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# Of History and Due Process

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# NOTES

## Of History and Due Process

People will not look forward to posterity, who never look backward to their ancestors . . . . Always acting as if in the presence of canonized forefathers, the spirit of freedom, leading in itself to misrule and excess, is tempered with an awful gravity.

—Edmund Burke<sup>1</sup>

### INTRODUCTION

In *Bowers v. Hardwick*,<sup>2</sup> the Supreme Court concluded that Georgia's anti-sodomy statute<sup>3</sup> did not infringe upon a fundamental right of the respondent, a practicing homosexual,<sup>4</sup> under the due process clause of the fourteenth amendment.<sup>5</sup> The Court's methodology in *Bowers* is most notable for its heavy reliance upon history—and specifically upon the long tradition of “Judeo-Christian moral and ethical standards.”<sup>6</sup> The Court cites anti-sodomy provisions in the *Code* of Justinian,<sup>7</sup> the statutes of Henry Tudor,<sup>8</sup> and the *Commentaries* of Sir William Blackstone<sup>9</sup> in reaching the conclusion that western civilization in general and, impliedly, the United States in particular, has not countenanced sodomy as a fundamental right or, indeed, as a permissible form of sexual conduct.<sup>10</sup> There is, of course, ample precedent for this history-based form of substantive due process analysis. The

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1. E. BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 53-54 (1955 ed.).

2. 106 S. Ct. 2841 (1986).

3. Section 16-6-2 of the Georgia Code states:

(a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another. A person commits the offense of aggravated sodomy when he commits sodomy with force and against the will of the other person.

(b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than twenty years. A person convicted of the offense of aggravated sodomy shall be punished by imprisonment for life or by imprisonment for not less than one nor more than twenty years.

GA. CODE ANN. § 16-6-2 (1984).

4. *Bowers*, 106 S. Ct. at 2842-44.

5. U.S. CONST. amend. XIV, § 1.

6. *Bowers*, 106 S. Ct. at 2847 (Burger, C.J., concurring).

7. *Id.*

8. *Id.*

9. *Id.*

10. See also *id.* at 2854-55 (Blackmun, J., dissenting).

historical method was explicitly inaugurated by Justice Harlan in his dissenting opinion in *Poe v. Ullman*,<sup>11</sup> and was used by Justice Powell, writing for a plurality of the Court, in *Moore v. East Cleveland*.<sup>12</sup> Significantly, Justice White, who had objected to the *Moore* Court's history-based derivation of fundamental rights,<sup>13</sup> cited both the plurality's approach in *Moore*<sup>14</sup> and "[p]roscriptions against [sodomy that] have ancient roots"<sup>15</sup> with apparent approval in his opinion for the Court in *Bowers*.

In dissent, Justice Blackmun rejected the historical methodology of the *Bowers* majority, citing Justice Holmes' dictum that:

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid have vanished long since, and the rule simply persists from blind imitation of the past.<sup>16</sup>

In his opinion for the Court in *Roe v. Wade*,<sup>17</sup> however, Justice Blackmun noted with approbation the endorsement given abortion by Plato<sup>18</sup> and Aristotle<sup>19</sup> (while dismissing Hippocrates' objection to the practice as a product of Pythagorean mysticism<sup>20</sup>) in concluding that a woman's right to end her pregnancy is fundamental under the due process clause.<sup>21</sup> Similarly, Justice Holmes' opinion of "the time of Henry IV" appears to have fluctuated. "[A] page of history," said the great jurist, "is worth a volume of logic."<sup>22</sup> Such a protean attitude toward the historical method of fundamental due process rights derivation (or, more generally, toward the use of the historical method in any branch of constitutional decisionmaking) reflects some of the problems inherent in this method, even while manifesting its enormous potential as a rhetorical and as an adjudicative device.

The issues raised by the historical form of analysis in major substantive due process cases such as *Bowers* and *Roe* are myriad. Has the extant historical record been explored in an impartial, evenhanded manner by the Court in these cases for the purpose of determining what rights are "fundamental" under the due process clause? Or, has advocacy distorted the Court's historical vision and balance in emotional, highly publicized cases

11. 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

12. 431 U.S. 494, 501-03 (1977).

13. *Id.* at 549-50 (White, J., dissenting).

14. *Bowers*, 106 S. Ct. at 2844.

15. *Id.*

16. *Id.* at 2848 (Blackmun, J., dissenting) (quoting Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897)).

17. 410 U.S. 113 (1973).

18. *Id.* at 131 (citing PLATO, *REPUBLIC* BK. V \*461).

19. *Id.* (citing ARISTOTLE, *POLITICS* BK. VII \*1335b).

20. *Id.* at 132. See also L. EDELSTEIN, *THE HIPPOCRATIC OATH* 63-64 (1943).

21. *Roe*, 410 U.S. at 153.

22. *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

like *Bowers* and *Roe*? Are there, in fact, certain demonstrable fundamental rights which emerge from the historical record taken as a whole; or, is this record—provided that its scope is broad enough—variegated to the extent that respectable authority can be found in it for virtually any given proposition one cares to assert? In sum, does the Court merely look to history to justify, *post hoc*, decisions which have actually been made in a historical vacuum? Beginning with a brief historical survey of opinions as to the issues of abortion and sodomy, and using as paradigms the Court's treatment of these volatile subjects in *Roe* and *Bowers*, this Note shall investigate—and attempt to propose some answers to—these vexing questions.

## I. A HISTORICAL SURVEY

### A. *Law and the History of Abortion*

Any history of opinion about the moral validity of abortion, as noted by the Court in *Roe*,<sup>23</sup> is marked by diversity. At the beginning of recorded history, in the Persian Empire, abortifacients were available, but procuring an abortion was, under some circumstances, a grave and severely punished criminal offense.<sup>24</sup> This sort of compromising attitude aptly exemplifies the view assumed by many later commentators. Ancient Greek opinion on the subject of abortion was mixed, with weighty authority arrayed on both sides of the issue. Influenced by the moral teachings of the philosopher and mathematician Pythagoras,<sup>25</sup> Hippocrates, the "father of medicine," proscribed abortion in no uncertain terms. There are various translations of Hippocrates' famous Oath, the incantation of which served for many years as a sort of rite of passage in the medical profession. In each translation, however, the physician's meaning is clear: "I will neither give a deadly drug to anybody if asked for it, nor will I make a suggestion to this effect." Similarly, "I will not give to a woman an abortive remedy."<sup>26</sup> Or again: "I will not give a fatal draught to anyone if I am asked, nor will I suggest any such thing. Neither will I give a woman means to procure an abortion."<sup>27</sup>

It should be noted that the Hippocratic condemnation of abortion is closely related to the physician's denunciation of suicide.<sup>28</sup> Like suicide, however, abortion was by no means an uncommon practice in ancient Greece, notwithstanding Hippocrates' exhortation. This became especially true by the turn of the fifth century B.C., as the Athenian Empire reached the apex of

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23. *Roe v. Wade*, 410 U.S. 113, 129-41.

24. A. CASTIGLIONI, *A HISTORY OF MEDICINE* 84 (E. Krumbhaar trans. 2d ed. 1947).

25. See generally L. EDELSTEIN, *supra* note 20, at 1-18.

26. *Id.* at 3.

27. HIPPOCRATES, *THE HIPPOCRATIC WRITINGS* 67 (1978).

28. L. EDELSTEIN, *supra* note 20, at 8-10.

its power.<sup>29</sup> At this time, abortion was concomitant to the practice of infanticide, carried out through exposure to the elements.<sup>30</sup> Indeed, by the second century B.C., the Roman historian Polybius declared that the Greek population was being rapidly depleted as a result of such practices.<sup>31</sup> The pervasive resort to abortion and infanticide is cogently summarized by Professor Edelstein: "Abortion was practiced in Greek times no less than in the Roman era, and it was resorted to without scruple. Small wonder! In a world in which it was held justifiable to expose children immediately after birth, it would hardly seem objectionable to destroy the embryo."<sup>32</sup> Another commentator has asserted that infant exposure was not universally practiced in the Greek city-states, nor, where practiced, was it as common or accepted as it was later to become in the Roman Republic.<sup>33</sup> These historiographical disputes aside, however, there appears to be abundant evidence to support the proposition that the Pythagorean-Hippocratic proscription of abortion and infanticide was ignored to one degree or another by the populace in pre-Platonic Greece.

At the time Plato wrote then, there was conflicting opinion in Athens and in the other city-states on the subject of abortion. In his *Republic*, Plato justified abortion for eugenic purposes, "admonishing" women "past the age of lawful procreation" either to procure abortions or to resort to some form of post-natal infanticide.<sup>34</sup> Children conceived in violation of the Republic's laws, said Plato, "must not be reared."<sup>35</sup> The *Republic* was Plato's first attempt at framing an ideal society. It was to be ruled not by law, but rather by "philosopher-kings," whose will governed citizens' decisions as to

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29. D. RIESMAN, *THE LONELY CROWD* 28-29 (1950).

30. Quay, *Justifiable Abortion—Medical and Legal Foundations*, 49 *GEO. L.J.* 395, 408 (1961).

31. D. RIESMAN, *supra* note 29, at 28-29.

32. L. EDELSTEIN, *supra* note 20, at 10.

33. Quay, *supra* note 30, at 408-09.

34. PLATO, *REPUBLIC* BK. V \*461b-c (D. Lee trans. 2d ed. 1955). Translations of this passage of the *Republic* vary, but all are reasonably clear. In Professor Lee's translation, this passage reads, in relevant part: "We shall first order them to make every effort to prevent any conception which takes place in these unions from seeing the light at all, and if they fail to prevent its birth, to dispose of it as a creature that must not be reared." *Id.* Professor Shorey's reading, reprinted in PLATO, *THE COLLECTED DIALOGUES* 700 (P. Shorey trans. 1961), is representative of typical translations:

But when, I take it, the men and the women have passed the age of lawful procreation, we shall leave the men free to form such relationships with whomever they please, except daughter and mother and their direct ascendants and descendants, and likewise the women, save with son and father, and so on, first admonishing them preferably not even to bring to light anything whatever thus conceived, but if they are unable to prevent a birth to dispose of it on the understanding that we cannot rear such an offspring.

*Id.* The two alternatives here prescribed are abortion and infanticide.

35. PLATO, *REPUBLIC*, *supra* note 34, at \*461c, at 242-43.

“breeding.”<sup>36</sup> Women were to be held in common,<sup>37</sup> and children raised in state nurseries.<sup>38</sup> Abortion and infanticide were to be available to ensure that such errors as the Platonic “Guardians” might make in selecting mates out of the common pool would not result in burdening the Republic with “any defective offspring.”<sup>39</sup> In sum, “[f]or Plato, foeticide [was] one of the regular institutions of the ideal state.”<sup>40</sup> Further Platonic commentary on abortion occurs in that thinker’s *Laws*, his final and most comprehensive work on legal and political theory. The relevant passage in the *Laws* is less clear than is its analogue in the *Republic*. Magistrates are to “contrive the best device they may to keep the number of households always at . . . five thousand and forty, and no more.”<sup>41</sup> Plato does not here specifically mention abortion as one of these salutary population control “devices,” but given the scope of authority accorded his magistrates, there is scant reason to believe that it did not include the power to mandate abortion and infanticide as means of ensuring that the population of the state did not grow to “excess.”<sup>42</sup> Above all, Plato appeared in his *Laws* to fear an “excessive glut of population.”<sup>43</sup> Accordingly, the remedial power given his magistrates is quite broad.<sup>44</sup> Thus, Plato justified abortion and infanticide as means of achieving eugenic perfection and a population of optimal size.

Similar justifications animate Aristotle’s approval of abortion. For Aristotle, however, these justifications are supplemented (and the practice of abortion is consequently circumscribed) by the Philosopher’s theory of the generation of the human soul. In his *Politics*, Aristotle touts abortion as a solution to the problem of excessive population growth.<sup>45</sup> “[W]hen couples have children in excess [of the state population limit], let abortion be procured before sense and life have begun.”<sup>46</sup> The last portion of this dictum implies an important Aristotelian caveat to the unrestrained practice of

36. *Id.* at \*461b, at 242.

37. *Id.* at \*457c-d, at 227. In the Lee translation, this passage reads: “[A]ll the women should be common to all the men; similarly, children should be held in common, and no parent should know its child, or child its parent.” *Id.*

38. *Id.* at \*460c, at 240.

39. *Id.*

40. L. EDELSTEIN, *supra* note 20, at 16.

41. PLATO, *LAWS* BK. V \*740d, reprinted in PLATO, *THE COLLECTED DIALOGUES* 1325 (Taylor trans. 1961). Plato continues: “Now there are several such devices. There are shifts for checking propagation when its course is too facile, and, on the other side, there are ways of fostering and encouraging numerous births . . .” *Id.*

42. *Id.*

43. *Id.* at \*740e, at 1325.

44. See, e.g., *id.* at \*740e to \*741a (to ameliorate the population problem “we can send out colonies of such persons as we deem convenient with love and friendship on both parts”).

45. ARISTOTLE, *POLITICS* BK. VII \*1335b, reprinted in 10 *THE WORKS OF ARISTOTLE* (W. Ross ed. B. Jowett trans. 1921). See also L. EDELSTEIN, *supra* note 20, at 16. According to Professor Edelstein: “Aristotle reckons abortion the best procedure to keep the population within the limits which he considers essential for a well-ordered community.” *Id.*

46. ARISTOTLE, *supra* note 45, at \*1335b.

abortion. This caveat is apparently predicated upon Aristotle's tripartite theory of the human soul. A developing human embryo was, according to this theory, at the time of conception invested with a "nutritive soul" (common to plants, animals, and humans), then, at some later point in the gestational process, with a "sensitive soul" (common to animals and humans), and finally with a sort of "intellectual" or "rational" soul unique to humans.<sup>47</sup> Within the framework of this complicated theory, Aristotle cautions that abortion is licit only where an embryo has not yet been invested with its sensitive (or "animal") soul—a point which is sometime after conception (*i.e.*, when only the nutritive soul exists) but before birth.<sup>48</sup> This, most probably, is what Aristotle meant when he said in the *Politics* that, as regards abortion, "what may or may not be lawfully done in these cases depends on the question of life and sensation,"<sup>49</sup> which "sensation" can be attributed only to those creatures invested with a sensitive, "animal" soul. In some respects, the three-stage gestational theory propounded by Aristotle anticipates later generational theories such as "quickenings" and "viability," which also have been used in judging the validity of abortion at various stages of pregnancy. Aristotle's theory of the soul, if not its application to the ethics of abortion, was to prove influential among medieval scholastic theologians, culminating in the thought of St. Thomas Aquinas.<sup>50</sup>

Opinions among Greek thinkers on the subject of abortion are thus quite diverse—ranging from the apparent *carte blanche* approval given by Plato to the absolute Pythagorean-Hippocratic proscription. Somewhere between these poles is Aristotle, with his guarded approval of abortion under some circumstances. Despite the widespread practice of abortion among the ancient Greeks, there was a strong countervailing tradition—perhaps a product of

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47. See generally ARISTOTLE, DE PARTIBUS ANIMALIUM BK. II \*736a-b, reprinted in ARISTOTLE'S DE PARTIBUS ANIMALIUS I AND DE GENERATIONE ANIMALIUM 3, 735-36 (D. Balme trans. 1972). According to Aristotle:

One could not class the foetus as soulless [or] in every way devoid of life; for the seeds and fetuses of animals are no less alive than plants, and are fertile up to a point. It is plain enough that they have nutritive soul (and why they must obtain this first is evident from what we have made clear elsewhere concerning the soul), but as they progress they have also the perceptive soul in virtue of which they are animal. . . . For they do not become simultaneously animal and man, or animal and horse, and so on; for the end is the last to be produced, and the end of each animal's generation is that which is peculiar to it. This is why the question of intellect—when and how and from where it is acquired by those that partake in this source—is especially difficult, and we must try hard to grasp it according to our capabilities and to the extent that is possible.

*Id.*

48. See L. EDELSTEIN, *supra* note 20, at 16 ("Aristotle advocates that abortion should be performed before the foetus has attained animal life; after that time, he no longer considers abortion compatible with holiness.").

49. ARISTOTLE, *supra* note 45, at \*1335b.

50. Quay, *supra* note 30, at 429.

religiously inspired sexual asceticism<sup>51</sup>—as represented by the Pythagorean school. This mixed tradition was inherited by the Romans upon their conquest of Macedonia and Greece.<sup>52</sup>

Like their cultural forebears the Greeks, the Romans had difficulty in formulating a consistent policy with regard to abortion. “Jurists, at different periods of Roman history, entertained diametrically opposed opinions on the criminal responsibility attaching to the production of abortion.”<sup>53</sup> The Roman Republic, at least after the end of the second Punic War,<sup>54</sup> appears generally to have been tolerant of both abortion and infanticide by exposure.<sup>55</sup> During the late Republican period, the dictator Sulla attempted to revive what he perceived to be the waning morals of his citizens through the enactment of a new criminal code, the *Lex Cornelia*.<sup>56</sup> “[T]he *Lex Cornelia* prescribed that whoever gave an aphrodisiac beverage or caused an abortion should be punished with deportation and the loss of part of his goods. If the patient should die as a result of these practices, the guilty party was condemned to death.”<sup>57</sup> This was the earliest express criminal proscription of abortion framed by a Roman legislator. It is thus not the case that the later proscriptions of abortion promulgated by Christian Emperors such as Leo were unprecedented products of a newly pervasive religious influence.

Despite the best efforts of late Republican tyrants like Sulla, the practice of abortion remained, by all accounts, quite common at the start of Rome’s imperial period,<sup>58</sup> especially among aristocrats.<sup>59</sup> Julius Caesar enacted gen-

51. L. EDELSTEIN, *supra* note 20, at 17-18. “In their ascetic rigorism, in their strictness concerning sexual matters and regarding matrimony in particular, [the Pythagoreans] went farther than any other sect. They banned extramarital relations. Even in matrimony, coitus was held justifiable only for the purpose of producing offspring.” *Id.* at 18. Professor Edelstein proceeds to describe this doctrine as one of “uncompromising austerity.” *Id.* at 18.

52. See generally 11 LIVY, HISTORY OF ROME BK. XXXIX \*219 (E. Sage ed. 1958) (the Roman historian Livy renders a primary account of the Republic’s Macedonian conquest).

53. 10 S. SCOTT, THE CIVIL LAW 328 n.1 (1932).

54. See Quay, *supra* note 30, at 413. On the effects of the second Punic War on Roman life, see generally W. DURANT, CAESAR AND CHRIST 47-54 (1944).

55. W. DURANT, *supra* note 54, at 211.

56. Quay, *supra* note 30, at 415.

57. A. CASTIGLIONI, *supra* note 24, at 227.

58. The satirist Juvenal provides a telling description of the moral fiber of Rome in transition: “[B]ut when did you ever discover [l]abor pains in a golden bed? There are potent prescriptions, [f]ine professional skill, to be hired for inducing abortions, [k]illing mankind in the womb.” JUVENAL, THE SATIRES OF JUVENAL No. VI 87 (R. Humphries trans. 1958). Juvenal admonishes reluctant husbands: “Rejoice, unfortunate husband, [g]ive her the dose yourself, whatever it is; never let her [c]ary till quickening time, or go on to full term and deliver [s]omething whose hue would seem to prove you a blackamoor father.” *Id.* See also W. DURANT, *supra* note 54, at 364.

59. W. DURANT, *supra* note 54, at 211. According to Durant:

Rome [at the fall of the Republic] was full of men who had lost their economic footing and then their moral stability . . . [and] women dizzy with freedom,



eral marital legislation, and similar morals laws were promulgated under Octavian and Tiberius.<sup>60</sup> These laws were soon revealed to be a notorious failure.<sup>61</sup> "Immorality continued, but was more polite than before . . ."<sup>62</sup> By the middle of the first century A.D., "[a]bortion . . . was on the increase."<sup>63</sup> Such a state of affairs was apparently in contravention of the *Lex Cornelia*. The lyric poet Horace acutely observed that laws are vain where hearts remain unchanged.<sup>64</sup> The dissolute rule of Gaius, Nero, and Domitian did little to alleviate Rome's imperial laxity. Stoicism was becoming fashionable in Rome, and with it came new intellectual justifications for abortion and infanticide.<sup>65</sup>

As the Roman Empire began its long decline, the rise of Christianity forced pagan Rome to reevaluate its legal code. Emperor Septimus Severus (193-211) drafted a new law against abortion: "The divine Severus . . . stated in a *Rescript* that a woman who purposely produces an abortion on herself should be sentenced to temporary exile by the Governor; for it may be considered dishonorable for a woman to deprive her husband of children with impunity."<sup>66</sup> Laden as it was with concern for decorum, Severus' *Rescript* was hardly a ringing denunciation of abortion. Nevertheless, the lawmaker's position finds at least colorable intellectual support in the writings of two of his contemporaries—the physician Galen,<sup>67</sup> and the philosopher Epictetus.<sup>68</sup> Neither abortion nor infanticide was tolerated by two great codifiers of Roman law, Theodosius (408-450) and Leo (457-474). Theodosius proscribed the ritual infanticide common to many pagan sects.<sup>69</sup> The Emperor Leo was more explicit in his *Constitutions*:

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multiplying divorces, abortions, and adulteries. Childlessness was spreading as the ideal of a declining vitality; and shallow sophistication prided itself upon its pessimism and cynicism.

*Id.* See also Quay, *supra* note 30, at 420.

60. Quay, *supra* note 30, at 416-20.

61. See, e.g., TACITUS, *THE ANNALS OF IMPERIAL ROME* BK. III 132 (M. Grant trans. 1986) (the legislation of Julius and Octavian "failed . . . to popularize marriage and the raising of families—childlessness was too attractive").

62. W. DURANT, *supra* note 54, at 224.

63. Quay, *supra* note 30, at 420.

64. HORACE, *THE ODES AND EPODES OF HORACE*, Odes BK. III No. 24, at 104 (M. Grant trans. 1968).

65. See, e.g., SENECA, *ON ANGER* BK. I \*15, reprinted in *MORAL ESSAYS* 107 (S. Basore trans. 1963). "[U]nnatural progeny we destroy; we drown even children who at birth are weakly and abnormal. Yet it is not anger but reason that separates the harmful from the sound." *Id.* at 145.

66. DIG. 47.11.4 (Marcian, Rules, 1).

67. 2 GALEN, *ON THE USEFULNESS OF THE PARTS OF THE BODY* 357 (M. May trans. 1968). "[I]n my commentaries *On Demonstration* and *On the Teachings of Hippocrates and Plato*, I have said that what is contained in the uterus is already an animal, at least when all its parts have been formed." *Id.* at 145.

68. Quay, *supra* note 30, at 423-24.

69. CODE TH. 9.14.1 ("If anyone, man or woman, should commit the crime of killing an infant, such an evil deed shall constitute a capital offense.").

Two laws have been enacted, one against a woman who, through dislike to her husband, takes pains to produce an abortion upon herself, and accomplishes the death of her unborn child, and another enacted against the husband requiring him to repudiate a woman who has been guilty of such an outrage; but We think it advisable to adopt that which authorizes divorce, as being much more advantageous.<sup>70</sup>

Abortion is described as "an outrage . . . against Nature" by the lawmaker.<sup>71</sup> In spite of these strictures, abortion remained common in the general populace, as had been the case in Greece some centuries prior to the Roman codification. One commentator has opined that "even the penalty of death was not sufficient to check the constantly increasing tendency of all classes to limit the size of their families, and abortion became more frequent under the Christian Emperors than it had been under their heathen predecessors."<sup>72</sup> This statement serves well to summarize the Roman attitude toward abortion. From Sulla to Theodosius, Roman rulers tried without substantial success to curb the practice of abortion. Horace's maxim concerning the inefficacy of law in changing men's hearts was being borne out, even as Christianity was undertaking the production of such a change in the context of a jaded, declining empire.

The Judeo-Christian attitude toward abortion has not been marked by the sort of vicissitudes seen in ancient Greece and Rome. Mosaic law, from which St. Augustine was to draw much of his inspiration on the subject, proscribed abortion.<sup>73</sup> The earliest Christian pronouncement on abortion probably occurred in an anonymous tract called the *Teaching*, or *Didache*, written in the first century A.D.<sup>74</sup> "The second commandment of the Teaching means: Commit no murder, adultery, sodomy, fornication, or theft. Practise no magic, sorcery, abortion, or infanticide."<sup>75</sup> The anonymous *Epistle to Diognetus* contrasts the practices of the pagans with regard to infanticide to those of second century Christians.<sup>76</sup> A second century Chris-

70. CONST. L. 31 ("[H]ow can a husband retain near him as a member of his family, instead of repulsing her as a dangerous enemy, a woman who has attempted to destroy a work of such excellent character, and one so necessary as procreation, when he experiences the greatest injury from her act?").

71. *Id.*

72. 10 S. SCOTT, *supra* note 53, at 328-29 n.1.

73. *Exodus* 21:22 (King James) ("If men strive, and hurt a woman with child, so that her fruit depart from her, and yet no mischief follow: he shall be surely punished, according as the woman's husband will lay upon him; and he shall pay as the judges shall determine." (emphasis in the original)).

74. Quay, *supra* note 30, at 423.

75. THE DIDACHE I.2, reprinted in EARLY CHRISTIAN WRITINGS 227-28 (M. Staniforth trans. 1968). Translations of the *Didache* vary, but the import of this passage is plain in all versions. See, e.g., the translation reprinted in Quay, *supra* note 30, at 423.

76. EPISTLE TO DIOGNETUS V, reprinted in EARLY CHRISTIAN WRITINGS, *supra* note 75, at 176-77.

tian lawyer, Minucius Felix, reiterated the condemnation of abortion.<sup>77</sup> The apologist Tertullian wrote in a similar vein.<sup>78</sup> Writing in the fifth century, St. Augustine categorically condemned abortion at all stages of pregnancy while conceding that he was unsure at what point the unborn child was invested with a soul.<sup>79</sup> When, in the twelfth century, the Benedictine monk Gratian assembled the first compilation of canonical decrees, the *Decretum*, he incorporated St. Augustine's teaching on abortion.<sup>80</sup> Gratian's *Decretum* formed the basis of many later codifications of canon law, most of which took the form of accretions and supplemental canons.<sup>81</sup>

Medieval scholastic theologians, the greatest of whom was probably St. Thomas Aquinas, used the writings of Aristotle as a point of departure in developing diverse theories of the soul.<sup>82</sup> Aquinas adopted Aristotelian terminology to describe the triune human soul. Unlike Aristotle, however, Aquinas believed that the sensitive, as well as the nutritive, soul "is transmitted with the semen."<sup>83</sup> The "intellectual" or "rational" soul is not transmitted with the semen,<sup>84</sup> but rather "is created by God at the end of human generation, and this soul is at the same time sensitive and nutritive, the pre-existing forms being corrupted."<sup>85</sup> In humans, said Aquinas, the three souls are not at any time "essentially different from one another."<sup>86</sup> Indeed, the difference between them appears to be largely conceptual, the nutritive and sensitive aspects of the soul being brought into actuality by

77. FELIX, THE OCTAVIUS OF MARCUS MINUCIUS FELIX 107-08 (G. Clark trans. 1974) ("[T]here are women who swallow drugs to stifle in their own womb the beginnings of a man to be—committing infanticide before they give birth to their infant.').

78. TERTULLIAN, APOLOGY BK. IX, reprinted in TERTULLIAN 3 (T. Page ed., T. Grover trans. 1931).

In our case, murder being once for all forbidden, we may not destroy even the fetus in the womb, while as yet the human being derives blood from other parts of the body for its sustenance. To hinder a birth is merely a speedier man-killing; nor does it matter whether you take away a life that is born, or destroy one that is coming to the birth. That is a man which is going to be one; you have the fruit already in its seed.

*Id.* On the complex, protean character of Tertullian, see W. DURANT, *supra* note 54, at 647-49.

79. Quay, *supra* note 30, at 428. See generally AUGUSTINE, THE CITY OF GOD BK. XXII § 13 (M. Dods trans. 1950). In treating of exchatology in *The City of God*, St. Augustine declares: "[I]f all human souls shall receive again the bodies which they had wherever they lived, and which they left when they died, then I do not see how I can say that even those who died in their mother's womb shall have no resurrection." *Id.* at 837.

80. Quay, *supra* note 30, at 428.

81. *Id.* See also W. DURANT, THE AGE OF FAITH 754-56 (1950) (Professor Durant favorably compares these *Codes* of ecclesiastical law with the civil *Code* of the Roman Emperor Justinian).

82. Quay, *supra* note 30, at 429.

83. AQUINAS, I SUMMA THEOLOGIAE q. 118 art. 1, at 186 (Dominican fathers ed. 1922).

84. *Id.* q. 118 art. 2, at 187.

85. *Id.* at 193.

86. *Id.* q. 76 art. 3, at 34. For Aquinas, "the sensitive soul, the intellectual soul, and the nutritive soul are numerically one soul." *Id.*

the procreative power of man, the rational aspect being infused by the power of God. Unlike Aristotle, Aquinas does not directly relate his theory of the generation of the soul to the subject of abortion. It is plain, however, from his emphasis upon the essential unity of the three facets of the human soul, that Aquinas would have regarded the destruction of the sensitive soul (which, he warrants, is in itself "corruptible"<sup>87</sup>) as an act whose effect would be to consign the rational (and incorruptible) soul to its fate by severing it from its mortal, "animal" aspect in the womb. The scholastic terminology is admittedly byzantine—a fact which naturally subjects it to a variety of interpretations. In the case of Aquinas, however, any exegesis which identifies his theory of the soul with that of Aristotle—thus apparently sanctioning abortion until such time in the gestational process as the intellectual soul supervenes upon the sensitive soul—is most dubious. Despite Aquinas' language of "supervention,"<sup>88</sup> one must conclude that his system operates so as to proscribe abortion as a practice harmful to the intellectual soul through the destruction of that incorruptible entity's essential unity with the mortal nutritive and sensitive souls.

Later Christian teaching on abortion is considerably more explicit than is the subtle, metaphysical doctrine of Aquinas. A new Code of Canon Law promulgated in 1917 expressly proscribed abortion.<sup>89</sup> Under this Code, "[t]hose who procure abortion, not excepting the mother, incur, if the effect is produced, an excommunication *latae sententiae* reserved to the Ordinary; and if they be clerics they are moreover to be deposed."<sup>90</sup> The subsequent papal encyclicals *Casti Connubii*<sup>91</sup> and *Humanae Vitae*<sup>92</sup> also condemned abortion. Lest any doubt remain, a Christian proscription of abortion is set forth in the 1983 Code of Canon Law.<sup>93</sup> In sum then, the Judeo-Christian stance on the subject of abortion has been, from its inception, one of universal disapproval.

Like the Christian tradition, that of the English common law has been framed by Aristotle. Writing in the thirteenth century, Henry de Bracton produced the concept of "quickening" as the determinative factor in judging

87. *Id.* at 34.

88. *Id.* q. 118 art. 2, at 193 ("[T]he generation of one thing is the corruption of another. . . . [I]t follows of necessity both in men and in other animals, when a more perfect form supervenes the previous form is corrupted: yet so that the supervening form contains the perfection of the previous form and something in addition.").

89. 1917 CODE c.2350 § 1.

90. *Id.*

91. Pius XI, *Casti Connubii* § 63, reprinted in THE PAPAL ENCYCLICALS (1903-1939) ("[A]nother very grave crime is . . . the taking of the life of the offspring hidden in the mother's womb.").

92. Paul VI, *Humanae Vitae* § 14 (All abortions, "even if for therapeutic reasons, are to be absolutely excluded as licit means of regulating birth."). *But see* P. JOHNSON, A HISTORY OF CHRISTIANITY 511-13 (1985) (a rather unfavorable critique of *Humanae Vitae*).

93. 1983 CODE c.1398 ("A person who actually procures an abortion incurs an automatic (*latae sententiae*) excommunication.").

the legal status of abortion. "If one strikes a pregnant woman or gives her poison in order to procure an abortion, if the foetus is already formed or quickened, especially if it is quickened, he commits homicide."<sup>94</sup> Like Aristotle then, Bracton appears to have countenanced abortion up until a certain point in the gestational process—at which point, it became illicit. Sir Edward Coke reasoned: "If a woman be quick with child, and by a potion or otherwise kills it in her womb . . . this is a great misprision and no murder."<sup>95</sup> Coke added that should a child be born alive and subsequently die as a result of the abortion producing "potion," this would properly be considered murder.<sup>96</sup> In Coke's scheme then, the law's fullest protection of a child attached only at birth. Prior to birth, and after quickening, the production of an abortion was to be treated as manslaughter (*i.e.*, some form of homicide of less severity than murder)—or, in Coke's nomenclature, "a great misprision." Sir William Blackstone followed Coke in holding that only the abortion of a quickened child could be regarded as a criminal offense, and then it was decreed to be nothing more than "a very heinous misdemeanor."<sup>97</sup>

Subsequent to the era of Blackstone, Parliament interposed statutes governing abortion in a manner more rigorous than that described by the great common law jurists. As a result of laws passed in the nineteenth century, abortion was proscribed in England under all circumstances until the early portion of the present century.<sup>98</sup> Thereafter, however, the English trend has been toward easing legal strictures on access to abortion, with both Parliament and the courts having a hand in this process.<sup>99</sup> The pattern of fluctuation which has marked the course of common and statutory law in England with regard to abortion has as its analogue American legal doctrine on this controversial subject. Thus, following the lead of Bracton and Blackstone, "[m]ost . . . early American statutes dealt severely with abortions performed after quickening, but were relatively . . . lenient as to abortions at an earlier

94. 2 H. BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 341 (S. Thorne ed. 1968).

95. 3 E. COKE, INSTITUTES OF THE LAWS OF ENGLAND \*47 to \*53.

96. *Id.*

97. 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \*125 to \*126. Blackstone states:

Life is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb. For if a woman is quick with child, and by a potion, or otherwise, killeth it in her womb . . . this, though not murder, was by the ancient law homicide or manslaughter. But at present it is not looked upon in quite so atrocious a light, though it remains a very heinous misdemeanor.

*Id.* Blackstone further noted that "an infant *in ventre sa mere* is supposed in law to be born for many purposes." *Id.* For example, "[i]t is capable of having a legacy . . . made to it." *Id.* See also 1 HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN ch. XXXI § 16 (discussing common law abortion doctrine).

98. See Quay, *supra* note 30, at 432-33.

99. See *id.* at 433-35 (describing the course of English common law on abortion in this century). See also *Roe*, 410 U.S. at 133, 137-38.

stage."<sup>100</sup> Additionally, these statutes typically permitted abortions undertaken for therapeutic reasons (*i.e.*, to preserve the life of the mother).<sup>101</sup> Instrumental in liberalizing abortion law in the United States prior to *Roe* was the American Law Institute's Model Penal Code, a document promulgated in 1962.<sup>102</sup> In brief, the Model Penal Code held abortion to be "justifiable," and hence free from sanction, where "there is a substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother or that the child would be born with grave physical or mental defect, or that the pregnancy resulted from rape, incest or other felonious intercourse."<sup>103</sup> Thus, the Model Penal Code went well beyond merely making provision for "therapeutic" abortions to save the lives of mothers. In doing so, it set the philosophical stage for the Court's decision in *Roe*, which was handed down eleven years after the drafting of the American Law Institute document.

The condition of American laws on abortion prior to *Roe*, replete with distinctions based upon therapeutic purposes and other, equally amorphous considerations (*e.g.*, the Model Penal Code's "mental health" criterion), is an excellent microcosm of the universe of tangled, and often sophistical, doctrines which has plagued the discussion of this issue since the distant days of Plato and Aristotle. It might well take the mind of an Aquinas, with its apparently boundless capacity for taxonomical maneuver, to master the legal and philosophical quagmire which has been briefly set forth in these pages. Such mastery might enable the jurist or historian to pull some common themes from the West's traditional attitudes toward abortion sufficient to clearly establish or dispel its purported status under the Constitution as a fundamental right. The present author declines to arrogate himself to such aptitude. It is enough for present purposes to conclude that western history provides modern man with a good deal of authority on both sides of this controversial issue. In many cases, the intellectual giants of the Nation's heritage stand arrayed in opposition to one another when the question of abortion is raised. Whether it is possible or desirable to derive any fundamental due process rights from this diffuse record is a subject which must be considered at some length below—both as an abstract matter and, more especially, for the purpose of evaluating in the light of history the legitimacy of the Court's landmark decision in *Roe*.

### B. *Law and the History of Sodomy*

Happily, the chronicler's task is easier when treating of the second major paradigm to be explored in this Note, that of sodomy. Western civilization,

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100. See Quay, *supra* note 30, at 437.

101. *Id.*

102. See MODEL PENAL CODE § 230.3(2) (Proposed Official Draft 1962) (note on history of section).

103. *Id.*

throughout its long history, has accorded this practice nearly universal condemnation. In contrast to the issue of abortion, there are in this case very few ambiguities or scholastic quibbles. As was the case with abortion, however, a proper historical survey must begin in ancient Greece. Sodomy was a common practice among the Greeks, a fact which is manifested in a number of Plato's *Dialogues*,<sup>104</sup> and in the plays of Aristophanes.<sup>105</sup> Nevertheless, it was Plato who posited the first legal argument advocating the proscription of sodomy.<sup>106</sup> This argument appeared, as did one of Plato's important commentaries on abortion, in the *Laws*.<sup>107</sup> Homosexual sodomy, said Plato, anticipating the words of many later thinkers, "is unnatural."<sup>108</sup> Plato acknowledged that his opinion would encounter fierce resistance from many of the Greek city-states,<sup>109</sup> but he believed his way to be essential in ensuring the masculinity and fecundity of the Greek race.<sup>110</sup> It will be recalled with what obsessive concern Plato viewed the problem of precise population control. Plato's theory has moral aspects in addition to the essentially utilitarian consideration of preventing the "wasting" of the Greek population base. Since Plato's eugenic theories sound rather cold-blooded to modern ears, his teaching on sodomy is perhaps better premised upon these moral considerations. "[I]t is the law's simple duty," said Plato, "to go straight on its way and tell our citizens that it is not for them to behave worse than birds and many other creatures which flock together in large bodies."<sup>111</sup> Plato's theory on this subject thus rested upon both utilitarian and moral foundations. Aristotle was similarly unsparing in his condemnation of homosexual sodomy. In his *Nichomachean Ethics*, Aristotle averred that sodomy was "the result of a constitution naturally depraved."<sup>112</sup> The Philosopher further condemned sodomy as an "unnatural sexual appetite."<sup>113</sup> In terms of moral gravity, Aristotle impliedly equated sodomy with cannibalism.<sup>114</sup> It

104. See, e.g., PLATO, SYMPOSIUM \*181a to \*185e, reprinted in PLATO, THE COLLECTED DIALOGUES 535-39 (E. Hamilton & H. Cairns eds. 1982).

105. See, e.g., ARISTOPHANES, THE FROGS, reprinted in ARISTOPHANES FOUR COMEDIES 11 (R. Lattimore trans. 1969).

106. See Note, *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. MIAMI L. REV. 521, 525 (1986).

107. PLATO, LAWS BK. VIII \*835d to \*842a, reprinted in PLATO, THE COLLECTED DIALOGUES 1401-06 (E. Hamilton & H. Cairns eds. 1982).

108. *Id.* at \*836c.

109. *Id.* at \*836b ("Crete as a whole and Lacedaemon . . . are dead against us . . . in this business of sex.").

110. *Id.* at \*838d to \*839a. Plato establishes a law "restricting procreative intercourse to its natural function by abstention from congress with our own sex, with its deliberate murder of the race, and its wasting of the seed of life on a stoney and rocky soil, where it will never take root and bear its natural fruit." See also Note, *supra* note 106, at 525.

111. PLATO, *supra* note 107, at \*840d.

112. ARISTOTLE, NICHOMACHEAN ETHICS BK. VII v. 132.

113. *Id.*

114. *Id.* ("Phalaris, for example, might have restrained his desire to eat children's flesh, and his unnatural sexual appetites . . . sometimes . . . a man not only suffers from [an] infirmity, but is also mastered by it.").

is thus apparent that Aristotle, who never hesitated to differ with his teacher Plato, in this case subscribed fully to the Platonic doctrine, while adding a sort of polemical flourish not found in the closely reasoned *Laws*.

As was the case in Greece, homosexual sodomy was a common enough practice during the later period of the Roman Republic and throughout the imperial years.<sup>115</sup> As has been seen, however, the fact that a given practice was common among Roman citizens did not prevent Roman legislators from making it a crime. At least as early as the time of the Emperors Constantius and Constans<sup>116</sup> in the fourth century A.D., sodomy was proscribed by Roman law. As recorded in the *Theodosian Code*, these Emperors decreed:

When a man "marries" in the manner of a woman, a "woman" about to renounce men, what does he wish, when sex has lost its significance; when the crime is one which it is not profitable to know; when Venus is changed into another form; when love is sought and not found? We order the statutes to arise, the laws to be armed with an avenging sword, that those infamous persons who are now, or who hereafter may be, guilty may be subjected to exquisite punishment.<sup>117</sup>

The imperial attitude had not changed by the epoch of Theodosius himself.<sup>118</sup> In the sixth century, the Emperor Justinian incorporated the sodomy law of Constantius and Constans into his *Code*.<sup>119</sup> As was the case with abortion then, the Roman Emperors felt it to be their duty to propound laws proscribing sodomy, even when these laws were not readily enforced in practice.

Like the Roman law, the Judeo-Christian tradition is firm as regards the condemnation of homosexual sodomy. Mosaic law is clear enough: "You must not lie with a man as with a woman. This is a hateful thing."<sup>120</sup> St. Paul was equally explicit in his *Epistle to the Romans*. Of sodomites he said: "God has abandoned them to degrading passions . . . their menfolk have given up natural intercourse to be consumed with passion for each other, men doing shameless things with men, and getting an appropriate reward for their perversion."<sup>121</sup> The *Didache*, already quoted in relevant part

115. C. PHARR, *THE THEodosian CODE* § 9.7.3 n.10 ("Sodomy was common during the later Roman Republic and the entire period of the Empire.").

116. See generally J. BURCKHARDT, *THE AGE OF CONSTANTINE THE GREAT 287* (1949 ed.) (discussing the dual reign of Constantius and Constans).

117. *CODE TH.* 9.7.3.

118. *Id.* at 9.7.6. The Code states:

All persons who have the shameful custom of condemning a man's body, acting the part of a woman's, to the sufferance of an alien sex (for they appear not to be different from women), shall expiate a crime of this kind in avenging flames in the sight of the people.

*Id.*

119. *CODE J.* 9.9.31.

120. *Leviticus* 18:22 (Jerusalem).

121. *Romans* 1:26 to 1:27 (Jerusalem).



above, echoed the same theme.<sup>122</sup> In the late fourth century, St. Augustine repeatedly indicted the sodomites.<sup>123</sup> Such men, said Augustine, are “driven by wicked lust,”<sup>124</sup> to perpetrate deeds of “wicked impiety.”<sup>125</sup> It is a crime “about which, as the Apostle says, ‘it is shameful even to speak.’”<sup>126</sup> Aquinas, whose doctrine is often difficult to decipher, wrote with exceptional clarity when treating of sodomy—a practice which he held to be among the worst species of “unnatural lust.”<sup>127</sup> Modern ecclesiastical law is reflective of these long-standing principles. Thus, the 1917 Code of Canon Law states: “Lay persons who have been legally found guilty of . . . rape, sodomy, incest, [or] pandering, are *ipso facto* infamous, besides being subject to other penalties . . . .”<sup>128</sup> The Judeo-Christian teaching on sodomy could hardly be more plain.

The English common law was similarly inexorable in its detestation of “the infamous crime” of sodomy.<sup>129</sup> Blackstone was especially ebullient on this subject, and deserves to be quoted in full:

What has been here observed, especially with regard to the manner of proof . . . may be applied to another offense, of still deeper malignity [than rape]; the infamous crime against nature, committed either with man or beast. . . . I will not act so disagreeable [a] part, to my readers as well as myself, as to dwell any longer upon a subject, the very mention of which is a disgrace to human nature.<sup>130</sup>

Blackstone proceeds to note the great severity with which the medieval common law had punished sodomy.<sup>131</sup> On this matter, Coke was in full agreement with Blackstone.<sup>132</sup> With his invocations of Divine Law in con-

122. See *supra* note 75 and accompanying text.

123. See, e.g., AUGUSTINE, *CONFESSIONS* BK. III 65 (R.S. Pine-Coffin trans. 1961).

Sins against nature, therefore, like the sin of sodom are abominable and deserve punishment wherever and whenever they are committed. If all nations committed them, all alike would be held guilty of the same charge in God's law, for our Maker did not prescribe that we should use each other in this way. In fact, the relationship which we ought to have with God is itself violated when our nature, of which he is the Author, is desecrated by perverted lust.

*Id.* For lucid exegesis of this passage of the *Confessions*, see G. PAPINI, *SAINTE AUGUSTINE* 43-47 (1930).

124. AUGUSTINE, *AGAINST LYING* ch. IX § 20.

125. *Id.* at ch. IX § 21.

126. AUGUSTINE, *THE GOOD OF MARRIAGE* BK. VIII § 8. See also *Ephesians* 5:12 (King James).

127. AQUINAS, *supra* note 83, q. 154 art. 12, at 12 (“[T]he most grievous is the sin of bestiality . . . . After this comes the sin of sodomy, because the use of the right sex is not observed.”).

128. 1917 CODE c.2357 § 1.

129. 4 W. BLACKSTONE, *supra* note 97, at \*215.

130. *Id.*

131. *Id.*

132. 3 E. COKE, *supra* note 95, at ch. 10. “Buggery is a detestable and abominable sin, among Christians not fit to be named, committed by carnal knowledge against the ordinance of the Creator and order of nature, by mankind with mankind.” *Id.*

demning sodomy, Coke exemplifies the attitude which caused sodomy to be classified as an ecclesiastical offense prior to Henry Tudor's break with Rome in the sixteenth century. Pollock and Maitland note that sodomy was readily identified with heresy—a rather odd combination—in the minds of “the vulgar.”<sup>133</sup>

The effects of the Henrecian Reformation are well known<sup>134</sup> as they relate to the curtailment of the authority of ecclesiastical courts in England.<sup>135</sup> To fill the capacious jurisprudential void created by the submission of the English clergy to secular power,<sup>136</sup> Henry was obliged to promulgate many new statutes,<sup>137</sup> one of which proscribed sodomy.<sup>138</sup> Sir James Stephen affirms that prior to Henry's sodomy statute of 1533, sodomy was a “merely ecclesiastical” offense.<sup>139</sup> Writing in the eighteenth century, Hawkins confirmed the fact that Henry's statute barring sodomy remained in full effect, and that sodomy was “punished in the same manner as other felonies which are excluded from the clergy.”<sup>140</sup>

The thirteen American colonies inherited from the English tradition outlined above a legal intolerance of sodomy.<sup>141</sup> Writing in the nineteenth century, May noted that in the recent past sodomy had been a capital crime in some states,<sup>142</sup> though he implied that such was no longer the case at the time of his writing. In any case, as recently as 1960 all fifty states and the District of Columbia provided some form of punishment for the violation of criminal sodomy statutes.<sup>143</sup> As was the case with abortion,<sup>144</sup> however, a liberalizing trend was manifested in the United States by the promulgation

133. 2 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* ch. 8 § 4 (2d ed. 1968).

134. See 3 D. HUME, *THE HISTORY OF ENGLAND* ch. 31 (London 1778) (commenting on the Acts of Succession and Supremacy). Hume, who had little regard for either religion in general, or for the papacy in particular, was nonetheless not altogether sympathetic with the path of English Reform.

135. See, e.g., 24 HEN. 8, ch. 12 (1533), reprinted in 5 C. WILLIAMS, *ENGLISH HISTORICAL DOCUMENTS* 738-41 (1967) (abolishing Rome's appellate jurisdiction over ecclesiastical courts in England).

136. 25 HEN. 8, ch. 19 (1534), reprinted in 5 C. WILLIAMS, *supra* note 135, at 741-42.

137. See, e.g., 5 C. WILLIAMS, *supra* note 135, at 727-47.

138. See Note, *supra* note 106, at 525 & n.18.

139. 2 J. STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* ch. 25 (London 1883).

140. 1 HAWKINS, *supra* note 97, at ch. IV. “All unnatural carnal copulations, whether with man or beast, seem to come under the Notion of Sodomy, which was [a] Felony by the ancient Common Law, and punished, according to some Authors with Burning, according to others, with Burying alive.” *Id.*

141. Cf. Note, *supra* note 106, at 523. “At common law, and at one time by statute in every state of the United States, sodomy was a criminal act.” *Id.*

142. J. MAY, *THE LAW OF CRIMES* 223 (Boston 1881). Sodomy “was anciently a felony at common law, punishable by burning or burying alive, and subsequently by hanging; and till recently, in some of the states, has been a capital offense.” *Id.* (citations omitted).

143. See Note, *supra* note 106, at 526 (“Until the early 1960's, homosexual behavior was prohibited in all fifty states and the District of Columbia through some form of sodomy statute.”).

144. See also *supra* notes 102-03 and accompanying text.

of the Model Penal Code.<sup>145</sup> Throughout the 1960's and 1970's many states decriminalized private, consensual sodomy.<sup>146</sup> However, by the time *Bowers* was decided in 1986, this trend in favor of decriminalization appeared to have waned.<sup>147</sup> Indeed, as of 1986, twenty-four states and the District of Columbia still imposed "criminal penalties on consenting adults who engage in private homosexual intercourse."<sup>148</sup>

While it is apparent that statutory support for the anti-sodomy position has been weakened in recent years, it is equally clear that until the latter portion of the present century, the western world's condemnation of this sexual act has been forceful, consistent, and oft-proclaimed. Thus, the historical record on this subject is far more monochromatic than is that pertaining to abortion. Theoretically at least, this fact should make the Supreme Court's job easier when it employs the historical method of fundamental rights derivation. Whether this is in fact the case is a topic which must be examined with care by this Note. However, before undertaking an examination of the Court's use of history in the two paradigmatic substantive due process cases—*Roe* and *Bowers*—it should be useful to trace cursorily the judicial development of the historical method of due process adjudication in a variety of factual contexts. Having reviewed the use of this method in a few important cases such as *Moore v. East Cleveland*<sup>149</sup> and *Griswold v. Connecticut*,<sup>150</sup> the analytical groundwork will be laid for a detailed appraisal of *Roe* and *Bowers* as recent exemplars of the Court's historical methodology in action.

## II. THE USES OF HISTORY IN DUE PROCESS ADJUDICATION

Since the first half of this century, the Supreme Court has used history and tradition as analytical tools in constitutional adjudication. More recently, this methodology has gained currency in the context of substantive due process cases. As early as 1938, in *Palko v. Connecticut*,<sup>151</sup> the Court recognized the value of tradition as a decisionmaking device. In concluding that the "right to trial by jury and the immunity from prosecution except as the result of an indictment"<sup>152</sup> were not to be incorporated against the

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145. Cf. MODEL PENAL CODE § 213.2 (Proposed Official Draft No. 1 1962) (note on status of section) ("The Institute voted against including private homosexuality not involving force, imposition or corruption of the young as an offense in the Model Penal Code.").

146. See Note, *supra* note 106, at 526-27 n.28 (collecting statutes).

147. See *id.* at 526-27 ("The impetus of the gay rights movement appears to have waned in the 1980's" with this loss of momentum being reflected on the floors of state legislatures.).

148. See *id.* at 524 & n.9 (collecting statutes). See also *Bowers*, 106 S. Ct. at 2845.

149. 431 U.S. 494 (1977).

150. 381 U.S. 479 (1965).

151. 302 U.S. 319 (1937).

152. *Id.* at 325.

states via the due process clause of the fourteenth amendment,<sup>153</sup> the *Palko* Court observed that these provisions of the Bill of Rights were "not of the very essence of a scheme of ordered liberty. To abolish them is not to violate a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" <sup>154</sup> Later in his *Palko* opinion, Justice Cardozo cited historical practice in continental Europe in justification of the Court's refusal to incorporate the double jeopardy clause<sup>155</sup> of the fifth amendment against the states.<sup>156</sup> It is significant that the Court's historical analysis in this early *procedural* due process case is broad enough in scope to encompass the practices of other nations, and to assign some probative weight to these foreign usages. Such a broad reading serves to supply a ready analogy for a court wishing to undertake an expansive historical survey in the substantive due process context. Because the *Roe* Court was later to embark upon just such an extensive investigation of foreign and domestic historical records, *Palko* remains important in standing for the proposition that due process analysis can be predicated upon such historical bases. The scope of the Court's reading of history in *Bowers* was similarly uncircumscribed. Thus, *Palko*'s chief importance, for present purposes, is that it at least impliedly opened the door to the sort of wide-ranging historical due process analysis seen in *Roe* and *Bowers*.

A further analogy supporting the Court's use of the historical method in the context of substantive due process is presented by a free exercise clause<sup>157</sup> case (with elements of procedural due process), *Wisconsin v. Yoder*.<sup>158</sup> In granting an exemption from Wisconsin's compulsory school attendance law to Amish parents, the Court noted: "The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of . . . children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."<sup>159</sup> Arguably, of course, these words are mere rhetorical flourish; but if taken literally, they indicate that the Court's universe of traditions relevant to "fundamental rights" decisionmaking is broad indeed. If the Court's appeals to the values historically embraced by "western civiliza-

153. U.S. CONST. amend. XIV, § 1.

154. *Palko*, 302 U.S. at 325 (quoting *Snyder v. Massachusetts*, 219 U.S. 97, 105 (1934)). See also *Brown v. Mississippi*, 297 U.S. 278 (1936); *Herbert v. Louisiana*, 272 U.S. 312, 316 (1926).

155. U.S. CONST. amend. V.

156. *Palko*, 302 U.S. at 326 n.3. In this footnote, the *Palko* Court cites a primary historical source (e.g., 5 J. BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* BK. IX pt. IV, ch. III (London 1827)) as well as secondary sources (e.g., M. RADIN, *ANGLO-AMERICAN LEGAL HISTORY* 228 (1936); 2 C. SHERMAN, *ROMAN LAW IN THE MODERN WORLD* 493-94 (1937)). Thus, the Court's citations to authority are both historical and extranational in character.

157. U.S. CONST. amend. I.

158. 406 U.S. 205 (1972).

159. *Id.* at 232.

tion"—or even by the "American tradition"—are to be interpreted as being something more than surplusage, then it is plain that the sort of unconfined resort to tradition seen in *Palko* has survived into the era of the Burger Court.

Having seen what can be done by analogy to other areas of constitutional jurisprudence, it is now necessary to turn directly to some substantive due process cases. Among the most significant of these cases in terms of its use of the historical method of fundamental rights derivation is *Moore v. East Cleveland*.<sup>160</sup> In *Moore*, Justice Powell's plurality opinion placed great emphasis upon the importance of the family unit in western and American history in holding that extended families have a fundamental right to share the same dwelling. While acknowledging that "[s]ubstantive due process has at times been a treacherous field for this Court,"<sup>161</sup> Justice Powell asserted that the lessons of history could serve as a salutary check upon "the predilections of those who happen . . . to be Members of [the] Court."<sup>162</sup> The *Moore* Court continued: "Appropriate limits on substantive due process come not from drawing arbitrary lines, but rather from careful 'respect for the teachings of history [and] solid recognition of the basic values that underlie our society.'"<sup>163</sup> The state cannot interfere with family living arrangements precisely because "the constitution protects the sanctity of the family . . . [as an] institution . . . deeply rooted in this Nation's history and tradition."<sup>164</sup> To the objection that conditions of modern life have rendered that tradition irrelevant or anomalous, the Court responds: "Even if conditions of modern society have brought about a decline in extended family households, they have not erased the accumulated wisdom of civilization, gained over the centuries and honored throughout our history, that supports a larger conception of the family."<sup>165</sup> Thus, the *Moore* plurality used a broad historical survey to expand the field of recognized fundamental rights arising under the due process clause. As shall be demonstrated below, however, the resort to history can just as easily be used to contract that field.

In his dissenting opinion in *Moore*, Justice White, the author of *Bowers*, objected to the plurality's use of tradition as the template against which substantive due process claims are to be measured. The historical method,

160. 431 U.S. 494 (1977).

161. *Id.* at 502. Justice Powell apparently is referring to the Court's much-reviled opinion in *Lochner v. New York*, 198 U.S. 45 (1905), an early excursion in economic tinkering conducted under the auspices of substantive due process analysis.

162. *Moore*, 431 U.S. at 502. The uneasy history of substantive due process analysis, says Justice Powell, "counsels caution and restraint."

163. *Id.* at 503 (quoting *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J., concurring)).

164. *Id.* (citing *Wisconsin v. Yoder*, 406 U.S. 205 (1972)).

165. *Id.* at 505. For a brief review of the Court's use of history, and the scope of that use, in substantive due process cases, see *id.* at 503-04 n.12. See also *Duncan v. Louisiana*, 391 U.S. 145, 149-50 n.14 (1968).

said Justice White, "suggests a far too expansive charter for this Court."<sup>166</sup> More appropriate, because less prone before judicial selectivity, is the "implicit in the concept of ordered liberty" criterion suggested by Justice Stewart.<sup>167</sup> "What the deeply rooted traditions of the country are is arguable; which of them deserve the protection of the Due Process Clause is even more debateable. The suggested view would broaden enormously the horizons of the Clause."<sup>168</sup> Justice White's emphasis upon the use of history as an engine of expansion of the field of fundamental due process rights may indicate that he is less troubled by the use of history per se as an adjudicative device than he is about the more general tendency of the Court to enlarge the ambit of its own substantive due process jurisdiction. Indeed, a similar distaste for such enlargement animates his opinion for the Court in *Bowers*.<sup>169</sup> To Justice White's critique, the plurality rejoins that the historical method of due process analysis is well established in its efficacy and legitimacy by the Court's precedents.<sup>170</sup>

The Court's appeal to history has been equally free in pre-*Roe*, right to privacy cases. Justice Harlan, in his dissent in *Poe v. Ullman*,<sup>171</sup> eloquently articulated the rationale for using tradition to give meaning to the due process clause. Due process, said Justice Harlan:

[h]as represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. . . . The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound.<sup>172</sup>

The importance of these words can scarcely be overestimated, given the subsequent course of substantive due process jurisprudence. Admittedly, the lyricism of Justice Harlan's words detracts a bit from their precision. Nev-

166. *Moore*, 431 U.S. at 549 (White, J., dissenting).

167. *Id.* (White, J., dissenting). See also *id.* at 537 (Stewart, J., dissenting) (quoting *Palko*, 302 U.S. at 326). For Justice White, in his *Moore* dissent, the historical method is "a far less meaningful and less confining guiding principle than Mr. Justice Stewart would use for serious substantive due process review." *Id.* at 549 (White, J., dissenting).

168. *Moore*, 431 U.S. at 549-50 (White, J., dissenting).

169. *Bowers v. Hardwick*, 106 S. Ct. 2841, 2846 (1986).

170. *Moore*, 431 U.S. at 503-04 n.12. See, e.g., *Duncan*, 391 U.S. 145, 149-50 n.14.

171. 367 U.S. 497, 542 (1961) (Harlan, J., dissenting). In *Poe*, the full Court failed to reach the merits of a challenge to the constitutionality of Connecticut's anti-contraception law. See also G. GUNTHER, CONSTITUTIONAL LAW 507-08 (11th ed. 1985). The Connecticut law was struck down on substantive due process grounds four years after *Poe* in *Griswold*, 381 U.S. 479.

172. *Poe*, 367 U.S. at 542 (Harlan, J., dissenting). One cannot help remarking at the similarity between this passage and that written nearly two centuries before by Edmund Burke. See *supra* note 1 and accompanying text.

ertheless, it seems clear that the scope of historical analysis suggested by Justice Harlan is as broad as was that used by the plurality in *Moore*. Not only is the tradition of the United States to be surveyed, but also "the traditions from which it broke." When the Court finally reached the merits of the specific privacy issue which it had avoided in *Poe* (*i.e.*, the constitutional validity of Connecticut's anti-contraception statute), Justice Harlan's proposed methodology helped to frame the result.

*Griswold v. Connecticut*,<sup>173</sup> perhaps the Court's most important privacy case prior to *Roe*, struck down a state law proscribing the use of artificial contraceptive means for the purpose of preventing conception.<sup>174</sup> The Court's references to history in *Griswold* are oblique and, arguably, largely rhetorical. "We deal," said Justice Douglas for the Court, "with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system."<sup>175</sup> Because the tradition of marital privacy is so extraordinarily venerable, the Court reasoned, it is not to be lightly abrogated by state law. In his concurring opinion, Justice Goldberg defended the penumbral derivation of fundamental rights with an appeal to "the traditions . . . of our people."<sup>176</sup> Such an approach is said to ensure that "judges are not left at large to decide cases in light of their personal and private notions."<sup>177</sup> Historical analysis can thus serve to limit the field of potential fundamental rights even while having the effect, in a particular case, of expanding those rights. In his concurrence in the judgment, Justice Harlan re-affirmed his belief in the methodology he had expounded in *Poe*.<sup>178</sup> Having now briefly examined the path of the Court's use of history, and particularly the scope of that use, it is possible to turn to the Court's historical gloss in *Roe*, and to put that epochal decision in proper methodological perspective.

### III. HISTORY IN *Roe* AND *Bowers*

#### A. *The Court's Use of History in Roe*

Perhaps the most extensive historical survey ever undertaken by the Court appears in *Roe*.<sup>179</sup> For Justice Blackmun, author of the Court's opinion in

173. 381 U.S. 479.

174. *Id.* at 485-86. See also *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (a related, pre-*Roe* privacy decision).

175. *Griswold*, 381 U.S. at 486. The validity of the Court's reading of history in *Griswold* is beyond the scope of this Note. For present purposes, it is sufficient to observe that the Court's resort to history in upholding a marital right to privacy is, by implication, very broad indeed. Such an appeal extends well beyond the Bill of Rights and American political parties. For some indication of just how vast the *Griswold* Court's historical gloss on this subject might have been, see AUGUSTINE, *supra* note 79, at BK. XIV § 18.

176. *Griswold*, 381 U.S. at 487 (Goldberg, J., concurring) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

177. *Id.* at 493 (Goldberg, J., concurring).

178. *Id.* at 500-01 (Harlan, J., concurring).

179. In this Note, the Court's historical methodology is analyzed largely on its own terms

*Roe*, the historical method of due process analysis ensures that the Court will discharge faithfully its duty "to resolve the [abortion] issue by constitutional measurement, free of emotion and predilection."<sup>180</sup> To this end, said Justice Blackmun, "we have inquired into, and in this opinion place some emphasis upon, medical and medical-legal history and what that history reveals about man's attitude toward the abortion procedure over the centuries."<sup>181</sup>

Beginning in the ancient world, the Court's treatment of Hippocrates is dismissive. Regarding Hippocrates' doctrine on abortion, the Court avers that its "apparent rigidity," and the fact that it was "not uncontested even in Hippocrates' day" weigh against its validity in the Court's analysis.<sup>182</sup> Such a "Pythagorean manifesto," such "austere" and uncompromising "dogma" is, says the Court, "not the expression of an absolute standard of medical conduct."<sup>183</sup> In fact, of course, the Hippocratic Oath embodies precisely such a standard—albeit one which was not accorded universal acceptance in ancient Greece. The fact that neither the opinion of Plato on abortion, nor that of Aristotle, was "uncontested in its day" is not mentioned by the Court. While exploring in some depth the quasi-religious principles which served as a rationale for the Pythagoreans in their opposition to abortion, the Court does not accord similar treatment to the proffered justifications of Plato and Aristotle, both of whom are correctly cited by the Court as supporters of the practice.<sup>184</sup> Possibly, this is because the philosophers' reasons for favoring abortion (*i.e.*, eugenic engineering and population control in the context of a totalitarian society) are among those which the *Roe* Court understandably wished to abjure—instead placing reliance upon notions of privacy and individual autonomy more in keeping with the western democratic tradition. In the Court's favor, it should be noted that the viability criterion, used in *Roe* as the test of when a state

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—which is to say in terms of "black-letter" doctrine. As indicated by the historical overview which appears above, however, the letter of the law has often been in tension with common practice. It may be, as Professor Hurst has asserted, that "reality lies in the substance, in operations, in getting behind the law's formalism to the hard facts of interest and practical maneuver." *AMERICAN LAW AND THE CONSTITUTIONAL ORDER* 3 (L. Friedman & H. Scheiber eds. 1978). The Court does not normally get "behind" the formalism of legal doctrine to investigate the "practical maneuvers" or practices of society at large. Neither does this Note purport to undertake such a daunting task. It will be observed then, that the most fundamental assumptions made by the Court as regards methodology in reading the historical record are supposed to be valid for purposes of this Note—although its author, at times, disagrees with the Court's application of those assumptions in the context of given historical issues.

180. *Roe v. Wade*, 410 U.S. 113, 116 (1973).

181. *Id.* at 116-17.

182. *Id.* at 131-32.

183. *Id.* See also L. EDELSTEIN, *supra* note 20, at 64.

184. *Roe*, 410 U.S. at 131. See also PLATO, *REPUBLIC*, *supra* note 34, at \*461; ARISTOTLE, *supra* note 45, at \*1335b.



may constitutionally proscribe abortion,<sup>185</sup> is much the same in practical effect as is the test used by Aristotle in determining when abortion becomes illicit in his *Politics*.<sup>186</sup> No such viability standard appears in Plato.

The entire Judeo-Christian tradition, encapsulated above in its three millennia, with its consistent opposition to abortion, is relegated to a single footnote by the Court.<sup>187</sup> Even this minimal treatment, however, is misleading. Augustine, it is noted, "expressed the view that human powers cannot determine the point during fetal development" at which the soul is created.<sup>188</sup> The Court fails to add, however, that Augustine considered abortion to be gravely wrong at any stage of pregnancy.<sup>189</sup> The canonical tradition is given similarly little space and weight. Only when the Court reaches the English common law tradition, represented by Bracton, Coke, and Blackstone, does its historical analysis become truly detailed. Propitiously, these authors embraced a position on abortion consonant with the Court's interpretation of the substantive elements of the due process clause. The common law notion of quickening is essentially adopted by the Court through the use of a viability standard. The Court views with suspicion the testimony of Bracton and Coke in asserting "that even post-quickening abortion was never established as a common law crime."<sup>190</sup> In this view, Bracton was apparently an aberration; Coke, who is even more culpable in the Court's eyes than is his medieval predecessor, "may have intentionally misstated the law,"<sup>191</sup> due to his strong personal aversion to abortion, by identifying it as a lesser form of homicide.<sup>192</sup> Additionally, Blackstone's attitude toward abortion was rather more ambivalent than is apparent from the Court's opinion.<sup>193</sup>

English statutory law proscribing abortion is treated summarily by the *Roe* Court.<sup>194</sup> Yet the Court places significant emphasis upon England's decriminalization of nontherapeutic abortion in 1967.<sup>195</sup> The Court's summary of American statutory law is more balanced, with both nineteenth century proscriptions of abortion and the countervailing trend prompted by the Model Penal Code being duly noted.<sup>196</sup>

185. *Roe*, 410 U.S. at 164-65.

186. *See supra* notes 45-49 and accompanying text.

187. *Roe*, 410 U.S. at 133 n.22.

188. *Id.*

189. *See, e.g.*, Quay, *supra* note 30, at 428 ("St. Augustine states clearly that destruction of the fetus at any stage is a grave offense . . .").

190. *Roe*, 410 U.S. at 134-35 & n.26. *See generally* Means, *The Phoenix of Abortional Freedom: Is a Penumbra or Ninth Amendment Right About to Arise from the Nineteenth Century Legislative Ashes of a Fourteenth Century Common Law Liberty?*, 17 N.Y.L.F. 335 (1971).

191. *Roe*, 410 U.S. at 135 n.26.

192. *See supra* notes 95-96 and accompanying text.

193. *Compare Roe*, 410 U.S. at 135 with 1 W. BLACKSTONE, *supra* note 97, at \*3 (abortion "remains a very heinous misdemeanor").

194. *Roe*, 410 U.S. at 136-37. *See supra* note 98 and accompanying text.

195. *Roe*, 410 U.S. at 138-39.

196. *Id.* at 139-40.

In sum, however, the Court's reading of history in *Roe* appears to be quite selective in its emphasis. Those portions of the western tradition which look with disfavor upon abortion—for example, the weight of statutory authority under Roman law and the lengthy Judeo-Christian tradition—are scarcely given space in the Court's historical survey analogous to their enormous duration and influence. This is not to say that the historical record does not contain substantial support for the practice of abortion. On the contrary, there is weighty authority favoring such practice; Plato and Aristotle provide signal examples, as does much of the English common law tradition. But even in treating of these favorable precedents the *Roe* Court seems, on occasion (*e.g.*, as with the opinions of Blackstone), to overstate its case.

The *Roe* Court uses the admittedly numerous historical opinions favoring abortion as one might expect to see common law precedents used. This is, in itself, of course, an unexceptionable, and even laudable, practice in that it allows Burke's "canonized forefathers" to impart some of their considerable wisdom upon modern decisionmakers facing long-standing legal and moral issues. As is often true with case-law precedents, however, historical precedents can, in many instances, be cited with equal validity in support of contradictory propositions. When a split of precedential authority exists on a given subject, it is customary for a court to attempt to distinguish, discredit, or otherwise explain away those precedents contrary to its holding. This the *Roe* Court made only a minimal effort to do. Because the split of authority in this instance is wide, and the issue presented clear, meaningful distinctions are almost impossible to establish. The questions presented, such as the question as to when life begins, are the same as those which faced Plato and Aristotle thousands of years ago. "Disfavorable" precedents, such as that of Hippocrates, are explained away as being products of unthinking doctrinal rigidity; but other anti-abortion opinions, perhaps more difficult to impugn, are implicitly discredited by being ignored entirely or relegated to footnotes. This is especially true of Roman statutory law as codified by the Emperors Theodosius and Justinian.<sup>197</sup>

If the *Roe* Court's historical survey is taken as being complete and fully explanatory on its face, it will be readily agreed that the procurement of abortion has indeed been a fundamental right of citizens throughout history, derogated only by fanatics and misanthropes like the Pythagoreans, and that it should, accordingly, be so recognized by tradition-oriented substantive due process analysis. If, however, those portions of the historical record omitted or accorded little significance by the Court are fully elucidated (or at least as fully set forth as is the tradition favoring abortion), then *Roe*, in historical terms, comes to represent a far more dubious use of the Court's substantive due process jurisdiction.

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197. See *supra* notes 52-72 and accompanying text.

The historical record on the issue of abortion appears to be one of rough equipoise—and of considerable ambiguity—hardly the raw material from which clear fundamental rights can be fashioned, using a historical methodology. Such a historical record must, of necessity, be read selectively in order for clear, universal rights to be recognized. The Court in *Roe* was able to arrive at the result it did—at least to the extent that this result had its basis in historical analysis—through the use of precisely such a self-conscious, selective reading of history. Having reached this conclusion with regard to *Roe*, however, it remains to be seen whether history was interpreted any less self-consciously in the Court's most recent, and perhaps most important, post-*Roe* substantive due process case, *Bowers v. Hardwick*.

### B. *The Court's Use of History in Bowers*

As was the case with *Roe*, the historical record is used extensively by the Court in *Bowers*.<sup>198</sup> On the basis of this record the Court concludes, by the narrowest of margins, that no fundamental right of the respondent was violated by Georgia's anti-sodomy statute.<sup>199</sup> Among the most notable things about the Court's opinion in *Bowers* is its author. Justice White, who had repudiated the historical method of substantive due process analysis in *Moore*,<sup>200</sup> embraces that method in *Bowers*.<sup>201</sup> Indeed, he goes so far as to cite the *Moore* methodology with favor.<sup>202</sup> The Court distinguishes the method used in *Palko* from that seen in *Moore*, but concludes "that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy."<sup>203</sup>

One major factor distinguishes the Court's use of history in *Moore* from that in *Bowers*. In the former case, history served to expand the universe of fundamental rights arising under the due process clause, while the latter declines to use history in such a way. The Court's historical analysis in *Bowers* leads to its refusal to expand the field of fundamental rights. This maintenance of the substantive due process status quo appears to be a paramount consideration for Justice White. The respondent's challenge to Georgia's law "calls for some judgment about the limits of the Court's role in carrying out its constitutional mandate."<sup>204</sup> In defining those limits in *Bowers*, the Court continues:

Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause.

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198. 106 S. Ct. 2841, 2843-47 (1986).

199. *Id.* at 2843. For the text of the Georgia statute, see *supra* note 3.

200. See *Moore v. City of East Cleveland*, 431 U.S. 494, 549 (1977) (White, J., dissenting).

201. *Bowers*, 106 S. Ct. at 2843-47.

202. *Id.* at 2844.

203. *Id.*

204. *Id.* at 2843.

The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.<sup>205</sup>

Similar fears about the expansion of fundamental due process rights were expressed by Justice White in his dissent in *Doe v. Bolton*,<sup>206</sup> a companion case to *Roe*. For Justice White then, the institutional imperative of preventing the further expansion of the Court's substantive due process jurisdiction appears to outweigh any abstract aversion he may have to the historical method of analysis. If such analysis can be made to increase the number of recognized fundamental rights, as was the case in *Moore*, then it provides too "expansive" a charter for the Court. If, conversely, an examination of the historical record reveals no basis for the "discovery" of new fundamental rights, then the historical method is harmless enough, and can be tolerated. This sort of rationale is perhaps not so cynical as it initially appears to be. It allows the weight of tradition to serve as ballast, tempering the fashions and emotional excesses of the moment, while at the same time ameliorating to some extent the problem of historical selectivity, as seen in *Roe*. Concededly, this desirable result is achieved at the cost of some appearance of disingenuousness, with history serving as *post hoc* rationalization for results reached on ahistorical bases. Arguably, however, history is best and most legitimately used in averting precipitate, and perhaps improvident, change.

Putting aside these theoretical concerns, it remains to be seen how faithfully the Court has read history in *Bowers*. The explicit scope of the majority's survey is not as broad in chronological terms as was that undertaken in *Roe*. The Court does note that "[p]roscriptions against [sodomy] have ancient roots."<sup>207</sup> This is undoubtedly true. The Court's reading of history begins in earnest with the English common law,<sup>208</sup> and proceeds to note in great detail the history of statutory proscriptions of sodomy.<sup>209</sup> As was the case with *Roe*, much is omitted from the majority's historical survey in *Bowers*. Only in the concurrence of Chief Justice Burger do hints of the Roman and

205. *Id.* at 2846. The Court goes on to recall the painful "face-off" between itself and the Executive in the 1930's as a result of the "substantive gloss" placed upon the due process clause in cases like *Lochner v. New York*, 198 U.S. 45 (1905).

There should be, therefore, great resistance to expand the substantive reach of those clauses, particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself authority to govern the country without express constitutional authority. The claimed right pressed on us today falls far short of overcoming this resistance.

*Bowers*, 106 S. Ct. at 2846.

206. 410 U.S. 179, 222 (1973) (White, J., dissenting) ("As an exercise of raw judicial power, the Court perhaps has authority to do what it does today; but in my view its judgment is an improvident and extravagant exercise of the power of judicial review that the Constitution extends to this Court.")

207. *Bowers*, 106 S. Ct. at 2844 (citing Note, *supra* note 106, at 525).

208. *Id.* at 2844-45 n.5.

209. *Id.* at 2844-45 & nn.5-6.

Judeo-Christian traditions on this subject appear.<sup>210</sup> The opinions of Justinian and Blackstone condemning sodomy are duly cited by Chief Justice Burger,<sup>211</sup> as is the criminalization of sodomy by Henry Tudor in the wake of that monarch's suppression of ecclesiastical courts.<sup>212</sup> The incomplete nature of the Court's historical survey in *Bowers* is mitigated to some extent by the fact that much of the omitted and glossed over material supports the Court's holding. It is nevertheless unfortunate that more of this material was not brought explicitly to bear by the Court in support of what was bound to be a controversial decision. As has been noted above,<sup>213</sup> the historical record on sodomy is rather more clear than is that on abortion. Consequently, that record more convincingly serves as the basis of a fundamental rights decision. Again, this is not to say that no countervailing tradition exists,<sup>214</sup> especially in the sublegal, popular ethos. Yet the weight of historical, intellectual, and legal opinion clearly supports the Court's conclusion that western civilization has not recognized as fundamental any putative right to engage in acts of consensual, homosexual sodomy. In terms of following the intellectual and legal traditions given by history to posterity, *Bowers* is a more easily justified decision than is *Roe*.

Ironically, the *Bowers* dissent, which abjures the historical method in this case, provides a more detailed historical survey than does the majority. Like Justice White, Justice Blackmun betrays his ambivalence about the use of history as an analytical tool in this case. If it is indeed "revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV,"<sup>215</sup> what then, is one to make of the extensive historical survey undertaken in *Roe*? The dissent's sudden reluctance to acknowledge history as a valuable means of substantive due process analysis comes rather late in the day, given the record of such analysis in cases like *Poe*, *Griswold*, and *Moore*. The dissent's reticence in adopting a historical methodology is perhaps the most eloquent, albeit unspoken, confession possible that the majority's reading of history in connection with the issue of sodomy is unassailable.

Despite its apparent dismissal, *ab initio*, of the historical method in this case, the dissent reserves particular venom for the "petitioner's invocation of Leviticus, Romans, St. Thomas Aquinas, and [the fact of] sodomy's heretical status during the Middle Ages."<sup>216</sup> Justice Blackmun continues: "A State can no more punish private behavior because of religious intolerance

210. *Id.* at 2847 (Burger, C.J., concurring).

211. *Id.*

212. *Id.* See also *supra* notes 134-38 and accompanying text.

213. See *supra* text accompanying note 149.

214. See *supra* note 115 and accompanying text.

215. *Bowers*, 106 S. Ct. at 2848 (Blackmun, J., dissenting) (quoting Holmes, *supra* note 16, at 469).

216. *Id.* at 2855 (Blackmun, J., dissenting).

than it can punish such behavior because of racial animus."<sup>217</sup> This attitude does much to explain the negligible weight given the opinions of the Pythagoreans (austere, uncompromising cultists) and those of Judeo-Christian commentators (enforcers of "intolerance") in the *Roe* Court's historical survey. The *Bowers* dissent would apparently require that laws such as that seen in Georgia be "morally neutral" in order for them to pass constitutional muster.<sup>218</sup> Yet it cannot be gainsaid that "[t]he law . . . is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed."<sup>219</sup> It is clear that secular laws must have a "secular purpose." Equally clear, however, is the fact that many of the positive law's proscriptions coincide with divers religious canons, or are otherwise based upon traditional, historically-verifiable notions of morality. That this is so does not portend theocracy, but merely gives to tradition some weight in the formation of modern policy.

The *Bowers* dissent includes a rather extensive commentary on the English common law tradition. It is noted that until the time of Henry Tudor, the crime of sodomy was "merely ecclesiastical" in England.<sup>220</sup> The dissent cites Coke, Pollock, and Maitland to this effect.<sup>221</sup> The fact that England's anti-sodomy laws were of "patent" theological origin is supposed impliedly to taint the Georgia statute.<sup>222</sup> Even if this dubious premise is accepted, it is still true that sodomy was a secular crime in England as early as the sixteenth century.<sup>223</sup> Based upon its reading of the common law tradition, the dissent concludes:

The transfer of jurisdiction over prosecutions for sodomy [from ecclesiastical courts] to the secular courts seems primarily due to the alteration of ecclesiastical jurisdiction attendant on England's break with the Roman Catholic Church, rather than to any new understanding of the sovereign's interest in preventing or punishing the behavior involved.<sup>224</sup>

The dilemma which the dissent poses here is false. It was precisely because of his break with Rome and his humiliation of the ecclesiastical courts that Henry acquired for the first time an interest in preventing and punishing sodomy. Indeed, if there had been no understanding that a secular sovereign had an interest in proscribing sodomy, then presumably Henry would not

217. *Id.*

218. *Id.* (citing *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 68-69 (1973)).

219. *Id.* at 2846.

220. *Id.* at 2855 n.6 (Blackmun, J., dissenting). *See also supra* note 139 and accompanying text.

221. *Bowers*, 106 S. Ct. at 2855 n.6 (Blackmun, J., dissenting). *See also supra* notes 132-33 and accompanying text.

222. *Bowers*, 106 S. Ct. at 2855 n.6 (Blackmun, J., dissenting).

223. *See Note, supra* note 106. *See also* text accompanying note 138.

224. *Bowers*, 106 S. Ct. at 2855 n.6 (Blackmun, J., dissenting).

have interposed his own law to fill the void left in this area by the coerced abdication of the English clergy. In short, while the dissent's statement of facts surrounding the Henrecian Reformation is accurate, the conclusions which it draws from these facts are questionable.<sup>225</sup>

Thus, in *Bowers*, the Court is on more solid historical ground than it occupied in *Roe*. This is due primarily to the fact that the historical record to which the Court appeals in *Bowers* is more uniform and ideologically monolithic than is the record on abortion used in *Roe*. As was true in *Roe*, some important portions of the relevant historical record are not discussed by the *Bowers* Court—but the *Bowers* omissions are less telling, since most of the omitted authorities actually support the Court's holding. As this Note has attempted to demonstrate, the same cannot be said of the *Roe* Court's omissions and minimizations.

### CONCLUSION

What lessons emerge regarding the historical method of substantive due process analysis from the study of these two important paradigms? First, it is apparent that there are some real dangers involved in the use of this method. Like case law precedents, historical precedents can be invoked selectively or wrenched out of context. If the historical record on a particular subject is diverse enough—as it inevitably will be in many crucial areas—history can be cited in support of contradictory conclusions. This, in essence, is Justice White's objection to the methodology of the *Moore* plurality. Because of historical diversity, the temptation will always exist to use the historical record for purposes of advocacy or rhetorical effect, rather than as the basis of principled constitutional decisionmaking. Similarly, history may be used to rationalize decisions made on other, ahistorical grounds—and the true (and perhaps perfectly legitimate) basis of a decision thereby may be obscured.

These evils are by no means insubstantial—but careful consideration reveals that they are overborne by the immense goods which can flow from a proper resort to tradition. Many of the objections adduced against the historical method, as it has been characterized in this Note, hold true as well against the firmly settled principle of *stare decisis*. Case law is, after all, a form of history itself. What is proposed by the historical method of substantive due process analysis is nothing more than an expansion of the relevant scope of *stare decisis* (the expansion contemplated being both chronological and special—meaning that some non-legal opinions are to be included) when dealing

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225. See generally 3 D. HUME, *supra* note 134, at 186-90 (commenting on the nature of Henry's motivations in dealing with matters of religion). The King's cynical attitude makes it improbable that any of these statutes was the product of piety.

with profound legal and moral questions arising under the due process clause. If the dangers created by an expanded scope of historical review are potentially formidable, those of relegating history to forgotten library shelves are greater. The result of such a consignment must be "misrule and excess."<sup>226</sup> In treating of history in the legal context, it is no virtue to confuse "blind imitation" with sagacious affirmation. If it is "revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV,"<sup>227</sup> it is similarly revolting to repudiate a rule of law for no better reason than that it is of ancient standing.

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226. E. BURKE, *supra* note 1, at 54.

227. Holmes, *supra* note 16, at 469.



