Dispatch from the Supreme Court Archives: Vagrancy, Abortion, and What the Links Between them Reveal about the History of Fundamental Rights

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Abstract

This Essay explores the implications for constitutional history of several documents I found in the archives of Supreme Court Justices William O. Douglas, William J. Brennan, Jr., Thurgood Marshall, Potter Stewart, and Harry Blackmun. In particular, I discuss (1) portions of an early draft of Justice Douglas’s opinion in the 1972 vagrancy case of Papachristou v. City of Jacksonville; (2) memoranda from Justices Brennan and Stewart about that opinion; and (3) memoranda between Justices Brennan and Douglas about Roe v. Wade. These documents—which I have reproduced in an appendix—shed new light on several apparently disparate issues in constitutional law: the Supreme Court’s use of void-for-vagueness doctrine; the social and constitutional history of vagrancy law; the possibility and contours of constitutional regulation of substantive criminal law; the relationship between Papachristou and Roe; and the development and conceptualization of substantive due process. These documents invite us to think both more deeply and more broadly about who was engaged in constructing the intellectual framework of modern fundamental rights, about where in the constitution such rights would be located, and about what the contours of such rights would be.
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(forthcoming 62 STAN. L. REV. ___ (2010))

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The title of this Essay is somewhat misleading. First of all, by Supreme Court archives, I do not mean the official documents of the Supreme Court as an institution. Rather, my dispatch heralds from the archives of individual justices who have deposited their papers in a variety of institutions, most notably the Library of Congress. Second of all, I am not actually writing from those archives. In this day and age, I am lucky not to have to suffer through weeks of reading dusty old manuscripts on hard wooden chairs under the surveillance of protective archivists. With a digital camera and a lot of memory cards, I can reproduce the archives on my computer. As this nifty technology allows me to read my thousands of documents pretty much anywhere, I must confess: I am not, at this very moment, in the archives.

Metaphorically speaking, however, my title is accurate. This essay is a dispatch from the archives in the sense that I am here to share a few finds I made in the justices’ papers that I imagine will be of interest to many a scholar of law and history. These finds consist of (1) portions of an early draft of Justice William O. Douglas’s opinion in the

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

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Ever since Anthony Amsterdam published his pathbreaking Note on the void-for-vagueness doctrine in 1960,\(^4\) legal scholars have speculated about the Supreme Court’s use of the doctrine. On the surface, under void for vagueness, judges condemned as violations of the due process clause of the Fifth or Fourteenth Amendments those laws they deemed unduly vague or ambiguous. As Amsterdam described it, such vagueness was constitutionally problematic for two reasons. First, vagueness fails to give fair notice...

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to the public as to what constitutes illegal conduct. Second, vagueness fails to guide the
discretion of executive officers and judges; it accordingly encourages arbitrary and
potentially discriminatory arrests and criminal convictions.

Amsterdam accepted the validity of these concerns, but he was not convinced that
vagueness—an indefiniteness of language—was the real problem in so-called vagueness
cases. Rather, he argued that vagueness was the Court’s way of obfuscating its
commitments to particular substantive rights. Vagueness was a “makeweight,” “an
available instrument in the service of other more determinative judicially felt needs and
pressures.”5 For example, Amsterdam showed how the Court had sometimes used
vagueness during the first third of the twentieth century in lieu of economic substantive
due process.6 Similarly, when the Court became more committed to First Amendment
protections beginning in the late 1930s, it used vagueness to strike down laws that
restricted free speech.7

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

5 *Id.* at 72, 75.
6 *Id.* at 75-85.
7 *Id.*
sympathetic defendants, they wondered whether vagueness was indeed a stand-in for other concerns.\(^8\)

In 1972, the Supreme Court used the void-for-vagueness doctrine to strike down an archaic Florida vagrancy law in *Papachristou v. City of Jacksonville*.\(^9\) The ordinance criminalized those deemed vagrants, which included, among many others, “rogues and vagabonds, or dissolute persons who go about begging, . . . persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers.”\(^10\) Jacksonville police officers used the ordinance to regulate and harass any number of socially marginal groups who failed—by choice or coercion—to comply with middle-class norms of behavior. These included poor people, African Americans, anyone who violated racial norms (by, for example, dating across the color line), and other nonconformists and dissidents. Writing for a unanimous Court,\(^11\) Justice William O. Douglas emphasized that the ordinance was vague both because it failed to give “fair

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\(^10\) Jacksonville Ordinance Code s. 26-57 (quoted in Papachristou v. City of Jacksonville, 405 U.S. 156, 157 n. 1 (1972)).

\(^11\) The opinion was unanimous, but only seven justices signed onto it. William H. Rehnquist and Lewis Powell joined the Court after argument in the case but before it was decided. They accordingly took no part in the case.
notice” to the public about what conduct was criminal and because it encouraged “arbitrary and erratic arrests and convictions.”12 These were the two hallmarks of vagueness Amsterdam had described in 1960.

But Douglas did not stop there. In addition to relying on vagueness, Douglas discussed at length the importance of the particular activities in which the Papachristou defendants had been engaged when arrested. He described walking, strolling, loafing, wandering, nightwalking, and the like as “historically part of the amenities of life as we have known them.”13 While Douglas acknowledged that they were “not mentioned in the Constitution or in the Bill of Rights,” he nonetheless emphasized that “[t]hese unwritten amenities have been in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity. These amenities have dignified the right of dissent and have honored the right to be nonconformists and the right to defy submissiveness. They have encouraged lives of high spirits rather than hushed, suffocating silence.”14 Douglas quoted such American literary luminaries as Walt Whitman and Henry David Thoreau for the depth of the American commitment to such freedoms.15

This lofty rhetoric has led scholars, lawyers, and judges in the decades since Papachristou to speculate about the meaning and implications of Papachristou specifically and void-for-vagueness doctrine more generally.16 In his article,

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12 405 U.S. at 162.
13 405 U.S. 156, 164.
14 405 U.S. at 164. This aspirational language drew on an essay by Douglas’s friend Charles Reich, which described Reich’s many run-ins with the police over his own wanderings and urged protection for “independence, boldness, creativity, high spirits.” Charles A. Reich, Police Questioning of Law-Abiding Citizens, 75 YALE L.J. 1161, 1172 (1966).
15 405 U.S. at 164.
“Reconceptualizing Vagueness,” for example, Professor Robert Post describes the _Papachristou_ Court as “trembl[ing] on the brink of . . . a substantive due process analysis.” He speculates that the “Court could have argued that it was constitutionally forbidden to use judgments to impose ‘lifestyle’ norms on unwilling segments of the population.” Because the law systematically and legitimately regulates various kinds of social outliers, however, deciding the case on those grounds would have required the Court to determine precisely when the imposition of such norms was unconstitutional. That would have been difficult. Post suggests that instead the Court used vagueness doctrine to delineate “the kinds of judgments that can be made by government officials” in particular circumstances. Accordingly, Post interprets the Court’s use of vagueness as “in effect, decid[ing] that it is constitutionally arbitrary and improper to use compliance with bourgeois morals as a trigger for police control.” Building on Post’s work, Debra Livingston has noted that lower courts too have treated _Papachristou_ as if it had a substantive component—as if its vagueness determination turned on “the character of prohibited conduct, rather than the clarity of the language with which it is prohibited.”

As it turns out, the Court came closer to the brink of substantive due process than Post, Livingston, and others have realized. And here is the first of the advertised portions of this essay: the draft opinions I have found in the papers of Justices Douglas, Brennan, Blackmun, and Marshall did not in fact rely on vagueness alone. They relied at first on

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18 _Id._ at 497-98.
19 _Id._ at 498.
20 _Id._ See also Debra Livingston, _Police Discretion and The Quality Of Life In Public Places: Courts, Communities, and The New Policing_, 97 COLUM. L. REV. 551 (1997) (describing the Court as stepping back from placing substantive constitutional limits on vagrancy laws and echoing Post’s interpretation).
21 Livingston, _Police Discretion_ at 619.
the Ninth Amendment and then on substantive due process. In one earlier draft, Douglas described the same activities listed above not as “historically part of the amenities of life as we have known them,” but rather as “historically part of the amenities of life contained in those rights ‘retained by the people’ within the meaning of the Ninth Amendment.” 22 (fig. 1) Douglas’s description of these activities as “rights” was no idle throwaway. He explicitly applied the strict scrutiny standard applicable “where fundamental rights and liberties are at issue.” He granted that state police power authorized regulation of some of the petty criminals listed in the Jacksonville ordinance—the “gamblers, thieves, pilferers, pickpockets, traders in stolen property, drunkards, railers, and brawlers.” But where Ninth Amendment rights were concerned, strict scrutiny applied. “[A]s we have often stated, laws in these sensitive areas must be narrowly drawn to meet a precise evil.” The “sensitive areas” to which his citations referred included both long-standing rights like those in the First Amendment (Cantwell v. Connecticut 23), and those of newer vintage like rights to association (Shelton v. Tucker 24), and voting (Harper v. Virginia Board of Elections 25 and Kramer v. Union School District 26). 27

In another version of the opinion, Douglas jettisoned the Ninth Amendment in favor of substantive due process. This change is particularly revelatory not only because it is lost in the published version of the opinion but also because Douglas had long opposed protecting substantive rights under the due process clause of the Fifth and Fourteenth Amendments. An ardent New Dealer whom Franklin Roosevelt had put on

the Court in 1939, Douglas had performed somersaults in a number of cases to avoid resort to the substantive due process he had abhorred during the *Lochner* era.\(^{28}\) Though a modern revival of substantive due process had long had its champions, especially in Justice John Marshall Harlan II,\(^{29}\) Douglas’s squeamishness was hardly unique.\(^{30}\) With a number of the justices disavowing economic substantive due process as late as 1963, they found the possibility of embracing new rights under the same old theory discomfiting indeed.\(^{31}\)

Nonetheless, over the course of the 1971 term, Douglas’s aversion to substantive due process seems to have waned some. A revised draft of *Papachristou* stated plainly, “These amenities are so basic and elemental in our scheme of values that we conclude that they are part of the ‘liberty’ of the individual that is protected by the Due Process Clause of the Fourteenth Amendment against infringement by the States.” (fig. 2) As he had when initially relying on the Ninth Amendment, Douglas again seemed to invoke strict scrutiny. He argued that though the police power enables states and cities to protect society, they must do so in a “narrowly drawn” way so as also “to protect the basic ‘liberty’ of the person.” The opinion’s final paragraph vaguely condemned those practices that were “foreign to the Bill of Rights.”\(^{32}\)

The existence of these early drafts gives heft to the speculation that void for vagueness hid substantive commitments. At least as to Douglas (and Brennan, as we will


\(^{30}\) See, e.g., Eisenstadt v. Baird, 405 U.S. 438 (1971). See also DAVID J. GARROW, *LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE* 181-182 (1998) (discussing various justices’ hesitance to strike down a contraception statute in 1961 due to opposition to reintroducing substantive due process). The issue continued to trouble the Court until the *Roe* decision. See id. at 238-63 (discussing *Griswold*).


\(^{32}\) Draft Opinion, Papachristou v. City of Jacksonville, No. 70-5030, Douglas Papers.
see in a moment), it most certainly did. Douglas initially had in mind the Ninth Amendment and substantive due process, not merely vagueness. He thought that there were rights at issue in *Papachristou*, that those rights were similar to other fundamental rights, and that they triggered the Court’s most stringent level of review.

That said, the substance of the rights Douglas purported to protect in the Ninth Amendment, the due process clause, and the Bill of Rights is not entirely clear. At times, Douglas emphasized physical mobility, the pure ability to move about as one desired, to stroll, loaf, walk, and wander. Over the course of more than thirty years on the bench, Douglas had repeatedly identified such mobility as crucially important and constitutionally protected. As early as 1941 in *Edwards v. California*, Douglas rhapsodized about the “right to move freely from State to State.” He identified American identity and some essential American spirit as bound closely with such physical mobility. In the 1965 civil rights case of *Shuttlesworth v. Birmingham*, Douglas described the United States as “a country where freedom of locomotion... is honored.”

The following year, in a dissent from the dismissal of a vagrancy case, Douglas came closest to the sentiments he would express in *Papachristou*. There he rehearsed the American mythology of mobility and the expansive frontier, and he expressed his consternation at laws that interfered with such movement.

In Douglas’s published opinion in *Papachristou*, these suggestions reached their rhetorical crescendo. Mobility was a right embodied and protected in the Constitution itself. Such mobility, both across the country and within particular places, was central not

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only to a pretty common myth of America but also to Douglas’s own sense of himself as a wanderer and champion of wanderers. His own (possibly apocryphal) claims to have ridden the rails with hobos as a young man pepper his many autobiographical writings.36

At other moments in his Papachristou drafts, Douglas points to rights not only to be physically on the move and out of place but to be socially, culturally, or politically so. He suggests that the rights at issue in Papachristou, rights he would deem fundamental and worthy of heightened judicial protection, included rights to “dissent,” “nonconformity,” and defiance of “submissiveness.” Four of the defendants in Papachristou, for example, were clearly targeted because two of them were white women, two were black men, and they were on a double date. This was northern Florida in 1969, after all. The others, each in his own way, were also “vaguely undesirable in the eyes of police and prosecution.”37 Through the vagrancy ordinance, they could “be required to comport themselves according to the life style deemed appropriate by the Jacksonville police and the courts.”38

One implication of this paean to nonconformity is the protection of certain rights that were exercised in public. The cornerstone of substantive due process as we have come to know it in the decades since Papachristou has been “privacy.” But here, in the context of vagrancy laws, Douglas appears to suggest rights to engage in unconventional

37 405 U.S. at 166 (internal quotation marks omitted).
38 405 U.S. at 170.
behavior—or simply to be an unconventional, even “undesirable,” person—precisely where others could, and likely would, encounter such behavior and such people.39

Much as the possibility that fundamental rights might include activities blatantly conducted in a public setting seems unlikely today, so too does Douglas’s suggestion that alternative “life style[s]” might receive constitutional protection. The possibility of such protection appears, in fact, to have had some traction in the early to mid 1970s. The Supreme Court had first invoked the idea of a “lifestyle” in Coates v. City of Cincinnati, the year before Papachristou. Coates struck down a loitering provision that based criminality on whether the loiterers’ conduct was “annoying” to passersby. In that case, the police had deemed “annoying” picketing union members and “dirty and unkempt” Antioch College students protesting the Vietnam War.40 Writing for the Court, Justice Potter Stewart saw the Cincinnati provision as containing “an obvious invitation to discrimination” on the basis of, among other things, “lifestyle.”41 To one person, walking around “dirty and unkempt” might be annoying; to another, it was a meaningful “lifestyle.” In Papachristou, Douglas used the term for the second time in the Court’s history. He worried about those unfortunate people whose “life style” made them particularly vulnerable to arrest: “poor people, nonconformists, dissenters, idlers.”42

Douglas continued to use the term over the next few years. He used it in dissent in Ham v. South Carolina, a case in which the Court required a trial judge to voir dire a jury as to their racial prejudices but not as to their prejudices about what Douglas called “non-

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39 Not all vagrancy cases involved public behavior, however. In the late 1960s, for example, hippies were sometimes arrested for vagrancy while sitting in their homes. See, e.g., Goldman v. Knecht, 295 F. Supp. 897 (D. Colo. 1969). Ironically, in Griswold, Douglas did the opposite: he transformed the quintessentially public freedom of association into a private right by closely linking it to marriage.
conventional hair growth” and then-Justice William H. Rehnquist, writing for the majority, simply called a “beard.” According to Douglas, with whom Marshall largely agreed, defenders of the status quo thought that such hair growth “symbolize[d] an undesirable life-style characterized by unreliability, dishonesty, lack of moral values, communal (‘communist’) tendencies, and the assumption of drug use.” And in his concurrence in *Roe v. Wade* and its companion case *Doe v. Bolton*—more on those in a moment—Douglas again used the term, stating that “childbirth may deprive a woman of her preferred lifestyle and force upon her a radically different and undesired future.”

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

Here too, Douglas’s own investment in such rights drew on a deep and long-held respect for eccentricity and rebellion. Douglas’s romance with the hobo and the wanderer had as much to do with lofty ideals of individual self-fulfillment and nonconformity as with physical mobility for its own sake. Thus, in Douglas’s own construction of his identity, he was not only a perpetual wanderer, but a perpetual rebel as well. He would see a straight line from Thoreau and Whitman through himself to the Beats and then the

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44 Roe v. Wade, Doe v. Bolton, 409 U.S. 179, 214 (1973) (Douglas, J., dissenting). The other intervening use of the term was Chief Justice Burger’s, in *Yoder v. Wisconsin*. He was clearly less comfortable with it and less committed to its protection generally, though he did protect it in that case. He referred to “what we would today call ‘life style’” in referring to the Amish’s longstanding religious and cultural practices. 406 U.S. 205, 217 (1972). Douglas notably did not use the term a few years later in *Belle Terre v. Boraas*, when he rejected a lifestyle claim in the face of zoning authority, though Thurgood Marshall used it three times in his lone dissent, 416 U.S. 1, 16, 18 (1974) (Marshall, J., dissenting).
hippies. This perspective led him to view young people’s rejection of the entire idea of “place” within an American social hierarchy with sympathy. In 1969, Douglas published a book, entitled Points of Rebellion, in which he railed against “the Establishment” and set himself decidedly on the side of the youth culture.46

Within this context, Douglas’s early draft of Papachristou reads as something of an anthem for the 1960s. Suggesting the existence of constitutional rights to such rebellion—as the draft opinion did—would have made Papachristou a key legal victory for the activists of the sixties. Read in the context of that draft, the published opinion takes on new meaning as well. The Warren Court’s various rights revolutions—pertaining to race, criminal procedure, voting, and other issues—have generated more than their share of the historical limelight. Though the Burger Court has received some glory (or infamy) for its part in the sexual revolution—in both its sex-based equal protection doctrine and its substantive due process doctrine—Papachristou has not really broken into the game. Until now.

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You may be thinking: “All this—the claim of a veritable cultural revolution, of a whole panoply of potential rights to mobility, to a lifestyle, to nonconformity, to a novel (and public) version of substantive due process—all this came out of a case about a local ordinance criminalizing vagrancy?” That is clearly the question of the moment, the answer is yes, and here is the explanation: Throughout American history and across the nation, local communities and their agents had long used vagrancy laws as a form of social control over diverse groups of people and toward a number of different ends. They employed vagrancy laws variously to regulate and extract labor from the resident poor, 46 WILLIAM O. DOUGLAS, POINTS OF REBELLION (1969).
exclude and punish poor strangers, incapacitate apparent threats to social order, prevent
the commission of incipient crime, enforce racial segregation and subordination, and
discipline minorities and nonconformists of all stripes. In each instance, police used these
laws to demarcate who was out of place in a given community, who was denied full
respect for their mobility, their autonomy, their lifestyle, their beliefs. Marginal people
shared a vulnerability to regulation by vagrancy law. That is, they shared a vulnerability
to arrest at almost any time and any place for any behavior or no behavior at all.

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

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

Understood in this way, vagrancy cases both reflected and propelled the larger culture wars of the 1960s. It was hardly a coincidence, then, that most of the social movements of the era found themselves challenging vagrancy laws. As their cases made their way to the Supreme Court, they schooled the justices in the problematic uses of vagrancy laws to restrain the free speech of political radicals, civil rights demonstrators, and Vietnam War protestors. The justices were increasingly troubled by the ways in which police officers used the laws to harass racial minorities, and to hide and coerce work out of the poor. And as postwar jurisprudence raised new questions about the appropriate contours of criminal law, the police who enforced it, and the sentences that vindicated it, lawyers argued, and the justices gradually came to agree, that vagrancy law was out of place in a modern liberal criminal justice system. The political, social, cultural, and intellectual currents of the 1960s thus conspired to destabilize the longstanding legitimacy of regulation by vagrancy law.

To say that Papachristou—as the final downfall of vagrancy laws—brought the fundamental issues of the 1960s into stark relief is not, however, to answer the question...
of precisely what rights Douglas meant to protect in his draft opinion. Trying to distill a single “right” from that opinion is like trying to distill a single essence out of the chaotic events of a chaotic decade. Even as vagrancy law served as something of a unifying target for the social movements of the era, each movement nonetheless retained its own separate goals for various kinds of freedom, equality, or social change. This heterogeneity of the underlying concerns of the many groups challenging vagrancy laws in the 1960s and 1970s reveals itself in the many possible rights that Douglas implicates in his draft opinion. Though Douglas meant to bring the fundamental challenge to placelessness into constitutional law, that challenge was not singular. It was layered and multi-faceted, differing across individuals, movements, regions, and particular locales. It is consequently no wonder that the rights Douglas referenced in *Papachristou* drew on a number of different images of individual freedom and pointed in a number of different directions.

The possible contours of the rights Douglas meant to protect to one side, the relationship between Douglas’s draft opinion in *Papachristou* and the published version is significant for at least four additional reasons. First, these documents suggest that void for vagueness was indeed the “makeweight” Amsterdam had declared it to be more than twenty years earlier. Douglas did not think the main problem with Jacksonville’s vagrancy law was that it had failed to specify the scope of its criminal prohibition with constitutionally adequate precision. Douglas—as well as at least a few others—understood what was at stake in *Papachristou* as not only faulty language but also rights protected by the Ninth Amendment, the due process clause, and the Bill of Rights. Though this view did not make it into the published opinion, Robert Post was obviously
right in *Reconceptualizing Vagueness* that Douglas aimed to limit the kinds of behavior Jacksonville officials could criminalize as well as the language with which they did so.

Second, by using vagueness in the published opinion, Douglas actually held not that any particular type of conduct was shielded from regulation, but rather that a better description of the prohibited conduct was needed. Much as Douglas waxed eloquent about the activities of the *Papachristou* defendants, they remained in the published opinion only “amenities” rather than rights anywhere protected in the Constitution itself. The doctrinal basis for striking down the Jacksonville ordinance was not that it violated protected rights, but rather that it was unconstitutionally vague. In choosing one doctrinal category (vagueness) over another (fundamental rights), Douglas shaped the subsequent framing of the issues among laypeople, legislators, and legal professionals alike. He essentially invited legislatures and city councils to draft more specific (less vague) laws regulating those out of place. And draft they did. They generated new, more specific loitering laws, new laws targeting the homeless (like those prohibiting begging, panhandling, and sleeping in public), and new forms of petty criminal regulation. Many of vagrancy law’s replacements—especially gang loitering ordinances, so-called quality of life laws, and the practice of broken windows policing—have provoked considerable legal, political, and constitutional controversy in their own right.47

It is difficult to say to what extent these subsequent developments would have differed had Douglas published his draft opinion. It seems unremarkable to suggest that a mismatch between judicial motivation and judicial explanation might affect—some might say, distort—dialogue between courts and legislatures about the limits of lawmaking. One can imagine that legislators, as well as lawyers, scholars, and judges, would frame arguments differently if they thought the Court cared about rights rather than words. Though abstract discussion of the relative autonomy of legal doctrine is beyond the scope of this essay, the question is certainly an important one: Would the subsequent development of constitutional doctrine—not to mention the actual practices of policing public spaces—have been different if the newly discovered early draft had actually been published?

Third, Douglas’s Papachristou drafts shed new light on the extent to which constitutional doctrine was in flux in the early Burger Court years. In 1967, the Court had made clear that it would show special constitutional solicitude for racial minorities in equal protection cases. Over the following decade, the Court waffled publicly about whether others—poor people, hippies, illegitimate children, women—would also receive heightened scrutiny. My archival explorations reveal that that public waffling was only the tip of the iceberg. Behind the scenes, the justices were even more openly debating such questions. In one 1975 case, Justice Harry A. Blackmun wrote a memo to himself noting that the Court had recently “been avoiding” questions of the standard of review. He felt “strongly . . . that we should do some articulating here and recognize the fact that

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we have been employing, inferentially at least, a middle tier approach."49 As the student of constitutional law knows, other than applying intermediate scrutiny to sex classifications, the Burger Court never followed up on Blackmun’s ideas.50 The Court occasionally hid behind what Gerald Gunther called rational basis review with “bite” instead of articulating a rationale for protecting some kinds of people more than others.51

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

Fourth, Douglas’s early draft of Papachristou is important not only for the light it sheds on void for vagueness and its judicial uses but also on the possible development—or lack thereof—of constitutional scrutiny of substantive criminal law. Professor William Stuntz has argued that the Warren Court’s famous (or infamous, if you prefer) transformation of American criminal procedure in cases like Mapp v. Ohio,52 Gideon v.

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49 Memorandum from Justice Harry A. Blackmun to self, Belle Terre v. Boraas, No. 73-191, Jan. 29, 1974, Blackmun Papers, Box 186.
50 See Craig v. Boren, 429 U.S. 190 (1976). The Burger Court made noises toward applying heightened scrutiny for classifications based on illegitimacy, but it was not until the Rehnquist Court that the Court explicitly applied intermediate scrutiny. See Clark v. Jeter, 486 U.S. 456, 461 (1988).
Wainwright,53 and Miranda v. Arizona54 has led to perverse consequences. He has blamed the Court’s constitutional oversight of state and federal criminal procedures for overcriminalization and a mismatch between actual guilt and convictions. In lieu of constitutionalizing criminal procedure, Stuntz has suggested the constitutionalization of substantive criminal law. Along with a few other cases from the 1960s and early 1970s,55 Papachristou is the poster child for this argument. In these cases, the Court struck down criminal laws as unconstitutional, whereas in most of the Court’s other criminal cases of that era, it had regulated the criminal process. Much as Stuntz praises the Court’s initial forays in this direction, he laments that they did not lead to a new constitutional jurisprudence of criminal law. The Court never really followed up, and Papachristou and its ilk became outliers rather than trailblazers.56

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

criminal law was due in part to the Court’s failure to identify the rights that would actually limit the substance of criminal regulation.57

To the extent that Douglas’s draft opinion suggested that the invalidation of vagrancy laws would place a substantive brake on what legislatures, police, and courts could do to marginal people, the vagueness basis of the published decision proceduralized the issue. It allowed for the possibility of fixing the constitutional problem through the same kinds of legislative cleverness Stuntz has blamed for the perverse consequences of the criminal procedure revolution. As Stuntz has noted, vagueness doctrine is a relatively limited way of regulating the substance of criminal law.58 Perhaps, then, Douglas’s draft opinion serves as the foil for what could have been. Perhaps the constitutionalization of criminal law would have had a fighting chance had it had a more substantive basis from the start.

This saga of social regulation by vagrancy, its demise, and the legal consequences of that demise is in itself an important story (and one I plan to tell at some length in a forthcoming book).59 Douglas’s early drafts in *Papachristou* reveal the critical implications of that story across a wide spectrum of issues. The drafts go a long way toward proving right court-watchers who see substantive commitments behind void for vagueness. They show how the Court understood vagrancy laws as infringing on legal rights that correlated closely with the widespread sixties challenges to the dominant hierarchical, conformity-driven social order of postwar America. The fact that they

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


59 People out of Place: The Sixties, the Supreme Court, and Vagrancy Law (manuscript in progress, on file with author).
remained draft opinions, however, also shows how the Court stepped back from fully embracing the sixties revolution in such a way. That fact also highlights the potential consequences of choosing void for vagueness over rights protection in the terms the Court’s opinion set for legislatures and police officers who continued to refine the techniques of social control. And it potentially implicates the void for vagueness doctrine in the aborted effort to create a substantive constitutional criminal law. The apparent inclination to constitutionalize a whole host of rights that today seem a little wacky—and these diverse consequences of the choice to use void for vagueness instead—alone would be worthy of comment.  

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

To what, exactly, was Brennan referring when he mentioned “the abortion cases” and “Harry’s Texas case?” In the winter of 1971? That would be the opinion Justice

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60 Vagrancy cases had also been challenged on a number of other grounds—under the First, Fourth, Fifth, Eighth, and Thirteenth Amendments—that influenced the Court’s doctrine in a variety of ways beyond the scope of this brief essay. See Goluboff, People out of Place.

Harry A. Blackmun was struggling to write striking down a Texas abortion law. That would be, you guessed it, *Roe v. Wade*. My archival finds thus go beyond *Papachristou* itself to implicate one of the most important Supreme Court cases of the twentieth century. Brennan’s memo shows that he saw connections between Douglas’s fundamental-rights-based *Papachristou* opinion and Blackmun’s forthcoming *Roe* opinion, which was to be based on the same constitutional theory. He was worried that other, more conservative, justices would see the same connections and that they would hesitate to sign onto *Roe* for fear of broadening substantive due process to include everything in Douglas’s opinion as well.

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

The Court was clearly still wrangling with such issues six years later, when it faced both *Eisenstadt v. Baird* and *Roe v. Wade* in 1971. In *Eisenstadt*, Brennan

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63 381 U.S. 479 (1965).
64 405 U.S. 438 (1971).
authored a somewhat strained plurality opinion holding that equal protection required that individuals have the same rights to contraceptives as married couples. He thereby avoided expanding any of the substantive theories *Griswold* had propounded.

In *Roe*, Blackmun’s initial impulse was also avoidance. Although the conference had voted to invalidate the abortion statute on privacy grounds, Blackmun’s early draft opinion relied not on any substantive right, but on—wait for it—void-for-vagueness doctrine.66 In response, Brennan and Douglas urged Blackmun to reach “the core issue” of privacy rather than rely on the makeweight of vagueness.67 These interchanges too support the conclusion Amsterdam had offered a decade before—that vagueness was an avoidance mechanism, denying and shielding the court’s substantive commitments. Afraid to embrace fully the implications of *Griswold* and wade too deeply into the abortion issue, Blackmun thought he could escape the problem by using void for vagueness.

What might seem more surprising than Brennan’s general preoccupation with *Roe* in the winter of 1971 was that he connected *Roe* to *Papachristou*. Thought about as privacy, sexual freedom, or reproduction cases, *Roe*, *Eisenstadt*, and *Griswold* had little in common with *Papachristou*. True, the Jacksonville police were using the city’s vagrancy ordinance to regulate the sexuality of the interracial double-daters, but sexuality was not central to *Papachristou*. Moreover, the acts that led to the vagrancy arrests, more

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65 410 U.S. 113 (1973). Chief Justice Burger ordered reargument in *Roe* so that new justices William H. Rehnquist and Lewis F. Powell, Jr., to take part in their consideration. Hence, the case was not decided until 1973.
66 Vagueness had also been the main substantive issue in an abortion case the Court had decided earlier in 1971, United States v. Vuitch, 402 U.S. 62 (1971).
67 Memorandum from William Brennan to Blackmun (copying the Conference), May 18, 1972, Brennan Papers; Memorandum from William O. Douglas to Blackmun (copying the Conference), May 19, 1972, Douglas Papers.
so even than abortions, could hardly be considered “private.” For the most part, in fact, not only did vagrancy laws regulate people in public spaces, they usually regulated men in public spaces. The abortion cases, by contrast, largely involved the choices of women in private.

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

Indeed, I have found memos that reveal that in thinking about how to resolve *Roe*, Brennan was then in the process of constructing a systematic framework for the “fundamental freedoms” that he deemed within the meaning of “liberty.” He viewed the first of three groups of such freedoms as including “freedom from bodily restraint or inspection, freedom to do with one’s body as one likes, and freedom to care for one’s health and person.” For these, he cited *Terry v. Ohio*, *Meyer v. Nebraska*, and *Jacobson v. Massachusetts*, among others. The second group included “freedom of choice in the basic decisions of life, such as marriage, divorce, procreation,

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68 Since Justice Rehnquist’s dissent in the case, it has, of course, been noted that abortions and many of the activities in the sexuality cases are also not exactly private in critical ways. *Roe v. Wade*, 410 U.S. 113, 172 (Rehnquist, J., dissenting); see also, e.g., John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920, 930-33 (1973).
70 262 U.S. 390 (1923).
71 197 U.S. 11 (1905).
contraception, and the education and upbringing of children.” Here he relied on Loving v. Virginia, Boddie v. Connecticut, Skinner v. Oklahoma, Eisenstadt v. Baird, Griswold v. Connecticut, and others. The third group included “autonomous control over the development and expression of one’s intellect and personality.” The precedent for this last group was thinner. Brennan cited only Stanley v. Georgia (protecting the possession of obscene materials in the home) and Justice Brandeis’s reference in Olmstead v. United States to a “right to be let alone.” Brennan thought that the decision to have an abortion “obviously fits directly within each of the categories of fundamental freedoms,” and therefore “should be held to involve a basic individual right.” (fig. 4)

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

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72 388 U.S. 1 (1967).
74 315 U.S. 535 (1942).
75 405 U.S. 438 (1972).
76 381 U.S. 479 (1965).
78 277 U.S. 438, 478 (Brandeis, J., dissenting).
Neither Blackmun’s majority nor Douglas’s concurrence in *Roe* ultimately drew much on the Ninth Amendment. By 1973, even those like Douglas who had long opposed renewing substantive due process had fallen in line. Douglas’s concurrence in *Roe* and *Doe* did, however, completely adopt the categories of fundamental rights Brennan had identified in his memo. Almost word for word. Douglas’s most significant divergence from Brennan’s framework unsurprisingly involved *Papachristou*. Douglas made a more explicit connection between *Roe/Doe* and *Papachristou* than Brennan had. He added to Brennan’s “freedom to care for one’s health and person,” and “freedom from bodily restraint or compulsion,” his own “freedom to walk, stroll, or loaf.” Quoting *Papachristou*, he called “walking, strolling, and wandering” “historically part of the amenities of life as we have known (them).” Douglas described these rights as fundamental and subject to strict scrutiny. Although the final draft of his *Papachristou* opinion had not made these rights fundamental, the earlier drafts remained alive in his re-imagining and reworking of the opinion. Douglas’s opinion in *Roe/Doe* reads as if his draft opinion in *Papachristou* had actually been published.

It nonetheless remains that Justice Douglas’s draft opinion was not actually published, and the final revelation of this dispatch goes to why. In short, Brennan turned out to be right that the link between *Roe* and *Papachristou* was both cause for celebration and cause for concern. Douglas does not seem to have been deterred by Brennan’s cautionary note; it would appear that he circulated his draft to the rest of the conference with its reliance on fundamental rights intact. As Brennan predicted, he and Douglas

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81 Douglas did mention the Ninth Amendment briefly at 410 U.S. 179, 211(1973) (Douglas, J., concurring).
82 Of course, Douglas had never been particularly committed to the Ninth Amendment. Though Douglas mentioned the amendment in *Griswold*, 381 U.S. at 484, it was Goldberg’s concurrence that had most relied on it. 381 U.S. at 488-99.
were not alone in seeing connections between *Roe* and *Papachristou*. The constitutional understanding that *Roe* represented would be potentially deeper, more expansive, and more secure with related fundamental rights protected in *Papachristou*. That security appealed to some justices and repelled others. Skeptics of this newfound judicial penchant for creating rights saw the connections as threatening rather than auspicious.

In particular, Justice Potter Stewart thought Douglas’s opinion off the mark in its constitutional interpretation. Stewart had dissented in *Griswold*, galled by the justices’ apparent fishing expedition to find some justification for its decision.\(^8^4\) By 1971, however, Stewart seems to have resigned himself to the growing consensus to base privacy rights to reproduction, contraception, and abortion on a new form of substantive due process. He joined the opinions in *Eisenstadt* and *Roe*.\(^8^5\)

Stewart nonetheless saw vagrancy as a different matter. He initially signed onto Douglas’s opinion only to the extent that it held “the ordinance before us to be unconstitutionally vague.”\(^8^6\) (fig. 5) Stewart held out signing onto the opinion until Douglas had eliminated all traces of a broader, rights-based argument. He even insisted on deletion of the final reference to the Bill of Rights in the last sentence of the opinion.\(^8^7\) (fig. 6) When Douglas removed that last sentence, Stewart finally signed onto the opinion, now limited to a void-for-vagueness holding. It was not, at this point, that Stewart opposed the whole project of judicial protection for fundamental rights. Nor was it that he found vagrancy and related laws constitutionally harmless. Stewart was, after

\(^8^4\) 381 U.S. 527-28 (Stewart, J., dissenting).
\(^8^5\) 405 U.S. 438 (1972); 410 U.S. 113, at 167 (1973).
\(^8^6\) Memorandum from Justice Potter Stewart to Justice William O. Douglas, Jan. 25, 1972, Box 1558, Douglas Papers.
all, the author of *Coates* (where he himself sympathetically used the word “lifestyle”) and a relatively aggressive participant in the invalidation of vagrancy laws as void for vagueness. Perhaps, having begun to dismantle vagrancy laws on the basis of vagueness, he was committed to continuing that approach. Or perhaps it was something in the nature of the rights Douglas was trying to protect—the breadth, the ambiguity, the public-ness, perhaps—and the constitutional basis Douglas offered for that protection that made Stewart balk.

The surviving record makes it difficult to identify Justice Stewart’s exact concerns. It also obscures how much Stewart spoke for others when he preferred vagueness to rights creation in *Papachristou*. Perhaps Douglas changed his draft opinion because a majority of the Court truly thought vagueness was the constitutional problem with the law. Or perhaps, as Post has suggested, the justices all thought something substantive was at stake, but they had trouble identifying—or disagreed about—precisely what the substantive problem was. In that case, there is some irony to the possibility that vagueness doctrine criticizes legislatures for failing to define precisely what they are prohibiting even while the Court finds itself unable to define precisely what it is protecting.

With Douglas, Brennan, and Stewart provoking us to view *Papachristou* and *Roe* together—whether for good or ill—implications beyond those for fundamental rights doctrine come into focus. In particular, placing the two cases in conversation provides additional fodder for Stuntz’s analysis of the relative absence of constitutional criminal

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88 Only Thurgood Marshall signed on to Douglas’s opinion immediately after Douglas circulated it. The rest of the justices, including Brennan, waited until Douglas had responded to Stewart’s comments. *Douglas Papers*.

89 With thanks to Mike Seidman for pointing out this irony.
law. Because we usually consider *Griswold, Loving, Eisenstadt, Roe*, and their ilk as substantive due process or fundamental rights (or even equal protection) cases, we fail to see them as criminal law cases. But they were. They were all cases in which the Court was placing substantive limits on the extent to which the criminal law could be used as a mechanism of social regulation. By viewing such cases in the context of what my documents reveal about *Papachristou*, it would appear that the Court may have developed a somewhat more robust constitutional criminal law after all.

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

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

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90 Stuntz considers *Griswold* a criminal law case, and he describes how Alexander Bickel had also seen it as such. But he notes that subsequently it was treated as a privacy case rather than a criminal law case. Moreover, because Stuntz sees the 1960s, up until the Court retreated in Powell v. Texas, 392 U.S. 514 (1968), as the moment of real possibility for a substantive constitutional intervention into criminal law, he does not consider *Roe* in his discussion. See Stuntz, *The Uneasy Relationship*, 107 Yale L.J. at 68-69 & n. 237.

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

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

Moving away from legal doctrine and particular cases, my archival finds offer Supreme Court junkies new fodder for the realms of judicial biography and court history. The interchanges between Brennan and Douglas are illuminating not only for their now largely forgotten classification of fundamental rights, but also for what they say about the relationship between the two men. It is easy, in light of Douglas’s eccentricities, to disregard his opinions as out of the mainstream, as a little bit crazy. Reading Douglas in *Roe*, one might wonder how he got from abortion to vagrancy. But Brennan was at the
heart of the Warren Court, the brains behind the liberal transformation. And he agreed with, perhaps even initiated, that connection. These documents show Douglas and Brennan sharing memos, ideas, drafts only with each other. More specifically, they show Brennan literally feeding Douglas lines for his opinion, lines that Douglas adopted almost verbatim. Douglas was notoriously difficult, and Brennan famously politic. Perhaps these memos show only Brennan doing what was necessary to get his votes. Yet some scholars have identified a growing relationship between Douglas and Brennan in Douglas’s later years. 92 Their interchanges in Papachristou and Roe require additional exploration into their relationship and perhaps a reevaluation of Douglas’s place on the Court.

Moving yet further beyond the insular world of the 1971 term, these cases raise questions about the nature of, and conflicts over, fundamental rights in the Warren and Burger Courts more generally. Reading the concurring opinions in Roe with Douglas’s early Papachristou draft in mind reveals the significant fissures that remained among the justices on this question—fissures beyond those apparent in the published opinions alone. These opinions invite us to think both more deeply and more broadly about who was engaged in constructing the intellectual framework of modern fundamental rights, about where in the constitution such rights would be located, about what conceptions of rights were possible, what conceptions were not, and how the lines between the possible and the not possible changed over time.93


93 Indeed, the themes in Douglas’s opinions may remain more available to legal scholars who came of age around the time of Roe and Papachristou than to those who came to constitutional law only after such
These cases also raise questions about the relationship between the Warren Court and the Burger Court that scholars have yet to mine. Though scholars in recent decades have exploded the liberal-conservative dichotomy of the two courts—especially as to sex discrimination and substantive due process—the history of *Papachristou*, and the relationship between *Papachristou* and *Roe* that emerges from these documents, complicates that picture further. The Warren Court had repeatedly toyed with constitutionally invalidating vagrancy laws, but it was not until Warren Burger’s tenure as chief justice that the Court actually struck them down. Moreover, where the Warren Court had granted police officials greater discretion to regulate people on the street in 1968’s *Terry v. Ohio*, the Burger Court constrained some of that discretion—extending the boundaries of acceptable public activity—in *Papachristou*. The documents I offer up here thus show the Burger Court years as in some ways the capstone of sixties social transformations that the Warren Court had not entirely embraced. At the same time, they reveal the limits of those transformations. To what extent, one might ask, did the fact that these cases were decided during the Burger Court years affect their framing and their consequences for future doctrinal developments?

possibilities had been forgotten. See, e.g., Mark Tushnet (concurring), in *What Roe v. Wade Should Have Said* 86-91 (Jack Balkin, ed. 2005).


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

96 392 U.S. 1 (1968).

97 There is already a substantial literature on the relationship between the Warren and Burger Courts. The first wave viewed the Burger Court as clearly more conservative than its predecessor, but subsequent revisions have complicated that picture. See, e.g., Martin H. Belsky, *The Burger Court and Criminal Justice: A Counter-Revolution in Expectations*, in *The Burger Court: Counter-Revolution or Confirmation?* 131-46 (Bernard Schwartz ed., 1998). Revisionists point most frequently to the constitutional protection of women, which the Burger Court, not the Warren Court, developed. See, e.g., Schwartz, Bernard, *Ascent of Pragmatism, The Burger Court in Action*, 1990; Ruth Bader
Alas, we have moved some distance from where we began, in 1960 with Anthony Amsterdam’s provocative Note. It turns out that once we lift the veil of the void-for-vagueness doctrine, the revelations can be far reaching. But that is the thing about archives, we never know where they will lead.

Appendix

Figure 1. Portion of Justice Douglas’s Early Draft of *Papachristou v. City of Jacksonville* discussing the Ninth Amendment (Library of Congress).
Figure 2. Portion of Justice Douglas’s Early Draft in *Papachristou v. City of Jacksonville* replacing Ninth Amendment analysis with substantive due process (Library of Congress).
December 30, 1971

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

Dear Bill:

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

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

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

Sincerely,

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

I guess my most significant departure from your approach is in the development of the right-of-privacy argument. I agree with you that the right is a species of "liberty" (although, as I mentioned yesterday, I think the Ninth Amendment (as in your proposed Papachristou opinion) should be brought into this problem at greater length) but I would identify three groups of fundamental freedoms that "liberty" encompasses: first, freedom from bodily restraint or inspection, freedom to do with one’s body as one likes, and freedom to care for one’s health and person; second, freedom of choice in the basic decisions of life,
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

January 25, 1972

No. 70-5030, Papachristou v. Jacksonville

Dear Bill,

I should appreciate your adding the following at the foot of your opinion in this case:

MR. JUSTICE STEWART joins in that part of the Court’s opinion that holds the ordinance before us to be unconstitutionally vague, and on that basis would reverse these convictions.

Sincerely yours,

Mr. Justice Douglas

Copies to the Conference

Figure 5. Memorandum from Justice Stewart to Justice Douglas about Papachristou v. City of Jacksonville (Library of Congress)
Figure 6. Exchange between Justice Stewart and Justice Douglas about Papachristou v. City of Jacksonville (Library of Congress).