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Who They Are and What They Want

On November 1, 1962, Estelle Griswold, the executive director of the Planned Parenthood League of Connecticut, and Charles Lee Buxton, the head of obstetrics and gynecology at Yale University, opened a clinic in New Haven, Connecticut. The clinic was one of several that Planned Parenthood had opened in Connecticut over the prior few decades. Like the other clinics, this one's purpose was to provide birth control information to married couples and dispense contraceptives to married women.

Within days of opening the clinic, Griswold and Buxton were arrested for violating an 1879 Connecticut statute, which prohibited any person from using "any drug, medicinal article or instrument for the purpose of preventing conception."[1] Violators could be fined or imprisoned for up to a year, and Connecticut law stated that "[a]ny person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender."[2] Griswold and Buxton were found guilty as accessories to violating the anti-contraceptive statute and fined $100 each. The Appellate Division of the Circuit Court and the Supreme Court of Errors in Connecticut both affirmed their convictions, so Griswold and Buxton appealed their case to the US Supreme Court.

When Griswold and Buxton opened the clinic in New Haven, they were well aware of the anti-contraceptive statute. In fact, one of their goals in opening the clinic was to provoke a legal action that would allow them to challenge the archaic Connecticut law. Though once fairly common in the United States, Connecticut's 82-year-old ban on contraceptives was one of only two such laws still in place in 1961. In the preceding decades, several doctors and patients had brought challenges to the law, but those

challenges had failed on procedural grounds.[3] In the most recent case, *Poe v. Ulman*,[4] Buxton and his patients had asked the Supreme Court to invalidate the statute, but their lawsuit was deemed unripe because the law had not actually been enforced against them. With their arrest and conviction, Griswold and Buxton were now positioned to directly challenge the constitutionality of the anti-contraceptive law.

In their appeal to the Supreme Court, Griswold and Buxton argued that the Connecticut statute violated the constitutional right to privacy. The US Constitution does not explicitly guarantee a right to privacy – indeed, the word "privacy" does not appear anywhere in the Constitution's text. Yet, in the preceding years, several constitutional scholars had come to believe that a right to privacy could be inferred from various constitutional provisions. The First Amendment Free Speech and Free Assembly Clauses protect the "freedom to associate and privacy in one's associations"; the Fourth Amendment Search and Seizure Clause and the Fifth Amendment Self Incrimination Clause protect "the sanctity of a man's home and the privacies of life."[5] The Fourteenth Amendment prohibits the state from depriving a person of "liberty" without "due process of law," and this clause had been interpreted to protect various fundamental personal liberties not explicitly listed in the text. Moreover, the Ninth Amendment says that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people," which suggests the Constitution may indeed protect certain rights not enumerated in the text itself. If so, it may protect a right to privacy that includes the use of contraceptives in a marital relationship. But would the Supreme Court agree with this novel legal theory?

The question raised by *Griswold v. Connecticut* prompted one of the most fundamental, consequential, and enduring debates in American constitutional law. If Griswold and Buxton were right, the Constitution may protect a wide range of private, intimate, and personal behavior that had long been outlawed throughout the United States. How far would such a right to privacy extend? Would it protect contraceptive use outside of marriage? What about other private sexual acts? Would privacy include all intimate decisions related to family and procreation, such as the right to abort a child? What about the right to suicide or drug use? Such an interpretation might spark a revolution in the Constitution's protections for a wide variety of behavior. But it might also empower judges to subject democratic majorities to their will and impose their own values on the public. How would judges decide which rights were truly fundamental? How could one determine if judges were

protecting constitutionally enshrined rights or inventing new ones out of whole cloth? On the Court, this critical debate played out between the two most senior justices: Hugo Lafayette Black and William Orville Douglas.

Black and Douglas were similar in many ways. They both had political backgrounds (Black was a US senator; Douglas was chairman of the Securities and Exchange Commission), and both harbored presidential aspirations, even after joining the Court.[6] Both were lifelong Democrats, appointed to the Court by Franklin Roosevelt, and regarded as liberals throughout their careers. Both justices shared a constitutional philosophy in which the Court generally deferred to the government with regard to economic regulations but strictly enforced protections for civil liberties. They were both well known for their strong stance on First Amendment freedoms, and they frequently signed each other's dissenting opinions in free speech cases.[7] Indeed, out of the 2,595 cases that Black and Douglas heard together on the Supreme Court, they voted together almost 80 percent of the time.[8]

Yet, the two long-time allies broke sharply in *Griswold v. Connecticut*. In the Court's conference discussion, Black firmly rejected Griswold's argument: "The right of husband and wife to assemble in bed," he declared, "is a new right of assembly to me."[9] But Douglas disagreed, insisting that the First Amendment protected the freedom of association, and the Court had interpreted that freedom to include a variety of activities on the periphery of association, including the right to travel and the right to send a child to a nonpublic school. The same logic applied here, Douglas argued, because there is nothing more personal than the marital relationship.[10] Douglas's argument won the day: The justices split 7–2 in Griswold's favor, and Chief Justice Earl Warren assigned Douglas to write the opinion of the Court. Douglas's initial draft was brief yet unapologetically bold:

> The association of husband and wife is not mentioned in the Constitution, nor in the Bill of Rights … But it is an association as vital in the life of a man or woman as any other, and perhaps more so … We deal with a right of association as old as the Bill of Rights, older than our political parties, older than our school system. It is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred.[11]

However, what Douglas's draft offered in rhetorical flourish, it lacked in legal substance – at least in the eyes of Justice William J. Brennan Jr. and his clerk, Paul Posner, who were privately shown a copy of the opinion before it was circulated to the full Court. At Posner's suggestion, Brennan

sent Douglas a memo urging him to adopt a broader legal framework to justify the decision:

> Instead of expanding the First Amendment right of association to include marriage, why not say that what has been done for the First Amendment can also be done for some of the other fundamental guarantees in the Bill of Rights? In other words, where fundamental rights are concerned, the Bill of Rights guarantees are but expressions or examples of those rights, and do not preclude applications or extensions of those rights to situations unanticipated by the framers.[12]

Douglas followed Brennan's suggestion and revised his draft. The opinion ultimately adopted by the Court held that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."[13] The right to privacy, the Court ruled – including the right of married couples to use contraceptives – was among those penumbras. Thus, in two senses, Douglas demonstrated his openness to change in *Griswold*: He was open to changing the Court's jurisprudence to protect the use of contraceptives, and he was open to changing the logic he used to arrive at that conclusion. Justice Black vehemently dissented.

Why did Black and Douglas split in *Griswold*? As one might expect, given his liberal predisposition, Justice Black was no great fan of the Connecticut law. In fact, his dissenting opinion emphasized that he did not believe the law was "wise" or "good" policy. In fact, he "fe[lt] constrained to add that the law is every bit as offensive to me as it is to my Brethren of the majority."[14] In private, he called the law "abhorrent, just viciously evil."[15] However, Black nonetheless rejected the majority's creative logic finding the law unconstitutional: "I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision."[16] Thus, Black concluded that his fellow justices were changing the Constitution's meaning in order to reject a law of which they personally disapproved. His opinion essentially boiled down to a rejection of such changes:

> I realize that many good and able men have eloquently spoken and written, sometimes in rhapsodical strains, about the duty of this Court to keep the Constitution in tune with the times. The idea is that the Constitution must be changed from time to time, and that this Court is charged with a duty to make those changes. For myself, I must, with all deference, reject that philosophy. The Constitution makers knew the need for change, and provided for it. Amendments suggested by the people's elected representatives can be submitted to the people or their selected agents for ratification. That method of change was good for our Fathers, and, being somewhat old-fashioned, I must add it is good enough for me.[17]

The last line was a paraphrase of the traditional Gospel song, "Old-Time Religion" ("Give me that old time religion, it's good enough for me!"). And in that line hides an important clue explaining the clash between Black and Douglas. In order to understand *what they did*, one must understand *who they were*.

Hugo Lafayette Black was born in 1886 in Clay County, Alabama – a poor, rural, and isolated region near the Appalachian foothills. His mother was a thoroughly devout Baptist – indeed, the Bible was the only book she ever read to him.[18] His father had fought for the Confederacy during the Civil War and named his oldest son Robert Lee.[19] Black's father also drank heavily, and the memories of his father's drinking problems instilled in Black a lifelong skepticism toward alcohol.[20] Black attended a small country high school with no library or study facilities,[21] but he was expelled for breaking a switch that a teacher was using to discipline his sister, and he never graduated.[22] Nonetheless, Black attended the new University of Alabama Law School, which had only two professors at the time.[23] After graduating, he was appointed as a local police court judge, elected district attorney, and later worked as a personal injury lawyer.[24] As an adult, Black maintained his religious devotion, serving as a Sunday school teacher and an organist in his Baptist church.[25]

In 1923, Black joined the Ku Klux Klan. He later minimized his participation in the Klan, claiming he "went to a couple of meetings and spoke about liberty," but, in actuality, during his first race for the Senate, Black marched in parades, spoke at numerous meetings, and dressed in full Klan regalia.[26] Although he occasionally protested the Klan's illegal and violent activities, he nonetheless remained a member in the hopes of attaining higher political office.[27] Asked years later by one of his clerks why he had joined, he answered simply: "Why son, if you wanted to be elected to the Senate in Alabama in the 1920s, you'd join the Klan, too."[28]

Despite his limited education – or perhaps because of it – Black relished reading, especially classics, such as Shakespeare, Dickens, Enlightenment philosophies, and the works of the Founding Fathers.[29] "The experience of communing with original texts, along with his childhood reading of the Bible, helped Black develop the rudiments of a strict constructionist judicial philosophy. Judicial subjectivity, he believed, was the greatest evil, and subjectivity could be avoided by forcing judges to study the text and original understanding of the Constitution."[30] His fidelity to the Constitution and to his principles, like his religious faith, was unflinching. Even in negotiations with other justices, Black "felt less free than Douglas to

change a position after he made a commitment," and he held steadfastly to his textualist dogma throughout his time on the Bench.[31]

Regardless of their ideological similarities, Black's principled inflexibility and legalistic purity were anathema to Justice Douglas, who "came to see Black as a moralistic prude and lamented what he considered Black's jurisprudential rigidity."[32] And Black's rigid tendencies only became stronger as he grew older. Indeed, his colleagues noted an increasing lack of "openness," "flexibility," and "receptivity to new ideas."[33] While Black was strict, rigid, and dogmatic, Douglas was open, flexible, and creative.

William Orville Douglas was born in 1898 in Otter Tail County, Minnesota. He was raised by his mother to be deeply ambitious, coveting the presidency throughout his lifetime.[34] His political ambition often prompted him to change his policy positions and, in some instances, even details about his own life in hopes of advancing his career. (For example, in his first autobiography, he described the intestinal colic he suffered as a child as an undiagnosed case of polio in hopes that the similarity to Franklin Roosevelt might aid him in a future campaign.[35]) He distinguished himself at Whitman College and then put himself through Columbia Law School. After he graduated, Columbia hired him to teach corporate law, and Douglas soon earned a reputation as the "finest law teacher in America" and a pathbreaking legal scholar.[36] After he joined the Court, many – including Black – viewed him as a borderline genius.[37]

Whereas Black was religious and moralistic, Douglas was brash and scandalous. Despite his professed reverence for the "enduring," "vital," and "sacred" institution of marriage, Douglas was on his third marriage when he penned the opinion in *Griswold*. He had met his current wife two years earlier when she was a 23-year-old college student (Douglas was 64 at the time); within a year, he would leave her for his fourth wife, a 20-year-old waitress he met while vacationing.[38] Indeed, throughout his life, Douglas was prone to incessant womanizing as well as binge drinking and self-destructive behavior. Justice Felix Frankfurter once called him "the most cynical, amoral character" he had ever known.[39]

Douglas's disdain for convention also shaped his professional life. "Douglas was contemptuous of the norms of the Court and of colleagues he considered intellectually slow."[40] His work was marked by "disinterest and carelessness," and some "wondered on occasion whether he was mentally absent."[41] Early in his career, when he was still angling for the vice-presidency and, ultimately, the White House, he often changed his positions, seemingly for political gain. When he abandoned those

ambitions after the 1960 election, "Douglas became more romantically aggressive in his defense of the principle that individuals should not blindly follow convention, but should be free to assert themselves in the face of disapproval."[42] Yet, whether he was contorting his principles for political expediency (to the frustration of his colleagues) or rebelliously defending individual liberty (against popular pressures), Douglas was always willing to defy the status quo. He was ever the creative thinker, pressing the envelope of the Court's role in American life. Near the end of his career, he no longer even bothered to pretend that he was constrained by legal precedents or conventional legal norms. In short, whereas Black felt a deep allegiance to consistency, Douglas was always open to change – in wives, in political positions, and, most certainly, in the law.

Thus, upon closer reflection, the split between Black and Douglas in *Griswold* may not be so surprising. The conventional, rigid Black balked at breaking with the Court's tradition because he could not square the right to privacy with his narrow devotion to his "textualist creed."[43] In contrast, Griswold's argument found sympathetic ears in "the freewheeling abstract expressionism represented most flamboyantly by Douglas."[44] In other words, in order to fully understand the divergence between Black and Douglas, one must look beyond their partisan affiliation, political ideology, and institutional context. To fully understand the justices' behavior, one must understand their personalities.

How do US Supreme Court justices make decisions in cases such as *Griswold*? What factors motivate and influence their behavior? For more than a half-century, legal scholars and social scientists have grappled with these questions, often arriving at disparate conclusions. The most prominent explanations of the justices' behavior can be grouped into three categories: legal theories, social-psychological theories, and economic theories.

Legalist Approaches. Traditional legal scholars often describe judicial behavior by reference to a theory known as legalism or formalism. In this view, the act of judging is a technical process in which judges mechanically apply preexisting laws to a set of specific facts in the case before them.[45] As Chief Justice John G. Roberts Jr. explained in his confirmation hearings, judges are like umpires in a baseball game: "Umpires don't make the rules; they apply them … it's my job to call balls and strikes and not to pitch or bat."[46] Or, as Alexander Hamilton eloquently explained in

The Federalist Papers, "judges possess neither force nor will, but merely judgment."[47]

In most cases, the application of law to facts is relatively straightforward. If the law says the speed limit is 55 miles per hour and a defendant was driving at 60 miles per hour, then the defendant violated the law. However, sometimes judges must answer more complicated legal questions in order to apply the law, especially in cases involving the US Constitution. The meaning of 55 miles per hour might be perfectly clear, but what do phrases like due process, equal protection, or freedom of speech mean? Is the death penalty a cruel and unusual punishment? Does a prayer at a high school graduation constitute an establishment of religion? And what exactly does it mean for Congress to regulate commerce among the several states? In the legalist view, when judges encounter ambiguous legal questions, such as these, they answer by applying a neutral method of interpretation, such as originalism or textualism. Therefore, judges do not exercise independent discretion; they systematically apply a process of legal interpretation based on neutral principles of law.

Legalism offers a fairly accurate description of what *most* judges do *most* of the time. However, Supreme Court justices are not most judges. Of the millions of legal actions filed in the United States each year, only a tiny fraction ever reach the US Supreme Court. In fact, for the last decade, the justices typically hear fewer than a hundred cases each year. Accordingly, they focus their attention on the most contentious cases involving the most important, complex, and ambiguous legal questions. Moreover, the so-called neutral interpretive methods, such as originalism or textualism, generally require substantial subjective interpretation and rarely provide clear answers to any question before the Court. Far from a mechanical process in which judges predictably follow a common legal craft, these methods of interpretation require the justices to use their discretion.

Moreover, all judges – but especially US Supreme Court justices – undoubtedly exercise some discretion on a regular basis. In fact, even the most clear-cut legal questions allow for discretion, and that discretion introduces the possibility of personal bias. Just as a hometown umpire might tend to see a larger strike zone when a rival batter comes to the plate, so too a judge may see special reason for leniency when a sympathetic defendant is charged with speeding. The opportunities for personal biases to influence decision-making are even greater when the legal questions at stake are inherently ambiguous. Thus, it should come as no surprise that the media, commentators, and academics often describe Supreme Court justices as liberal or conservative based on their tendencies

to make liberal or conservative decisions. Accordingly, at its core, legalism fails to account for the most basic facts about judging on the US Supreme Court: The justices frequently disagree, they disagree in predictable ways, and (believe it or not) they are human beings who are susceptible to all of the influences and biases that affect other human beings.

Social-Psychological Approaches. The human aspect of judging is the starting point for social-psychological theories of judicial behavior.[48] These theories emphasize the importance of individual differences, such as demographic characteristics,[49] life experiences,[50] role orientations,[51] and ideological attitudes,[52] in shaping judicial decisions. These approaches, though distinct, share a common understanding of how people make choices: Individuals possess distinct characteristics, and they respond to stimuli based on those characteristics. Accordingly, judges' choices are simply idiosyncratic responses to the stimuli presented in the cases they hear.[53]

These individual characteristics may influence judges' decisions in specific and nuanced ways. For example, judges who have daughters may be more sympathetic to plaintiffs in sex discrimination cases than judges who only have sons.[54] But for the most part, judges' individual characteristics are thought to influence their behavior by shaping their ideological policy preferences.[55] That is, certain characteristics, such as judge's race, political party, or religion, tend to be associated with more liberal or conservative policy preferences, and it is these policy preferences that are thought to genuinely drive the judges' decision-making. This "attitudinal" model simplifies the social-psychological approach by arguing that US Supreme Court justices base their decisions solely on their personal policy preferences. The most prominent advocates of this view, Jeffrey Segal and Harold Spaeth, succinctly summarize the attitudinal model: "[Chief Justice William H.] Rehnquist vote[d] the way he [did] because he [was] extremely conservative; [Justice Thurgood] Marshall voted the way he did because he was extremely liberal."[56]

The notion that judges base their decisions on their own policy preferences was once a highly controversial idea in the legal academy, and it is still disputed by some judges, lawyers, and law professors.[57] However, beginning with the legal realist movement in the early twentieth century, numerous scholars have convincingly established that judges do not mechanically apply neutral principles of law to case facts. Instead, judges often make decisions based on the same ideological and policy considerations that motivate legislative and executive decision-makers.[58] In fact, among social scientists studying judicial behavior, the claim that

judges make decisions based (at least partially) on a desire to influence policy is now so widely accepted that proponents of the view are sometimes criticized for attacking a straw man.[59]

Nonetheless, the degree to which judges pursue policy goals varies across judges. A variety of factors "dampen the ideological ambitions of lower court judges," including "caseload pressures, the threat of reversal or eventual overruling (and so of not having the last word), desire for promotion, a different case mix, and lower visibility."[60] In contrast, US Supreme Court justices decide which cases to hear, tend to focus on important and controversial cases, cannot be promoted to a higher court, and are far more visible than any other type of judge. Consequently, US Supreme Court justices are the judges most likely to pursue their own ideological preferences.[61]

Yet judges may also vary in attributes that influence their behavior without shaping their policy preferences. Dating back to the early twentieth century, some scholars have argued that judges are influenced by their individual personalities.[62] For example, judges' self-esteem may be associated with judicial activism, the decision to enter politics, or their understanding of a judge's proper role.[63] Judges' birth order may influence their policy preferences and willingness to exercise judicial review by inducing particular childhood roles.[64] And personality traits may be associated with interpersonal influence and leadership styles on courts.[65] Yet, as James Gibson emphasized more than three decades ago, "[t]he amount of attention given personality attributes is not commensurate with the potential influence of these variables."[66] That sentiment still rings true today. In fact, "[s]ince 1980, there has been a slow decline in attention to psychology" in courts-related research.[67]

Economic Approaches. Beginning in the 1990s, economic (sometimes called "strategic") models replaced social-psychological theories as the predominant approach to studying judicial behavior. Economic models depict judges as rational actors who strategically seek to maximize their utility; that is, when confronted with an array of options, judges make the choice they believe will best serve their objectives. This approach offers a comprehensive theory of judicial decision-making. Judges are not simply black boxes who spit out responses to stimuli based on their characteristics; they are rational human beings trying to pursue their goals. Moreover, economic theories highlight the interdependent nature of judicial behavior. Supreme Court justices do not naively pursue their policy goals; they rationally anticipate the actions of their fellow justices,