SUPREME JUDICIAL BULLSHIT (NEAR FINAL DRAFT)

Adam J. Kolber*

ABSTRACT

While we have come to expect bullshit from politicians, there is no shortage of judicial bullshit either. After discussing Harry Frankfurt's famous description of bullshit, I illustrate possible instances of judicial bullshit in a wide range of bioethics cases, mostly at the Supreme Court. Along the way, we see judges bullshit for many reasons including the desire to keep precedents malleable, avoid line drawing, hide the arbitrariness of line drawing, sound important, be memorable, gloss over inconvenient facts, sound poetic, make it seem like their hands are tied, and appear to address profound questions without actually staking out provocative positions.

I pay particular attention to the discussion of reproductive rights in Planned Parenthood v. Casey *where the joint opinion authors arguably used bullshit to deflect attention from the thorny philosophical questions at the core of rights to choose. That's not necessarily a criticism of the opinion, as some uses of bullshit may be warranted or even praiseworthy. Whether we applaud or condemn the phenomenon, however, judicial bullshit does reduce transparency, and scholars, journalists, and other judges sometimes take bullshit more seriously than perhaps they should.*

INTRODUCTION

Our government has been accused of producing too little prosperity, equality, and justice. But it has never been accused of producing too little bullshit. Famed reporter Carl Bernstein has said of Donald Trump that "[n]o president, including Richard Nixon, has been so ignorant of fact and disdains

* Professor of Law, Brooklyn Law School. For helpful comments, I thank Ryan Calo, John Cogan, Adam Elga, Nada Gligorov, Hank Greely, Christopher Hernandez, Moshe Hoffman, Simone Lamont, Stephen Latham, Kimberly Mutcherson, Govind Persad, and Laurent Sacharoff, as well as participants at workshops at the Icahn School of Medicine at Mount Sinai, Seton Hall Law School, and Stanford Law School.

fact in the way" Trump does.[1] One commentator described Trump as a "bullshit artist" who "proudly moves through the world without ever bothering to consider how concepts of truth or falsehood might potentially shape his behavior."[2]

That same commentator claims that "law is the very opposite of bullshit."[3] To her, law is "a highly systematized structure of meaning used to evaluate the merit and relevance of facts and arguments. In that same capacity, it's also a way of regulating which statements are valid understandings of reality or legal text and which are beyond the pale."[4] Yet, as I will suggest, there is no shortage of judicial bullshit.

You might think that judges, especially those with life tenure, could dispense with bullshit. There are many reasons, however, why judges bullshit, some of them quite strategic. It's not easy for judges to resolve contentious issues that have flummoxed lawyers and ethicists for decades. Bullshit can help judges appear to address profound questions without actually staking out provocative positions. Indeed, judicial bullshit may sometimes provide the best path forward.

Judicial bullshit is often easiest to spot when judges wax philosophical; hence many of the clearest exemplars come from bioethics cases. Consider, for example, these two sentences from the U.S. Supreme Court's joint opinion in *Planned Parenthood v. Casey*, which reaffirmed the fundamental constitutional right to abortion: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."[5] If you teach constitutional law or health law, you've probably read this passage many times. But have you ever stopped to figure out what it means?

---

1. Alexandra King, *Carl Bernstein: Donald Trump Has 'Disdain for the Truth*,*'* CNN (Dec. 11, 2016, 3:39 PM), https://www.cnn.com/2016/12/11/us/bernstein-on-trumps-disdain-cnntv/index.html; *see also* Harry G. Frankfurt, *Donald Trump is BS, Says Expert in BS*, TIME (May 12, 2016), http://time.com/4321036/donald-trump-bs/.

2. Quinta Jurecic, *On Bullshit and the Oath of Office: The "LOL Nothing Matters" Presidency*, LAWFARE (Nov. 23, 2016, 11:28 AM), https://lawfareblog.com/bullshit-and-oath-office-lol-nothing-matters-presidency. Jurecic refers here to "bullshit" as the term is used by Harry Frankfurt. *See* discussion *infra* Part I.

3. Jurecic, *supra* note 2.

4. *Id.*

5. 505 U.S. 833, 851 (1992). Justice Antonin Scalia bemoaned the passage's "exalted" language. *Id.* at 980 (Scalia, J., concurring in the judgment in part and dissenting in part). When it was later cited by the majority in the groundbreaking case of *Lawrence v. Texas*, 539 U.S. 558, 574 (2003), the passage was apparently of such renown that Scalia called it the "famed sweet-mystery-of-life passage." *Id.* at 588 (Scalia, J., dissenting).

It seems to express a lofty commitment to personal liberty, indirectly associating abortion rights with the most fundamental aspects of our humanity.

On closer reading, however, the passage makes little sense. It claims that the most important aspect of liberty is the "right to define [a] concept." But a right to define a concept, while a kind of liberty, is certainly not "at the heart of liberty." Governments rarely seek to limit people's rights to define concepts.[6] Inside your own head, you can define concepts however you'd like. Liberty is more centrally concerned not with our freedom to define concepts but with the sorts of *actions* we are permitted to take without interference from others. If *Casey* were merely about rights to define concepts, it would be of greater interest to metaphysicians than actual physicians.

And what does it mean to have a right to define one's own concept of the mystery of human life? People are far more likely to debate the mystery of human life than the *concept of* the mystery of human life. Perhaps the Justices meant that we should be free to reach our own conclusions about the mysteries of life, but it would have been much more straightforward just to say that. And again, the passage concerns liberties associated with freedom of thought rather than the liberties of bodily autonomy that are at the heart of the abortion debate.

Lastly, it's not clear precisely what "these matters" refers to in the second sentence. Presumably, these matters are existence, meaning, and the universe and not rights to define concepts of these things. Still, beliefs about existence, meaning, and the universe aren't the sorts of things typically thought to "define" attributes of personhood. Attributes of personhood are usually qualities that entitle people to basic rights. For example, perhaps abilities to feel pain, be self-aware, or form complex desires constitute attributes of personhood. But how can beliefs about existence, meaning, or the universe (or beliefs about rights to define such concepts) constitute attributes of personhood? Surely humans with no beliefs about these things still have rights to life.

"So what," you might say, "if the Justices would fail their Philosophy 101 exams?" Maybe the quoted passage isn't meant to be picked apart for putative philosophical content; maybe it's only meant to set the ambience for the joint opinion. But that's precisely my point. The joint opinion is cloaked in philosophical language, but the authors often seem unconcerned with the

---

6. *See Lawrence*, 539 U.S. at 588 (Scalia, J., dissenting) ("I have never heard of a law that attempted to restrict one's 'right to define' certain concepts."). On possible First Amendment protections of freedom of thought, see Adam J. Kolber, *Two Views of First Amendment Thought Privacy*, 18 U. PA. J. CONST. L. 1381, 1386–96 (2016).

truth or falsity of their statements in just the way, as we will see, philosopher Harry Frankfurt famously characterized bullshit. The joint opinion references lofty ideas without wrestling in any careful way with those ideas.

How tragic, it may seem, that the authors should get a failing grade in philosophy in one of the most philosophically rich and important cases in the nation's history. But while it's possible the joint opinion authors simply lacked the acumen to evaluate what they wrote or failed to carefully compose or edit their prose, the case is so important and closely-scrutinized that the failure to make clear, precise statements might have been exactly what was intended.

I will argue that, among many potentially overlapping reasons, judges sometimes resort to bullshit to: keep precedents malleable, avoid line drawing, hide the arbitrariness of line drawing, sound important, be memorable, gloss over inconvenient facts, sound poetic, seem as though their hands are tied, and seem principled rather than strategic. I make no strong claims about whether or when courts ought to bullshit, but there are probably appropriate occasions.

At the same time, bullshit lacks transparency, and we should avoid it absent good reason. The "mystery passage" above is quoted in full in hundreds of law review articles and many court opinions,[7] including famous cases such as *Lawrence v. Texas*,[8] *Washington v. Glucksberg*,[9] and *People v. Kevorkian*.[10] Rather than recognizing bullshit for what it is, the vast majority of these scholarly and judicial sources seem to endorse its content. They take the passage to actually mean something with genuine legal implications.[11] Indeed, if judges believe the passage has legal implications, then in fact it probably does. But given the lack of transparency underlying bullshit, judges and scholars should pay keen attention to its use to see what may be hiding in the background.

---

7. As of February 12, 2018, a search of Westlaw's Secondary Sources database, filtered for publication type "Law Reviews & Journals," shows 461 law reviews, and Westlaw's database of federal and states cases finds thirty-six.

8. 539 U.S. at 574.

9. 521 U.S. 702, 726–27 (1997).

10. 527 N.W.2d 714, 727 (Mich. 1994).

11. *See* Trent L. Pepper, *The "Mystery of Life" in the Lower Courts: The Influence of the Mystery Passage on American Jurisprudence*, 51 HOW. L.J. 335, 335–36 (2008) (collecting judicial and scholarly sources); *id.* at 347 tbl.3 (finding that just over 10% of judicial references to the "mystery passage" were critical). Some commentators, however, have indeed called out the passage. For example, Michael McConnell has deemed it a "faux philosophic argument." Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665, 669. John Garvey claims it resembles a "bad freshman philosophy paper" but still thinks it expresses a coherent notion. John H. Garvey, *Control Freaks*, 47 DRAKE L. REV. 1, 3 (1998).

In Part I, I discuss Frankfurt's understanding of bullshit and illustrate possible instances of judicial bullshit in a wide range of bioethics cases, especially those decided by the U.S. Supreme Court. In Part II, I examine several potential instances of bullshit in the joint opinion in *Planned Parenthood v. Casey* to show the role bullshit can play more broadly in a single opinion. *Casey* concerns the particularly controversial issue of abortion and arguably uses bullshit to deflect attention from the thorny philosophical questions at its core. I don't take a position as to whether the joint opinion should be applauded or condemned for its apparent reliance on bullshit, but I do highlight ways in which judicial bullshit reduces transparency in ways that may be troublesome.

The composition of the Supreme Court may change dramatically in the coming years, and many of the Court's apparently-settled constitutional cases will reopen for debate in ways that few scholars predicted. Now is a particularly timely opportunity to reexamine the philosophical arguments underpinning those and other decisions to see where bullshit must be replaced by careful argumentation and where bullshit might be the best we can hope for.

I. JUDICIAL BULLSHIT

A. The Nature of Bullshit

In a now-famous essay, philosopher Harry Frankfurt sought to "begin the development of a theoretical understanding of bullshit."[12] Though "bullshit" is sometimes just a "generic term of abuse" that is "vast and amorphous,"[13] Frankfurt believed it possible to elucidate the concept "even though it is not likely to be decisive" for "[e]ven the most basic and preliminary questions about bullshit remain, after all, not only unanswered but unasked."[14]

According to Frankfurt, bullshit is often pretentious[15] and phony.[16] It is paradigmatically different than lying because liars are *trying* to deceive.[17] Bullshitters, by contrast, are unconcerned or insufficiently concerned with the truth of their statements. They describe "a certain state of affairs without

12. HARRY G. FRANKFURT, *On Bullshit*, *in* THE IMPORTANCE OF WHAT WE CARE ABOUT 117, 117 (1988).
13. *Id.*
14. *Id.*
15. *Id.* at 119 ("'[P]retentious bullshit' is close to being a stock phrase.").
16. *Id.* at 128 ("[T]he essence of bullshit is not that it is *false* but that it is *phony*.").
17. *Id.* at 118.

genuinely submitting to the constraints which the endeavor to provide an accurate representation of reality imposes."[18] It's not merely that they "fail[] to get things right" but that they are "not even trying."[19] The bullshitter's speech "is grounded neither in a belief that it is true nor, as a lie must be, in a belief that it is not true. It is just this lack of connection to a concern with truth—this indifference to how things really are—that [Frankfurt] regard[s] as of the essence of bullshit."[20]

Moreover, Frankfurt believes that, like liars, bullshitters are hiding something. What bullshitters hide is their lack of concern for the truth:

> This is the crux of the distinction between [the bullshitter] and the liar. Both he and the liar represent themselves falsely as endeavoring to communicate the truth. The success of each depends upon deceiving us about that. But the fact about himself that the liar hides is that he is attempting to lead us away from a correct apprehension of reality; we are not to know that he wants us to believe something he supposes to be false. The fact about himself that the bullshitter hides, on the other hand, is that the truth-values of his statements are of no central interest to him; what we are not to understand is that his intention is neither to report the truth nor to conceal it . . . .
>
> . . . .
>
> It is impossible for someone to lie unless he thinks he knows the truth. Producing bullshit requires no such conviction. A person who lies is thereby responding to the truth, and he is to that extent respectful of it. When an honest man speaks, he says only what he believes to be true; and for the liar, it is correspondingly indispensable that he considers his statements to be false. For the bullshitter, however, all these bets are off: he is neither on the side of the true nor on the side of the false.[21]

Frankfurt's description of bullshit captures at least much of what we mean by the term and shows how bullshit can differ from lying. For Frankfurt, the essence of bullshit is expression made with *insufficient concern for the truth*, coupled with, as I read him, a certain *attitude* of insufficient concern for the truth. To be sure, bullshit can have other meanings, as Frankfurt later

---

18. *Id.* at 125 (discussing a particular alleged instance of bullshit in a conversation between Fania Pascal and Ludwig Wittgenstein).

19. *Id.*

20. *Id.*

21. *Id.* at 130–32.

acknowledged.[22] But I will take up his famous definition, filling in some gaps where necessary, but without special effort to make improvements.[23]

Notice that Frankfurtian bullshit need not have the negative connotation that "bullshit" has in common parlance. Indeed, Frankfurt states that his essay does "not consider the rhetorical uses and misuses of bullshit,"[24] reflecting, it seems, Frankfurt's belief that there might be appropriate uses of bullshit.[25] Unlike Frankfurt, I will largely focus on these rhetorical uses and misuses. In particular, I will examine how courts opining on bioethical issues, especially the U.S. Supreme Court, make use of bullshit for reasons of convenience and strategy.

B. Bullshit in Multi-Authored Court Opinions

Given the difficulty of detecting insufficient concern for the truth, identifying bullshit will always be subject to error and is particularly challenging in judicial contexts. We may know when our friends and family are bullshitting, but most of us lack intimate acquaintance with the knowledge and attitudes of particular judges.

Compounding the problem, appellate opinions, especially at the Supreme Court, almost always have multiple, sometimes uncredited, authors. Some opinions, including the opinion in *Casey* that I will focus on, are explicitly authored by more than one Justice. Even those written by a single Justice will often have revisions proposed by other Justices either as friendly suggestions or as conditions for a Justice to sign on to a proposed opinion. Moreover, many Justices rely on their law clerks to draft or substantially revise opinions.

---

22. Harry Frankfurt, *Reply to G.A. Cohen*, *in* CONTOURS OF AGENCY 340, 340–41 (Sarah Buss & Lee Overton eds., 2002).

23. A lot turns on what Frankfurt means by *insufficient* concern with truth. One might argue that even communication with little regard for truth may not be *insufficiently* concerned with truth so long as it is morally justified by broader goals. But interpreting "insufficient concern" as a moral criterion means that only morally unjustified communication could possibly constitute bullshit. By contrast, I think Frankfurtian "insufficient concern" refers not to moral considerations but to norms or expectations of accuracy in communication. *See* FRANKFURT, *supra* note 12, at 125 (stating that bullshitters do not "genuinely submit[] to the constraints which the endeavor to provide an accurate representation of reality imposes"). Hence, an expression could be bullshit relative to communicative norms even if it is morally justified all things considered. For efforts to refine the meaning of bullshit, see, for example, BULLSHIT AND PHILOSOPHY: GUARANTEED TO GET PERFECT RESULTS EVERY TIME (Gary L. Hardcastle & George A. Reisch eds., 2006) [hereinafter BULLSHIT AND PHILOSOPHY] and Andreas Stokke & Don Fallis, *Bullshitting, Lying, and Indifference Toward Truth*, 4 ERGO 277 (2017).

24. FRANKFURT, *supra* note 12, at 117.

25. Perhaps such instances are rare in his mind as he also states that "[c]haracterizing something as bullshit is naturally construed as seriously pejorative." Frankfurt, *supra* note 22, at 343.

Any published Supreme Court opinion is likely the product of multiple authors, each with different levels of involvement, and perhaps, different levels of concern for the truth.

Frankfurt says nothing about the nature of multi-authored bullshit, so we're necessarily stretching his conception. In the pages that follow, I will often speak of "bullshit candidates"—statements that seem like one or more authors were bullshitting. Because Supreme Court opinions are usually vetted by smart people with strong verbal and analytical skills, at least some candidate bullshit seems not the result of mere error or oversight but of intentional strategy. Considering how hard it is to characterize the level of concern for truth among a group of authors, however, we can rarely, if ever, be certain.

C. The Mens Rea of Bullshit

Frankfurt doesn't precisely specify which mental states, or lack thereof, are required for some communication to represent bullshit. For example, does a bullshitter need to know that she's bullshitting? Or could someone *try* to speak the truth yet nevertheless utter bullshit due to an objective deficiency in effort or ability to speak the truth? While Frankfurt believes bullshitters reflect "indifference to how things really are,"[26] it's not obvious whether Frankfurtian bullshit can be inadvertent.[27]

Either way, mere mistakes that evidence insufficient concern for the truth probably do not qualify as bullshit. Bullshitters need to have an attitude of indifference to the truth. For example, the Supreme Court made one of its more widely publicized slip-ups in *Kennedy v. Louisiana*.[28] In that case, the Court deemed the death penalty unconstitutionally cruel and unusual

---

26. FRANKFURT, *supra* note 12, at 125.

27. Speaking of the meaning of "bull," Frankfurt writes in a footnote that "[i]t may be noted that the inclusion of insincerity among its essential conditions would imply that bull cannot be produced inadvertently; for it hardly seems possible to be inadvertently insincere." FRANKFURT, *supra* note 12, at 127 n.5. He goes on to say, however, that while speaking of bull as "insincere" is helpful "it needs to be sharpened," *id.* at 127, and it's not clear that Frankfurt considers "bull" and "bullshit" synonymous.

G.A. Cohen believed that Frankfurtian bullshit could not be inadvertent and criticized Frankfurt's description of bullshit for that reason. G.A. Cohen, *Deeper into Bullshit*, *in* BULLSHIT AND PHILOSOPHY, *supra* note 23, at 121. Cohen argued that we also use the term "bullshit" to refer to nonsensical language that needn't make "reference to the bullshit-producer's state of mind." *Id.*

28. 554 U.S. 407 (2008); Editorial, *Supreme Slip-Up*, WASH. POST (July 5, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/07/04/AR2008070402146.html.

punishment for the crime of child rape.[29] As part of the majority's claim that the punishment would be unusual and run counter to the practices of most death penalty jurisdictions,[30] the Court initially failed to recognize that U.S. military law at the time permitted the execution of child rapists.[31] Justice Scalia believed the missing information devastated the majority's claim to a national consensus against executing child rapists.[32]

But even if the Court's omission of federal military law showed insufficient concern for the truth, it doesn't necessarily make assertions in the opinion bullshit. Mere forgetfulness or insufficient research by an otherwise conscientious speaker does not equate to bullshit. Indeed, in this particular case, the relevant information apparently eluded all relevant parties, including dissenting Justices, counsel for both the convicted rapist and the state of Louisiana, and writers of ten amicus briefs.[33]

Moreover, the bar for identifying bullshit of omission may be higher than the bar for bullshit of commission (if bullshit by omission is even possible). The Court has certainly made errors of commission as well: a ProPublica study found that seven of twenty-four recent Supreme Court opinions containing legislative facts had factual errors.[34] But unless we deem the kinds of errors sufficiently egregious, they probably do not constitute bullshit.

Perhaps bullshit requires not only insufficient concern for the truth but insufficient concern for the speaker's insufficient concern. In other words, bullshit may require a kind of second-order insufficient concern.[35] So, had a Justice or clerk insufficiently researched federal death penalty law when

---

29. 554 U.S. at 413.

30. *Id.* at 426.

31. Kennedy v. Louisiana, 554 U.S. 945 (2008) (mem.) (denying a petition for rehearing but modifying the Court's earlier opinion to note that "[w]hen issued and announced on June 25, 2008, the Court's decision neither noted nor discussed the military penalty for rape under the Uniform Code of Military Justice"); *see also Supreme Slip-Up*, *supra* note 28 (noting the bill was from 2006).

32. "[L]et there be no doubt that [the error] utterly destroys the majority's claim to be discerning a national consensus and not just giving effect to the majority's own preference. As noted in [a] letter from Members of Congress, the [2006] bill providing the death penalty for child rape passed the Senate 95–0; it passed the House 374–41, with the votes of a majority of each State's delegation; and was signed by the President." *Kennedy*, 554 U.S. at 947 (Scalia, J., concurring) (supporting denial of rehearing on other grounds).

33. *Supreme Slip-Up*, *supra* note 28.

34. Ryan Gabrielson, *It's a Fact: Supreme Court Errors Aren't Hard to Find*, PROPUBLICA (Oct. 17, 2017, 8:00 AM), https://www.propublica.org/article/supreme-court-errors-are-not-hard-to-find.

35. *Cf.* Donald Fallis, *Frankfurt Wasn't Bullshitting!*, 37 SW. PHIL. STUD. 11, 12 (2015) (suggesting "that an assertion is bullshit if the speaker lacks a concern *for the inquiry getting to* the truth").

usually quite conscientious, the error might not represent bullshit. But if the writer was insufficiently concerned about substantive law and insufficiently concerned about the process of identifying substantive law, the bullshit moniker would be more applicable.

If my comments so far fairly interpret Frankfurt or represent friendly amendments, we should perhaps recognize a form of negligent bullshit. Hanlon's razor advises us to "[n]ever attribute to malice that which is adequately explained by stupidity," or, more diplomatically, "[d]on't assume bad intentions over neglect and misunderstanding."[36] In the judicial context, some candidate bullshit is not motivated by deliberate attempts to play fast and loose with the truth but arises from the failure to develop adequate norms to identify the truth.

Moreover, it would be unfair to hold judges to the same epistemological standards as scholars. Most scholars can quite freely choose the subjects on which they focus and have substantial leeway in deciding how much time to spend on any particular topic. Most courts have no such luxury. They usually have substantial dockets with heavy caseloads. Even Justices of the U.S. Supreme Court, though only obligated to hear cases in which four of nine Justices vote to grant certiorari,[37] likely write about far more topics per year than most scholars. Justices are also more limited than scholars in terms of the kinds of empirical and experimental data they can gather to resolve important questions. So it is no surprise that judges are sometimes called upon to address matters that they would rather ignore or are incompetent to address. Frankfurt fittingly explains why bullshit is common in the public sphere:

> Bullshit is unavoidable whenever circumstances require someone to talk without knowing what he is talking about. Thus the production of bullshit is stimulated whenever a person's obligations or opportunities to speak about some topic are more excessive than his knowledge of the facts that are relevant to that topic. This discrepancy is common in public life, where people are frequently impelled—whether by their own propensities or by the demands of others—to speak extensively about matters of which they are to some degree ignorant.[38]

---

36. Naomi Karten, *Don't Assume Bad Intentions When There May Be Another Explanation*, TECHWELL: INSIGHTS (May 15, 2017), https://www.techwell.com/techwell-insights/2017/05/don-t-assume-bad-intentions-when-there-may-be-another-explanation.

37. *Supreme Court Procedures*, U.S. CTS., http://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1 (last visited Feb. 18, 2018).

38. FRANKFURT, *supra* note 12, at 132–33.

But judges often exude confidence in their proclamations even when they lack the resources to competently issue them. Such fakery can often be characterized as bullshit, despite being motivated by genuine resource limitations. Faced with the choice of painstakingly defending a controversial position or admitting uncertainty due to time or other constraints, courts sometimes do neither; they bullshit to retain the veneer of omniscience.

D. Five Strategic Reasons for Judicial Bullshit

In this section, I discuss five strategic uses of judicial bullshit and give a possible example of each. We will see more such uses later when we take a closer look at *Planned Parenthood v. Casey*. These strategic uses of bullshit raise genuine questions about when, if ever, judges ought to bullshit in order to further the demands of justice or other important values.

1. Malleability

One reason courts bullshit is to maintain flexibility. Clear, firm statements of the law limit courts' discretion. The motivation to maximize flexibility seems particularly apparent when the Supreme Court considers what qualifies as a fundamental right protected by substantive due process under the Constitution. It's very difficult to determine, perhaps partly by design, exactly which rights will be deemed fundamental and which will not.

Example: Washington v. Glucksberg

In *Washington v. Glucksberg*, respondents claimed that we have a fundamental right to physician aid-in-dying.[39] The Supreme Court offered the following test of whether a right to physician aid-in-dying—and any other right—is protected by Fifth and Fourteenth Amendment substantive due process:

> *Bullshit Candidate*: [T]he Due Process Clause specially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed."[40]

---

39. Washington v. Glucksberg, 521 U.S. 702, 708 (1997).
40. *Id.* at 720–21 (citations omitted).

The passage speaks of "rights and liberties." In many contexts, and as seems to be the case here, these words are used synonymously.[41] Certainly nothing in the opinion suggests otherwise. So, skipping some intervening words, we learn one requirement for a liberty to be protected by substantive due process is that the liberty must be "implicit in the concept of ordered liberty."

At this point, our bullshit detectors are firing warning signals. On a quick read, at least, this requirement seems circular, using the word "liberty" to define itself. But the term "ordered" is used to qualify "liberty." One dictionary defines "ordered liberty" as "freedom limited by the need for order in society."[42] The notion of "ordered liberty" seems to imply that not all liberty is good or in need of promotion. Some liberty limitations are necessary for the general good. So perhaps the Court narrowly avoids circularity by distinguishing liberty from ordered liberty.

Unfortunately, the Court's meaning is still muddled. The Court instructs us that it is not enough for some liberty in dispute to *be* an "ordered liberty." Rather, it has to be a liberty *implicit in the concept* of ordered liberty. Hence the Court's test requires us to know which liberties are implicit in the concept of liberties-consistent-with-a-free-but-responsible society.

I doubt that any particular liberty is implicit in the concept of ordered liberty. Suppose I told you to bring any bread for lunch that is implicit in the concept of healthy bread. Would whole wheat bread satisfy the request? I don't think so. While whole wheat bread might be a kind of healthy bread, nothing about whole wheat is implicit in the *concept* of healthy bread. If, for example, the medical community univocally determined that whole wheat is unhealthy, we'd still have a concept of what healthy bread is; it simply wouldn't include whole wheat bread in the category. If whole wheat bread is a healthy bread, it is a contingent nutritional fact, not something implicit in the concept of healthy bread.[43] And just as no particular bread is implicit in the concept of healthy bread, there is quite possibly no particular liberty

41. *See, e.g.*, Mark Tushnet, *Three Essays on Proportionality Doctrine*, Harvard Public Law Working Paper No. 16-43, Dec. 14, 2016, at 3, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2818860 (stating that "in many contexts the terms ["right" and "liberty"] are interchangeable").

42. MERRIAM-WEBSTER'S DICTIONARY OF LAW 344 (1996).

43. Stating what is implicit in the concept of healthy bread is no easy task. The concept of healthy bread might include notions of tasting a certain way, having certain texture or ingredients, being generally edible, having only certain effects on the body, being capable of receiving condiment spreads, and so on.

implicit in the concept of ordered liberty. We can understand the concept of ordered liberty without referring to any particular liberty.[44]

So far, it seems, the candidate passage is arguably insufficiently concerned with truth: the authors offered a possibly empty description of liberty by failing to explain how an "ordered" liberty differs from any other and then added a confusing, seemingly unnecessary implicit-in-a-concept requirement.

More troubling, though, than the discussion of ordered liberty is the further requirement that rights protected by substantive due process be so fundamental that "neither liberty nor justice would exist if they were sacrificed." This non-existence requirement is absurdly overdemanding. It's one thing to say that there are no fundamental rights and no such thing as substantive due process. That would shift current law dramatically, but its meaning would be straightforward. The Court opts instead for the bullshit approach, laying out a path to declaring a fundamental right that is so implausible that it's hard to believe the authors of the passage cared about its truth.

As important as our fundamental right to use contraceptives is, for example, one cannot believe that liberty and justice would not *exist* without it. Surely liberty and justice existed in this country prior to the Court's decision in *Griswold v. Connecticut*,[45] even if our liberty was more constrained than it ought to have been. Requiring that liberty and justice be incapable of existing to anoint something a fundamental right sets the bar preposterously high. And the bullshit can have consequences. For example, the high bar in *Glucksberg* was noted in dissent from the view that same-sex marriage is constitutionally protected.[46]

When the Court grants the next fundamental right, it will likely do so in a case where a person was deemed by a lower court to lack the right at issue. That future Supreme Court will implicitly say that liberty and justice did not exist before the Court deemed the litigant's right fundamental. Hence, we will apparently taste no liberty nor justice until the Court has identified the last fundamental right that someone has been deprived of. One wonders why

---

44. For more on the nature of concepts, see Eric Margolis & Stephen Laurence, *Concepts*, STAN. ENCYCLOPEDIA PHIL. (May 17, 2011), https://plato.stanford.edu/entries/concepts/.

45. 381 U.S. 479, 484–86 (1965) (holding that a law prohibiting married couples from using contraceptives unconstitutionally violated penumbral constitutional rights to privacy). Even if *Griswold* did not apply the same fundamental rights test that *Glucksberg* did, it seems unlikely that the *Glucksberg* Court doubted that *Griswold* would satisfy the current test. *See* Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997); *see also id.* at 762–65 (Souter, J., concurring).

46. Obergefell v. Hodges, 135 S. Ct. 2584, 2606, 2618 (2015) (Roberts, C.J., dissenting).

we're fighting so quixotically for liberty and justice when the Court implies that they have been and may always be unattainable.

The fundamental rights test in *Glucksberg* is derived from Justice Benjamin Cardozo's decision in *Palko v. Connecticut*.[47] In the relevant portion of *Palko*, Cardozo explained how to determine whether a right against the federal government under Fifth Amendment due process is also a right against state governments under the Fourteenth Amendment.[48] Cardozo argued that "freedom of thought and speech"[49] certainly qualifies; rights to think and to express ourselves are so fundamental that "neither liberty nor justice would exist if they were sacrificed."[50] While Cardozo did indeed pick out an important right, it seems doubtful that the absence of the right obliterates all liberty and justice. We can identify instances of liberty and justice even in, say, countries that sharply limit freedom of thought and expression.

Cardozo seemed to recognize the hyperbolic nature of his test for, just a bit later, he describes freedom of thought and expression as "the matrix, the indispensable condition, of *nearly* every other form of freedom."[51] In other words, he has already toned down the test from the candidate passage by saying not that *liberty* would not exist without freedom of thought and expression, but only that *nearly* every form of liberty would not exist. If liberty and justice really would not exist without freedom of thought and expression, Cardozo wouldn't need the "nearly" qualification.

The main problem, of course, is that Cardozo and others are focusing on the existence of liberty and justice rather than their quantities.[52] Amounts of liberty and justice spread across a spectrum. The more we restrict liberty, the less liberty we have. But the test of whether anything is a fundamental liberty cannot be whether or not its loss would eviscerate all other liberties.

Maybe the Court in *Glucksberg* was saying that if we had *no* fundamental liberties at all, liberty and justice would not exist. I doubt this is a true statement about the nature of liberty and justice, but even if it were, it's hard

---

47. 302 U.S. 319 (1937).
48. *Id.* at 323–25.
49. *Id.* at 326–27.
50. *Id.* at 326.
51. *Id.* at 327 (emphasis added).
52. *Cf.* Larry Alexander, *Scalar Properties, Binary Judgments*, 25 J. APPLIED PHIL. 85, 95–96 (2008). *See generally* Adam J. Kolber, *Smooth and Bumpy Laws*, 102 CALIF. L. REV. 655 (2014) [hereinafter Kolber, *Smooth and Bumpy Laws*]; Adam J. Kolber, *Smoothing Vague Laws*, *in* VAGUENESS AND LAW: PHILOSOPHICAL AND LEGAL PERSPECTIVES 275 (Geert Keil & Ralf Poscher eds., 2016) [hereinafter Kolber, *Smoothing Vague Laws*]; Adam J. Kolber, *The Bumpiness of Criminal Law*, 67 ALA. L. REV. 855 (2016) [hereinafter Kolber, *The Bumpiness of Criminal Law*] (arguing that criminal law often relies on all-or-nothing determinations rather than smooth input-output relationships between culpability and amount of punishment).

to understand the sort of test the Court would have established. Would we determine if something is a fundamental right by asking whether liberty and justice would still exist if we retained the right at issue but lost all other fundamental rights? To determine if we have a right to physician-assisted suicide, would we ask whether liberty and justice would still exist if we lost all other fundamental rights but retained the right to physician-assisted suicide? That would be a strange test indeed. The candidate statement would be bullshit for making it seem like it gave us a real test when no such thing was actually offered. More importantly, this does not appear to be the test the Court had in mind. Indeed, in *Palko*, the Court seemed to apply the fundamental rights test to freedom of thought and speech as a single right without considering all other fundamental rights that have or ever will be recognized.

To be sure, few issues rile people up as much as substantive due process. For this reason, the field is a bullshit magnet, as the Court is reluctant to speak precisely on such a controversial and potentially alienating topic. Thus, we are left with assertions about substantive due process that are practically incomprehensible. Even Cardozo, as I showed, didn't take his own test seriously, qualifying it almost immediately.

2. To Avoid Line Drawing

Perhaps the most important task for courts is to draw legal lines. Judges must consider conduct that harms or has other undesirable properties that fall along a spectrum and say "here the conduct is lawful, and here it is not." It's a notoriously difficult task because, even though many will agree that the properties of the activity fall along a spectrum of severity, they will disagree about where the legal dividing line should be. Sometimes it's easier to simply pretend that there is no plausible line to draw.

Example: McFall v. Shimp

In *McFall v. Shimp*,[53] McFall was dying from a bone marrow disease and sought an injunction to require his cousin, Shimp, to donate bone marrow that could save McFall's life.[54] The Court of Common Pleas in Allegheny County,

53. 10 Pa. D. & C.3d 90 (Ct. Com. Pl. 1978).

54. *Id.*; *see In re* A.C., 573 A.2d 1235, 1244 (D.C. 1990) (identifying the *McFall* parties as cousins).

Pennsylvania described Shimp's refusal as "morally indefensible"[55] but declined to order the injunction. McFall died soon after the court's decision.[56]

In defense of its view, the court recognized that "[t]he common law has consistently held to a rule which provides that one human being is under no legal compulsion to give aid or to take action to save another human being or to rescue."[57] So put, this description of the law overgeneralizes.[58] But even if the court correctly decided the law, we can still question the court's further claim that its solution is the morally appropriate one. The court arguably veers toward bullshit when it suggests that no other solution would be practical and consistent with our country's values:

> *Bullshit Candidate*: For our law to *compel* defendant to submit to an intrusion of his body would change every concept and principle upon which our society is founded. To do so would defeat the sanctity of the individual, and would impose a rule which would know no limits, and one could not imagine where the line would be drawn.[59]

Let's start with the second sentence. The court says that if it required Shimp to make the donation, the court would be crafting a rule that "would know no limits, and one could not imagine where the line would be drawn." This sentence seems like bullshit. Whether the rule would know no limits depends on the rule that is crafted. Lots of courts create rules and set limits; this court has simply declined to do so. For example, the court could have said, "Where we can save a life by minimally intruding on bodily integrity with no expectation of long-term negative effects, the state is permitted to conduct the minimal intrusion." That rule would set some limits on the state and not necessarily preclude the invasion in this case. Moreover, it would be consistent with other areas of the law that permit invasions of bodily integrity for arguably less important aims, as where the state is permitted to remove a bullet from a person against his will if the invasion is relatively minor and could have significant value in a criminal investigation.[60]

---

55. *McFall*, 10 Pa. D. & C.3d at 91.

56. MARK A. HALL, MARY ANNE BOBINSKI, & DAVID ORENTLICHER, HEALTH CARE LAW AND ETHICS 672 (8th ed. 2013).

57. *McFall*, 10 Pa. D. & C.3d at 91.

58. For example, one can be criminally prosecuted for failing to aid those to whom one owes a legal duty of care. *See, e.g.*, Jones v. United States, 308 F.2d 307, 310 (D.C. Cir. 1962).

59. *McFall*, 10 Pa. D. & C.3d at 91.

60. *See* Winston v. Lee, 470 U.S. 753, 760 (1985) ("The reasonableness of surgical intrusions beneath the skin depends on a case-by-case approach, in which the individual's interests in privacy and security are weighed against society's interests in conducting the procedure."); *cf.* United States v. Crowder, 543 F.2d 312, 316 (D.C. Cir. 1976) (finding no

Of course, none of this means that the court reached the wrong result. Maybe we need an absolute prohibition on such invasions. Or maybe we don't, but this case still fails to justify invasion. The point is that even if the case was correctly decided, the court *could have* crafted a more permissive rule with some limits, vague as they might have been. Indeed, we can certainly "imagine where the line would be drawn." If we could save a life with only ten hairs from Shimp's bushy scalp, the case might have and perhaps should have come out the other way. If the state can involuntarily tax our labor, draft us into military combat, remove criminal evidence from our bodies, and conduct unconsented-to autopsies on our remains, the state can plausibly remove a few pieces of hair against our will. Whether it ought to allow forced bone marrow donation is a tougher question but not because we are radically incapable of drawing limits.

Returning to the first sentence in the passage, the court says that the requested intrusion "would change every concept and principle upon which our society is founded." This sounds like overgeneralized bullshit. Would a law that permitted limited bodily intrusions change the principle that the federal government should have limited powers? That we have rights to free speech and free thought? That we shouldn't tax people unless they have representation in government? The candidate statement is clearly hyperbolic because a rule that permitted limited intrusions on bodily integrity would leave many of our founding concepts and principles untouched, at least in the minds of many, and the court says nothing to show otherwise.

Even if the court correctly precluded the intrusion here, it's not because an alternative conclusion would rip apart the fabric of society. Painting such a picture makes its choice seem binary (allow all bodily intrusions or none) perhaps to hide the availability of the more difficult task of setting boundaries along a spectrum.

3. To Sound Grand and Important

Judicial opinions sometimes like to wave the flag and sound high-minded in the process. You would think judges could do so while still trying to speak truthfully. But perhaps there's something about high-minded flag-waving rhetoric that seems more effective when the flag-waving is especially frenetic and the high-mindedness implausibly high.

---

violation of the Fourth Amendment when a bullet that could serve as evidence of a crime was surgically removed against the defendant's will, where the bullet was anatomically superficial and the surgical intervention comparatively minor).

Example: Hall v. Florida

In 1989, the Supreme Court held that the Cruel and Unusual Punishment Clause of the Eighth Amendment does not prohibit the execution of people with severe intellectual disabilities.[61] The Court changed its mind thirteen years later in *Atkins v. Virginia*[62] but never clarified precisely how severe an intellectual disability must be in order to take capital punishment off the table.[63]

At the time the Court considered *Hall v. Florida*, Florida law required a person to have an IQ of seventy or lower to be ineligible for the death penalty on grounds of intellectual disability.[64] Justice Anthony Kennedy wrote the majority opinion, which held that Florida's rigid approach creates too much risk that people with intellectual disabilities will be executed and must allow for more flexible measurements of intellectual disability.[65]

As Kennedy explained, the Eighth Amendment "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice."[66] Eighth Amendment law famously fills in the meaning of "cruel and unusual" punishment to protect human dignity by looking to "evolving standards of decency that mark the progress of a maturing society."[67] Immediately after this discussion, Kennedy offers the following:

> *Bullshit Candidate*: The Eighth Amendment's protection of dignity reflects the Nation we have been, the Nation we are, and the Nation we aspire to be. This is to affirm that the Nation's constant, unyielding purpose must be to transmit the Constitution so that its precepts and guarantees retain their meaning and force.[68]

Wait, you've just told us that the Eighth Amendment's protection of human dignity resides in the Cruel and Unusual Punishment Clause, and the meaning of the Clause is constantly evolving. Now you're saying that the Clause reflects "the Nation we have been, the Nation we are, and the Nation we aspire to be." If the meaning of "cruel and unusual" evolves, I see how it could reflect the Nation we are now and maybe even the nation we aspire to be. But if its meaning is evolving, it does so precisely so as *not* to reflect the

---

61. Penry v. Lynaugh, 492 U.S. 302, 340 (1989). The Court used the term "mental retardation" in cases prior to *Hall v. Florida*, 134 S. Ct. 1986 (2014), but stated in *Hall* that it was now using "'intellectual disability' to describe the identical phenomenon." *Id.* at 1990.

62. 536 U.S. 304, 321 (2002).

63. *Id.* at 317 (leaving the matter to states, at least at first, to set boundaries).

64. *Hall*, 134 S. Ct. at 1990.

65. *Id.*

66. *Id.* at 1992 (quoting Weems v. United States, 217 U.S. 349, 378 (1910)).

67. *Id.* (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).

68. *Id.*

nation we have been. Kennedy's statement is particularly absurd in the context of capital punishment for the intellectually disabled. Within a thirteen-year span, the Court held that we *can* execute those with severe intellectual disabilities and then held that we *cannot*. Are we to believe that the Eighth Amendment simultaneously reflects what we are, were, and aspire to be even when they contradict?

There is a sense, of course, in which Eighth Amendment law can reflect a contradictory past and present. To understand the Amendment, courts surely examine prior cases. In this limited sense, prior cases, even when they conflict, can be viewed as contributing to the overall meaning of the Amendment. But if Kennedy is merely noting that the meaning of the Amendment reflects various stages in its history, that will be true of practically all constitutional doctrine. So the first sentence in this bullshit-candidate passage is either false (since the doctrine cannot embody a contradiction) or patently obvious (since it applies to virtually all laws).

The second sentence in the bullshit-candidate passage states: "This is to affirm that the Nation's constant, unyielding purpose must be to transmit the Constitution so that its precepts and guarantees retain their meaning and force."[69] The referent of "this" is not entirely clear. It seems to refer to the preceding sentence which asserts that the Eighth Amendment's protection of dignity reflects what our nation was, is, and aspires to be. But how can that statement about the Eighth Amendment affirm what our "Nation's constant, unyielding purpose must be"? One is about the meaning of an amendment and the other is about a nation's purpose. Is our nation's purpose to transmit contradictory constitutional meanings? That may be the purpose of a constitutional law professor but not the purpose of a nation.

Even if we have a moral obligation to transmit the meaning of the Constitution, could it really be our nation's purpose to *constantly and unyieldingly* transmit such meaning? Aren't we also permitted to do other things like go swimming and play chess? It wouldn't be much of a country if its sole purpose is to remind others of the meaning of our Constitution (and if it were, given limited knowledge of the Constitution among the populace, we'd have to deem the project an abject failure).

Perhaps *one* of our nation's purposes is to transmit the meaning of our Constitution, but transmitting constitutional meaning seems more like an opportunity or even a duty rather than a purpose, let alone a constant and unyielding one. And it's odd to emphasize how we must transmit the meaning of the Constitution "so that its precepts and guarantees retain their meanings and force" when the very provision at issue is one whose meaning is meant

69. *Id.*

to constantly evolve. I guess we're supposed to constantly remind each other that the meaning of the Eighth Amendment is constantly evolving. Whatever exactly the passage means, Kennedy seems to have written purple-mountain-majestic prose rather than discernably truthful statements.[70]

4. To Be Memorable

Courts also bullshit to be memorable. Carefully qualified statements can be boring. Judges make their opinions more memorable and memetic by cutting out pesky restrictions and limitations.

Example: Schloendorff v. Society of New York Hospital

Schloendorff v. Society of New York Hospital is one of the most highly-cited bioethics cases because of a famous passage by then-Judge Benjamin Cardozo concerning the importance of obtaining patient informed consent prior to a medical or surgical intervention:

> *Bullshit Candidate*: Every human being of adult years and sound mind has a right to determine what shall be done with his own body . . . .[71]

The passage has been quoted in over 200 cases,[72] including several landmark Supreme Court bioethics decisions.[73] Nevertheless, it's clearly not true that *every* adult human has the right to determine what shall be done with his body. Prisoners do not, nor do those quarantined with contagious illnesses. And a Supreme Court opinion likely well-known at the time of

---

70. Nevertheless, scholars still celebrate the parts of the passage that resonate with whatever they take it to mean. For example, Robert Smith and Zoë Robinson believe the passage "powerfully" makes the point that "with knowledge and experience, society understands more fully the consequences of its collective actions; to say that the drafters of the Constitution did not intend for that experience to be imported into the protections against [invasions of] liberty misunderstands the enterprise of crafting an enduring Bill of Rights." Robert J. Smith & Zoë Robinson, *Constitutional Liberty and the Progression of Punishment*, 102 CORNELL L. REV. 413, 463–64 (2017).

71. Schloendorff v. Soc'y of N.Y. Hosp., 105 N.E. 92, 93 (N.Y. 1914), *abrogated by* Bing v. Thunig, 143 N.E.2d 3, 9 (N.Y. 1957).

72. Search of the quoted expression, WESTLAWNEXT, https://1.next.westlaw.com (narrowing search by "all federal & state cases" returns 208 cases as of Mar. 12, 2018).

73. *See* Vacco v. Quill, 521 U.S. 793, 803 n.7 (1997); Washington v. Glucksberg, 521 U.S. 702, 777 (1997); Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 269 (1990); Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 799 (1986) (citing Canterbury v. Spence, 464 F.2d 772, 780 (D.C. Cir. 1972)).

Schloendorff gave the government the right to involuntarily vaccinate.[74] In situations like these, the state can do things to the bodies of adults of sound mind without consent.[75]

Moreover, the quoted passage doesn't speak only of actions taken against someone's will. If we can "determine what shall be done with" our bodies, it sounds like we have a right to determine *what others do to us* in accordance with our wishes. Yet people seeking physician-assisted suicide do not have the choice to die with the assistance they'd like in most U.S. states, nor do people seeking euthanasia in any U.S. state. Similarly, almost no place in the United States allows adults (of sound mind or otherwise) to hire prostitutes for sexual services.

But while the passage might be bullshit, it's not the strongest candidate. Immediately after the semi-colon in the quoted passage it states, "and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages."[76] So, even though the quoted passage lacks limitations, the context of the statement makes certain interpretations off limits. We cannot expect judges to list every qualification of every statement they make. Readers can figure out some qualifications just from context.

Still, the statement is overbroad, perhaps consciously so. And I think the overbroad nature of the statement is part of what makes it memorable. Compare the actual passage to a more qualified version: "Most non-incarcerated, non-quarantined human beings of adult years and sound mind have a right to determine what shall be done to their own bodies (though, of course, they cannot always direct what others must do or are permitted to do to their bodies)." This version is not nearly as catchy. Had some other judge written that in 1914, you might never have even seen it, and if you had, you probably wouldn't have remembered it.

5. To Gloss Over Inconvenient Facts

In law school, students spend most of their time examining legal arguments. The actual practice of law, however, is quite heavily dependent on fact-finding. Courts, especially high-level appellate courts, often have the

---

74. Jacobson v. Massachusetts, 197 U.S. 11, 38 (1905).

75. My statement is qualified at least as to the vaccination example. In *Jacobson*, the Court held it lawful to fine Jacobson for refusing to vaccinate but did not address whether he could be physically compelled to vaccinate. *Id.*

76. *Schloendorff*, 105 N.E. at 93.

resources to fact-check their opinions. Sometimes, however, strategic bullshit papers over inconvenient facts.

Example: Strunk v. Strunk

A 1969 decision of the Kentucky Court of Appeals warrants mention for its brazen bullshit in dissent. In *Strunk v. Strunk*,[77] the court allowed a mentally incompetent twenty-seven-year-old ward of the state, said to have the mental age of a six-year-old, to donate a kidney to his dying brother.[78] The majority recognized that the brothers had a good relationship and that, by prolonging his sick brother's life, the ward would benefit from their continued close connection.[79] Judge Steinfeld objected in dissent:

> *Bullshit Candidate*: The majority opinion is predicated upon the finding of the circuit court that there will be psychological benefits to the ward but points out that the incompetent has the mentality of a six-year-old child. It is common knowledge beyond dispute that the loss of a close relative or a friend to a six-year-old child is not of major impact. Opinions concerning psychological trauma are at best most nebulous.[80]

Judge Steinfeld tells us that the death of a loved one has no major impact on a six-year-old, but I bet millions of hours of psychotherapy sessions would beg to differ. Furthermore, were a family member killed negligently, I doubt the judge would dismiss claims brought on behalf of surviving six-year-old children on the grounds that they did not experience major impact from the death.

Research on sibling death does indeed point to longstanding harms.[81] Granted, the matter may have been less clear in 1969. But even relative to when it was written, there are four egregious problems with the passage that collectively make it quite likely to represent bullshit. First, Judge Steinfeld makes a very counterintuitive assertion as though it is not only fact but common knowledge and not only common knowledge but common knowledge "beyond dispute." Second, presumably because it is so beyond dispute, the court offers no citation for its claim. What the assertion lacks in

77. 445 S.W.2d 145 (Ky. Ct. App. 1969).
78. *Id.* at 145–46.
79. *Id.* at 146–49.
80. *Id.* at 150 (Steinfeld, J., dissenting).
81. *See, e.g.*, Jason Fletcher et al., *A Sibling Death in the Family: Common and Consequential*, 50 DEMOGRAPHY 803, 817–18, 821 (2013) (finding detrimental effects "of sibling death with respect to educational attainment, establishing an independent residence, marriage, employment, and fertility," though surviving sisters were more likely to have such problems than surviving brothers).

factual support**,** it makes up for by implicitly insulting the intelligence of those who would dare to disagree. After all, what intelligent person would question a matter that is common knowledge beyond dispute? Indeed, only a child would be foolish enough to announce that the emperor wears no clothes. Third, the case concerns not a six-year-old child but a mentally incompetent twenty-seven-year-old. No single "mental age" can capture the varying ability levels of a mentally incompetent adult along cognitive and affective dimensions, and this should have been apparent, even in 1969. Fourth, Judge Steinfeld claims that "opinions concerning psychological trauma are at best most nebulous" but ignores the fact that his own assertion that six-year-olds experience no major impact from the death of a loved one is itself an "opinion[] concerning psychological trauma." Some skepticism about psychological conclusions may be perfectly reasonable, but the judge cannot exempt himself from that very same skepticism. He may be setting a high bar to justify taking an organ from an incompetent person, but his dissent is framed as though we'd be foolish to weigh factors any differently than he does.

In Part I, we saw how bullshit might be used strategically to bolster judicial discretion in the future, avoid line drawing, sound grand or important, be memorable, and gloss over inconvenient facts. In Part II, we'll see additional reasons for judicial bullshit (some of which overlap) and see how bullshit can be used to broaden the appeal of a landmark opinion that sought to settle the law surrounding what is still the most controversial bioethics topic of all.

II. BULLSHIT IN *PLANNED PARENTHOOD V. CASEY*

In its 1973 *Roe v. Wade* decision,[82] the Supreme Court held that women have a fundamental right to abortion.[83] The Court confronted the central issue in *Roe* again in 1992 in *Planned Parenthood v. Casey*. Though *Casey* may have weakened abortion rights relative to *Roe*, Justices Anthony Kennedy, Sandra Day O'Connor, and David Souter wrote a joint opinion that, joined in part by two others, formed a majority to reaffirm *Roe's* central holding that women have a fundamental right to abortion.[84] I focus on the joint opinion to see if the political heat surrounding abortion may have led to some strategic bullshit.

---

82. 410 U.S. 113 (1973).

83. *Id.* at 154.

84. 505 U.S. 833, 843, 853 (1992). Justices Harry Blackmun and John Paul Stevens concurred in the reaffirmation of the central holding of *Roe*. *Id.* at 923 (Blackmun, J., concurring in part and dissenting in part).

Given the contentiousness of the abortion debate and its importance, some readers may confuse the claim that a passage is bullshit with the claim that it's bad all things considered. The link between these claims is more tenuous than it may at first seem. A Justice who ardently supports rights to choose might best protect those rights with an opinion that cabins those views in order to maximize support among other Justices and the American public. If doing so requires bullshit, then some loss of transparency and analytical rigor may be worthwhile tradeoffs. I will say little about such tradeoffs except to draw attention to them. My point here is simply that whether you love or hate the substance of the joint opinion, you can still love or hate its apparent reliance on bullshit.

A. Rhetorical Flourish in the "Jurisprudence of Doubt" Passage

The joint opinion begins with a reflection on the unsettled nature of abortion law. Here are the first two sentences:

> *Bullshit Candidate*: Liberty finds no refuge in a jurisprudence of doubt. Yet 19 years after our holding that the Constitution protects a woman's right to terminate her pregnancy in its early stages, *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), that definition of liberty is still questioned.[85]

The passage states that liberty finds no refuge in a jurisprudence of doubt. But what is a jurisprudence *of* doubt? The term "jurisprudence" is more clearly deployed to speak of the field of study that addresses certain theoretical or philosophical issues related to law.[86] Here, however, the term refers to a body of law or legal principles, as when people speak of tort law or contract law jurisprudence. But what area of law is *about* doubt? What was actually in doubt was the state of the law concerning reproductive rights. The joint opinion could have spoken of reproductive rights jurisprudence being *in* doubt rather than being *of* doubt.

Putting aside the Court's peculiar wording, however, its intended meaning is false or at least hyperbolic. Contra the joint opinion's claim that liberty can take *no* refuge in a jurisprudence in doubt, liberty can in fact take *some* refuge. Most laws are uncertain to some degree. To the extent abortion rights were in doubt at the time of *Casey*, women had weaker liberty to abort. But weaker liberty is not the same as no liberty. Certainly those women who aborted during this period had more liberty than those living in countries that

---

85. *Id.* at 844 (plurality opinion).

86. *See, e.g.*, Andrei Marmor & Alexander Sarch, *The Nature of Law*, STAN. ENCYCLOPEDIA PHIL. (Aug. 7, 2015), https://plato.stanford.edu/entries/lawphil-nature/.

categorically prohibited abortion. And there are limits to how much any Supreme Court can limit future Supreme Courts. So if liberty finds no refuge in a jurisprudence containing any amount of doubt, then liberty will find no refuge after *Casey* either: abortion jurisprudence is still subject to the whims of current and future Justices.

Of course, one can easily dismiss the opinion's first sentence as merely a poor choice of words. But it is the first sentence of one of the most important opinions of the twentieth century; an opinion that addresses the most heated political issue of the last several decades and sets out what is still the governing law on the topic. The authors plausibly sacrificed precision for strategic reasons.

Indeed, if they were trying to be strategic, they may have succeeded. Consider how Linda Greenhouse compared a recent abortion rights case to the "aspirational rhetoric" of *Casey* in a *New York Times* op-ed:

> There is no poetry in the 40-page opinion [in *Whole Woman's Health v. Hellerstedt*] . . . . The dry, almost clinical tone could scarcely be more different from the meditative mood the Supreme Court struck the last time it stood up for abortion rights, in Planned Parenthood v. Casey, 24 years ago this week. "Liberty finds no refuge in a jurisprudence of doubt" was Justice Anthony M. Kennedy's mysterious opening line in that opinion.[87]

What the joint opinion sacrificed in precision, it apparently made up for in devotees. But it's easy to feel ambivalent about the tradeoff. Even Greenhouse seems ambivalent by the end of her piece:

> [Later,] I realized that while the court in Casey called upon "the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution," it didn't really work out. Maybe, after all, this is not a moment for poetry, but for facts.[88]

In dissent, Justice Scalia called out the joint opinion for its "jurisprudence of doubt" claim. He argued that the "undue burden" standard put forward by the joint opinion is so hard to pin down that it creates more doubt than we

---

87. Linda Greenhouse, *The Facts Win Out on Abortion*, N.Y. TIMES (June 27, 2016), https://www.nytimes.com/2016/06/28/opinion/the-facts-win-out-on-abortion.html. Justice Scalia, by contrast, was critical of the length and "epic tone" of the joint opinion which "suggest that its authors believe they are bringing to an end a troublesome era in the history of our Nation and of our Court." *Casey*, 505 U.S. at 1001 (Scalia, J., concurring in the judgment in part and dissenting in part).

88. Greenhouse, *supra* note 87.

had under *Roe*.[89] Hence, Scalia retorted, "[r]eason finds no refuge in this jurisprudence of confusion."[90] By contrast, I take the joint opinion's discussion of "doubt" to refer, first and foremost, to reduced doubts about the viability of the fundamental right to abortion, and on that score the authors succeeded (even if Scalia is right that the authors sowed confusion over the detailed implementation of the right). Whatever your take is on this debate, however, some judicial misstatements and indiscretions aren't bullshit; they're just generic mistakes. The joint opinion authors were not obviously bullshitting about their efforts to reduce doubt.

The second sentence in our bullshit candidate passage references *Roe's* holding that abortion is a fundamental right and then states that "that definition of liberty is still questioned." But the holding of *Roe* is not a "definition" of liberty. A definition of liberty would describe what we mean by the word "liberty." So while *Roe's* holding describes an aspect of our liberty under the Constitution, it is certainly not a definition of it. What the authors seem to mean is not that some definition of liberty is in doubt but rather that the validity of the Court's holding in *Roe* is in doubt. That more transparent description, however, reveals a less majestic, less powerful Court whose holdings can be questioned. Hazy talk of a *definition* of liberty downplays the limits of the Court's power.

B. Our Hands Are Tied in "Some of Us Find Abortion Offensive" Passage

The joint opinion addresses what I take to be one of the most important issues in all of jurisprudence: to what extent should judges allow their moral beliefs to influence their legal decisions? The authors would have us believe that there is a clear distinction between law and morality, and their job is only to consider the law. This is a view the Supreme Court repeatedly tries to make us believe,[91] and so variations on this bullshit can be found all over the place:

> *Bullshit Candidate*: Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot

89. *Casey*, 505 U.S. at 984–85 (Scalia, J., concurring in the judgment in part and dissenting in part).

90. *Id.* at 993.

91. *Cf.* Brian Leiter, *Constitutional Law, Moral Judgment, and the Supreme Court as Super-Legislature*, 66 HASTINGS L.J. 1601, 1601 (2015) (arguing that the Supreme Court acts as a "kind of super-legislature" that "essentially makes its final choice among the legally viable options based on the moral and political values of the Justices, and not simply on the basis of legally binding standards").

> control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code.[92]

I cannot argue in detail here why the passage is hard to take seriously. But let me hint at some reasons. A judge might try her best to avoid mixing law and morality by trying to resolve a case at bar solely in terms of the law. But as any first-year law student should recognize, the law underdetermines the answer to many disputes, especially in major constitutional law cases such as *Casey*. So judges inevitably fill in the gaps with their moral beliefs or personal preferences. Judge Richard Posner has rather candidly admitted to it: "I pay very little attention to legal rules, statutes, constitutional provisions . . . . A case is just a dispute. The first thing you do is ask yourself—forget about the law—what is a sensible resolution of this dispute?"[93] But even if Posner took more liberties than most judges, surely all judges fall somewhere on a spectrum as to their willingness to permit their moral beliefs or personal preferences to influence their decisions.

Indeed, if Brian Leiter is right, the moral beliefs (or personal preferences) of Justices are so important to their decisions that they ought to be addressed more explicitly in confirmation hearings because "political and legal insiders" know how much these views influence decisions:

> [A]ll political actors know that the Supreme Court often operates as a super-legislature, and thus that the moral and political views of Justices are decisive criteria for their appointment. This almost banal truth is, however, rarely discussed in the public confirmation process, but is common knowledge among political and legal insiders.[94]

If political and legal insiders know all of this, and surely the joint opinion writers are legal insiders, then there's reason to think that the Justices were either lying or at least bullshitting. Moreover, even if the Justices could truly prevent their personal views from dictating their legal decisions, as they suggest in the passage above, they have presumably used their moral code *in so limiting* their personal views. For on some moral views, it would be *immoral* not to use one's powers to influence such an important decision.

Sometimes we can fill in legal gaps not with personal or moral views but with predictions about how we think judges would decide an issue. A lawyer advising state legislatures about the constitutionality of abortion laws a year

---

92. *Casey*, 505 U.S. at 850.

93. Adam Liptak, *An Exit Interview with Richard Posner, Judicial Provocateur*, N.Y. TIMES (Sept. 11, 2017), https://www.nytimes.com/2017/09/11/us/politics/judge-richard-posner-retirement.html.

94. Leiter, *supra* note 91, at 1602.

prior to *Casey* could surely make predictions about the views of appellate judges. But even if lawyers can make predictions to advise clients and even if lower court judges can predict what appellate judges will do, Supreme Court Justices can't rely on predictions in the same way, especially in a case like *Casey* in which a single Justice can sway the outcome. A Justice cannot plausibly say, "I need to decide what the law *is* on abortion, so let me predict how *I* will in fact decide the case."

So, if Supreme Court Justices are not deciding by prediction, what are they doing? If you agree that existing law underdetermines the answer (and even if you don't agree as to abortion you are likely to agree in general), then you will likely agree that if judges are not deciding on purely self-interested grounds, they are deciding at least in part on moral grounds. Thus, it's hard to believe that the Justices are truly deciding *Casey* without appeal to their own moral codes.

The very wording in the joint opinion hints at the authors' bullshit where they state that their job is "to define the liberty of all." While language use varies, if a judge is merely determining the scope of a right under the law, we wouldn't ordinarily say the judge is *defining* liberty. One who defines a liberty seems to be to be one who takes on a legislative role; a role that is supposed to include direct consideration of moral issues.

Perhaps when the joint opinion authors state that their principles of morality "cannot control [their] decision," they mean that those principles can influence their decision but not be the sole determining factor. Such an admission, however, would mean that the Justices might well be allowing their moral views to substantially influence their decisions—a fact they are likely loath to admit and happy to bury between the lines. Thus, it seems that the joint opinion authors either never thought carefully about the passage or are deliberately projecting an unrealistic air of legalistic detachment from the controversial topic of abortion for fear of seeming partisan.

C. Hide Arbitrariness of Line Drawing in "Viability" Passage

The core bioethical question raised by *Casey* concerns when an entity is entitled to a right to life. Some think an embryo is ensouled at formation and immediately has a right to life. Others would grant a right to life at viability or birth. And some, including perhaps the joint opinion authors, believe that rights to life develop gradually as an embryo matures into a fetus and then an infant.[95]

95. *See* Kolber, *Smoothing Vague Laws*, *supra* note 52, at 282–86.

Recognizing that *Roe* permitted states to ban abortion entirely at the time of fetal viability, the joint opinion sought to offer a principled justification for drawing the same line. Aside from *stare decisis*, however, the Court had trouble mustering any substantive justification in favor of viability:

> *Bullshit Candidate*: [T]he concept of viability, as we noted in *Roe*, is the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman. Consistent with other constitutional norms, legislatures may draw lines which appear arbitrary without the necessity of offering a justification. But courts may not. We must justify the lines we draw. And there is no line other than viability which is more workable. To be sure, as we have said, there may be some medical developments that affect the precise point of viability, but this is an imprecision within tolerable limits given that the medical community and all those who must apply its discoveries will continue to explore the matter.[96]

If you carefully reread the prior passage, you'll see that it actually offers no moral justification whatsoever. It contains only the conclusory assertion that a realistic possibility of surviving outside the womb gives the state the right to override a woman's rights. Whatever you think of viability as a sensible place to cut off a mother's abortion right, you won't find a moral justification for it in this passage, a point that is seized on by Justice Scalia in dissent.[97]

Immediately after the candidate passage, the authors write: "The viability line also has, as a practical matter, an element of fairness. In some broad sense it might be said that a woman who fails to act before viability has consented to the State's intervention on behalf of the developing child."[98] Interestingly, this remark begins with "also" and "as a practical matter," so as to imply that the authors have already given a reason, presumably a theoretical reason, in defense of their position, even though no such reason can be found on careful

---

96. *Casey*, 505 U.S. at 870 (citations omitted).

97. *Id.* at 989 n.5 (Scalia, J., concurring in part and dissenting in part) ("The arbitrariness of the viability line is confirmed by the Court's inability to offer any justification for it beyond the conclusory assertion that it is only at that point that the unborn child's life 'can in reason and all fairness' be thought to override the interests of the mother. Precisely why is it that, at the magical second when machines currently in use (though not necessarily available to the particular woman) are able to keep an unborn child alive apart from its mother, the creature is suddenly able (under our Constitution) to be protected by law, whereas before that magical second it was not? That makes no more sense than according infants legal protection only after the point when they can feed themselves." (citations omitted)).

98. *Id.* at 870 (plurality opinion) (citations omitted).

reading. But at least this second remark about viability adds some substance. It asserts that the viability line is fair to the extent that a woman could be said at that point to have consented to the loss of the abortion right by not having previously exercised it.

The assertion, however, is never defended. It's not as though a woman knows precisely when a baby becomes viable (after all, doctors don't always know and the line has been shifting for decades). Moreover, any well-publicized date, so long as it is after a woman is aware she is pregnant would have a mere "element of fairness." Unfortunately, women don't always know when they are pregnant and the quality of whatever consent is deemed implicit only improves as more time elapses. So if viability plus one day benefits from some sort of implicit consent, viability plus two days will have only clearer indicia of consent and so on the more time that elapses. If the authors really wanted to draw lines surrounding consent, it would make more sense to start with actual research (or to call for research) into how women typically perceive their rights and obligations as pregnancies progress. But the authors seem happy to adopt viability as the pertinent cutoff merely because it has "an element of fairness," even though other dates might be fairer still.

It takes more than just inadequate reasoning, however, to label a passage as bullshit. And to be sure, the Court is addressing a very hard question. What makes this passage possible bullshit is that the authors assert that judges have to offer a justification for the lines they draw, thereby implying that they are offering a justification. Yet they really say nothing that could qualify as a justification. Not only do they not offer a justification, they do not offer one that is true "in reason and all fairness," except for baldly asserting that it is true in reason and all fairness.

None of this means that viability is the wrong place to draw the line. It simply means that the authors failed to offer a plausible justification for drawing the legal line where they did but created the illusion that they had. Of course, there may not be a strong justification for any particular line, but a line ought nevertheless be drawn. In that case, a court could transparently admit the arbitrariness of the line-drawing process rather than take great pains to emphasize the high quality of its non-existent argument.

In Part I, I used *McFall v. Shimp* to illustrate how courts bullshit to avoid line drawing. There, the court took a matter that could fall on a spectrum but arguably used bullshit to make it seem like it did not. In *Casey*, the Justices used the opposite strategy. In trying to determine when a human is entitled to a right to life, the joint opinion authors treated the matter as falling on a spectrum and purported to find an appropriate place to draw the line. To

justify their decision, however, they made bald assertions to artificially enhance confidence in the location of the line they selected.

D. Metabullshit in Plessy *Passage*

One way the joint opinion seeks to deflect responsibility, quite appropriately perhaps, is by relying on *Roe v. Wade* as precedent. In doing so, the joint opinion spends considerable time discussing when a watershed decision can be overturned.[99] In part of that discussion, the joint opinion looks at two watershed decisions that *were* overturned and explains why *Roe* does not warrant the same treatment.

The authors focus first on the infamous and influential decision in *Lochner v. New York*[100] which identified a constitutional right to freedom of contract.[101] That decision was overturned, we're told, because it led to cases such as *Adkins v. Children's Hospital* which found that a federal minimum wage law for women violated constitutional rights to freedom of contract.[102] The Depression taught "the lesson that seemed unmistakable to most people by 1937, that the interpretation of contractual freedom protected in *Adkins* rested on fundamentally false factual assumptions about the capacity of a relatively unregulated market to satisfy minimal levels of human welfare."[103] Furthermore, facts that "had premised a constitutional resolution of social controversy had proven to be untrue, and history's demonstration of their untruth not only justified but required"[104] the Court to overrule *Lochner*.

The joint opinion also tries to explain why the 1954 decision in *Brown v. Board of Education*[105] to overrule the 1896 decision in *Plessy v. Ferguson*[106] was inapposite in *Casey*.[107] In holding that separate is not equal,[108] *Brown* did not overrule *Plessy* simply because facts changed. The joint opinion does not assert that separate was equal in *Plessy* but was no longer equal in *Brown*. That might imply that *Plessy* was correct when decided, and the authors make clear that "*Plessy* was wrong the day it was decided."[109] They claim that what changed in *Brown* was the way the Court perceived the relevant facts:

---

99. *Id.* at 854–69.
100. 198 U.S. 45 (1905).
101. *Id.* at 53.
102. 261 U.S. 525, 560–62 (1923).
103. *Casey*, 505 U.S. at 861–62.
104. *Id.* at 862.
105. 347 U.S. 483, 495 (1954).
106. 163 U.S. 537 (1896).
107. 505 U.S. at 862–69.
108. *Brown*, 347 U.S. at 495.
109. *Casey*, 505 U.S. at 863.

> *Bullshit Candidate*: Society's understanding of the facts upon which a constitutional ruling was sought in 1954 was thus fundamentally different from the basis claimed for the decision in 1896. While we think *Plessy* was wrong the day it was decided, we must also recognize that the *Plessy* Court's explanation for its decision was so clearly at odds with the facts apparent to the Court in 1954 that the decision to reexamine *Plessy* was on this ground alone not only justified but required.
>
> *West Coast Hotel* [which overruled *Lochner*] and *Brown* each rested on facts, or an understanding of facts, changed from those which furnished the claimed justifications for the earlier constitutional resolutions. Each case was comprehensible as the Court's response to facts that the country could understand, or had come to understand already, but which the Court of an earlier day, as its own declarations disclosed, had not been able to perceive. As the decisions were thus comprehensible they were also defensible, not merely as the victories of one doctrinal school over another by dint of numbers (victories though they were), but as applications of constitutional principle to facts as they had not been seen by the Court before.[110]

Despite efforts to suggest the contrary, the joint opinion fails to adequately explain why *Lochner* was overruled because of a change in facts rather than, as in *Plessy*, a change in perceptions of facts. Nothing in the opinion states that, over time, markets changed the way they functioned. Hence, both *Lochner* and *Plessy* seem to have been overruled because of misperceptions of facts. This is important because if a precedent can be overruled not because of a change in facts but a change in the *perception* of facts, *Roe* opponents will argue that *Roe* should be overturned as well due to misperceptions. To them, *Casey* offered an opportunity to correct these misperceptions. In their minds, the fact that *Brown* represented an "application[] of constitutional principle to facts as they had not been seen by the Court before"[111] does nothing to normatively distinguish the *Plessy-Brown* context from the *Roe-Casey* context.[112]

---

110. *Id.* at 863–64 (citations omitted).

111. *Id.* at 864.

112. As Chief Justice Rehnquist discusses in dissent: "It appears to us very odd indeed that the joint opinion chooses as benchmarks two cases in which the Court chose *not* to adhere to erroneous constitutional precedent, but instead enhanced its stature by acknowledging and correcting its error, apparently in violation of the joint opinion's 'legitimacy' principle." *Id.* at 959. (Rehnquist, C.J., concurring in part and dissenting in part); *see id.* at 961 (arguing that the doctrinal shift accomplished in *West Coast Hotel* was attributed by the Court to a change in its view about the Constitution, not about economics).

Perhaps the joint opinion authors believed that *societal changes* in perceptions were more dramatic in the overturning of *Lochner* and *Plessy* than in the potential overturning of *Roe*, but that seems inconsistent with the authors' view that *Plessy* was wrong when it was decided. If *Plessy* was wrong when it was decided, it was wrong before societal perceptions shifted. Thus, the candidate passage is perhaps showing insufficient concern for the difference between facts and the perception of facts and insufficient concern as to whether changes in perceptions of facts can serve to meaningfully distinguish *Casey* from predecessor cases.

If the passage is viewed as bullshit, the broader section in which it appears may represent metabullshit. For in nearby discussion, the Court seems suspicious of the genuineness of the argument in *Plessy*. After describing the *Plessy* Court's stated view that facilities can be both separate and equal, the joint opinion implicitly raises the question of "[w]hether, as a matter of historical fact, the Justices in the *Plessy* majority believed this or not."[113] Hence, the authors are suggesting that the *Plessy* majority may have lied or bullshitted when it asserted that separate is equal. In other words, sections of the joint opinion may constitute metabullshit: bullshit that complains about bullshit by earlier Courts.[114]

E. Seeming Especially Principled in "Legitimacy" Passage

The joint opinion makes the further argument that its approach is not only consistent with stare decisis but that a contrary conclusion "would seriously weaken the Court's capacity to exercise the judicial power and to function as

---

113. *Id.* at 862 (plurality opinion).

114. Alternatively, the Court in *Plessy* might have been lying rather than bullshitting, depending perhaps on how you interpret Justice John Marshall Harlan's famous dissent implying that the Justices in the majority might have been "wanting in candor":

> It was said in argument that the statute of Louisiana does not discriminate against either race, but prescribes a rule applicable alike to white and colored citizens. But this argument does not meet the difficulty. Every one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons. Railroad corporations of Louisiana did not make discrimination among whites in the matter of accommodation for travelers. The thing to accomplish was, under the guise of giving equal accommodation for whites and blacks, to compel the latter to keep to themselves while traveling in railroad passenger coaches. No one would be so wanting in candor as to assert the contrary.

Plessy v. Ferguson, 163 U.S. 537, 556–57 (1896) (Harlan, J., dissenting), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

the Supreme Court of a Nation dedicated to the rule of law."[115] The reason, the authors assert, is that:

> *Bullshit Candidate*: The Court's power lies . . . in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands.
>
> . . . .
>
> . . . The underlying substance of this legitimacy is of course the warrant for the Court's decisions in the Constitution and the lesser sources of legal principle on which the Court draws. That substance is expressed in the Court's opinions, and our contemporary understanding is such that a decision without principled justification would be no judicial act at all. But even when justification is furnished by apposite legal principle, something more is required. Because not every conscientious claim of principled justification will be accepted as such, the justification claimed must be beyond dispute. The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make. Thus, the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.[116]

As a preliminary matter, the claim that the Court's power depends on its substantive legitimacy is false, except quite indirectly. A court's power lies not in its actual legitimacy but in perceptions of its legitimacy. Suppose, for example, that a duly elected President of the United States is secretly murdered by his heretofore unknown identical twin. If the twin takes the place of the legitimate president, the twin will have as much power as the legitimate president would have had, despite his illegitimacy, so long as he is *perceived* as legitimate. The joint opinion appropriately goes on to discuss *perceptions* of legitimacy, but the claim that power depends on actual legitimacy is arguably fairly subtle bullshit: it makes the joint opinion seem more principled and less conniving.

An even clearer instance of bullshit is the joint opinion's claim that "a decision without principled justification would be no judicial act at all." Surely judges have made unprincipled determinations in the past. Do authors

115. *Casey*, 505 U.S. at 865.
116. *Id.* at 865–66.

of the joint opinion really believe that these judges' determinations were not judicial acts? The authors have already said that they believe *Plessy* was wrong the day it was decided. But it is hard to believe that *Plessy* did not involve a judicial act. In other words, the authors seem to stake out a very non-positivist understanding of what a judicial act is[117]—one that I doubt they actually take seriously, making it a prime candidate for the bullshit label.

The quoted passage is also noteworthy for the constantly shifting standard to which the Supreme Court is said to be held. First it says that the justification claimed by the Court "must be beyond dispute," but that's clearly an unrealistic standard. The authors surely knew at publication that their own colleagues on the Court were dissenting, making it hard to believe the authors intended such a high bar. Indeed, two sentences later, the authors state that the principled character of their decisions must be "sufficiently plausible to be accepted by the nation." So they quickly downgraded their obligation from justification beyond dispute to justification that is sufficiently plausible. That's a big change in a small amount of ink.

Finally, let's return to the overall role of bullshit in *Casey*. One might expect an opinion about abortion rights to address issues such as: what entitles an entity to a right to life? When in our development from an embryo to a corpse are we entitled to such rights? Yet, for good reason, the joint opinion says little about these topics of fundamental importance: they know the authors cannot rest their abortion rights opinion on their philosophical prowess, for even professional philosophers lack the prowess to write about abortion in a way that will satisfy the masses. Hence, the joint opinion fills the void with strategic bullshit: the authors wax philosophical even when the content of their message is unclear, argue that stare decisis ties their hands, cloak their line drawing with a non-existent justification, and try to seem more principled than perhaps they really are.

That said, it's not obvious that the opinion would necessarily be better without all the bullshit. If long-time court follower Linda Greenhouse was enraptured by the authors' "poetry,"[118] we can expect that many others were too. And the advantages of writing poetry over hardcore philosophical analysis are abundantly clear when dealing with an issue as controversial and destined-to-disappoint as abortion: when you can't provide careful, precise philosophical answers, razzle and dazzle the crowd. If you believe that women should have a right to abort, then you may well find razzle and dazzle

---

117. *See* Jules L. Coleman & Brian Leiter, *Legal Positivism*, *in* A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 228, 229 (Dennis Patterson ed., 2d ed. 2010) (stating that the "central tenet" of positivism according to H.L.A. Hart is "that there is a difference between the way the law is and the way it ought to be").

118. Greenhouse, *supra* note 87.

better than flat and unsatisfying when razzle and dazzle are required to generate a coalition. We can save "flat and unsatisfying" for scholars.

The need to build coalitions points to an important reason we might forgive judges for writing about bioethical topics with less care than analytic philosophers. Few traditional papers in philosophy are written by more than one or two authors. By contrast, judges often need to convince other judges to join an opinion (or not overrule an opinion). U.S. Supreme Court cases are usually heard by nine Justices, and the need to repeatedly edit opinions to develop coalitions may well prove particularly bullshit conducive. Justices may settle for a Frankensteinian mass of words because they care more about reaching what they perceive as the best ultimate result than reaching the best-explained result. Some supreme judicial bullshit may be an unfortunate side effect of trying to dispense justice by committee.

CONCLUSION

I have given numerous instances of "candidate" bullshit. It's hard to be more definitive than that since we cannot easily read judges' minds, and Frankfurt's test of bullshit requires us to. In some examples I give, judges probably were not bullshitting; they just slipped up in one way or another. In others, judges probably were bullshitting: they knowingly wrote with inadequate attention to the truth or falsity of what they were communicating while recognizing at some level that they were doing so.

The most important value jeopardized by judicial bullshit is truth. Bullshit is insufficiently concerned with truth, so it risks reducing our knowledge of how the world really is. While asking judges for truth may be unrealistic, especially in heated bioethics cases, we can still demand transparency. When courts are unsure, better perhaps that they admit their limitations than obfuscate with flowery or confusing language.

On the other hand, some important values counsel against flat prohibitions on judicial bullshit. Bullshit can build consensus. Even if people won't agree on the values and metaphysical premises underlying some substantive issue, they may agree to bullshit that has multiple interpretations each of which pleases a different contingency. Bullshit can also bolster confidence in some conclusion. We sometimes mistake hard-to-understand prose for deep and meaningful prose. The boost in confidence may be illusory but perhaps some illusions are valuable nonetheless. (Bullshit may also be a scare resource: the more it's used, the more reason we have to identify it as such, thereby weakening its ability to build consensus and bolster confidence.)

Some empirical inquiries could shed important light on the relative merits and demerits of bullshit. How often do judges bullshit and for which reasons?

Is it more common in certain areas of law? Do some judges do it more often than others? What distinguishes judges who frequently bullshit from those who don't? Answers to such questions might help us determine if bullshit should be frowned upon always, never, or on a case-by-case basis.

In short, if justice is principally about reaching the right result, maybe it's okay for judges to bullshit strategically. But if justice is principally about democratic transparency and reaching the right result for the right reasons, bullshit is more suspect. I can only hope to have offered food for thought on these deeper questions.