms. Roraback's litigation. The intellectual force of his essay is not dependent on the facts with which Ms. Roraback was obliged to deal more than a quarter of a century ago. Professor Fineman, in her turn, makes it plain that the theory of family upon which *Griswold* turned is so remote from her conceptual approach to "family" that notions of privacy emerging from *Griswold* are irrelevant to her work. Professor Schneider completes the cycle, bringing us back into confrontation with the reality of violence against women—once more, the raw facts of suffering—and challenging us to think anew about the adequacy of existing law as a vehicle through which that suffering can be stopped.

Griswold may have nothing to offer Professor Fineman at the level of theory, nor to Professor Schneider at that of practice. But doctrine standing alone barely covers the exigencies that called it into being. Doctrine never speaks directly or adequately to the next set of exigencies that press upon it, and *Griswold* for all its riches may have nothing more to give. To understand how much it has already given, consider an argument made by Connecticut in its brief to the Connecticut Supreme Court. The state, looking to the police power rationale of the statute, asserted that marriage, the only relation in which sexual relations could legally take place, was regulated by the state not only so

that children may be born and properly reared, but that the parties to the marriage may themselves be the better citizens; it being in accordance with the experience of all mankind that

human beings are happier and are better citizens and *better disposed toward the State*, when married and surrounded by the ties of a family and with children.¹³

The state needs citizens who are well disposed toward it. People with children are thus better disposed. The state may, therefore, prohibit contraception in order to increase the number of hostages held to assure the good behavior of adults. Today's world in some respects may be a poorer place than when that brief was written. It is nonetheless difficult to imagine, even on the most pessimistic prognosis for the United States Supreme Court, that so primitively statist an argument could be offered anywhere with a straight face today. If *Griswold v. Connecticut* did nothing but discredit the view of the relation between the citizen and the state expressed in the language quoted, it would still be worth celebrating—on its twenty-fifth anniversary and regularly thereafter.

13. Brief of State-Appellee at 14, *State v. Griswold*, 151 Conn. 544, 200 A.2d 479 (1964) (quoting *Dennis v. Dennis*, 68 Conn. 186, 196-97, 36 A. 34, 37 (1896) (emphasis added)).