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Melissa Murray*

Sexual Liberty and Criminal Law Reform: The Story of *Griswold v. Connecticut*

Estelle Griswold, the Executive Director of the Planned Parenthood League of Connecticut (PPLC), could not have been more delighted. Just two days after she opened a Planned Parenthood birth control clinic at 79 Trumbull Street in New Haven, Connecticut, two police detectives were knocking on the door, seeking permission to search the premises.[1] For most, the prospect of welcoming police scrutiny would be unfathomable. But police scrutiny is exactly what Griswold and Lee Buxton, a Yale Medical School obstetrician and the clinic's medical director, hoped for when the clinic opened its doors on November 1, 1961.[2]

Just a few months earlier, the United States Supreme Court had dismissed a constitutional challenge to Connecticut's birth control ban on the ground that, although the law was on the books, it was rarely enforced—a crucial fact that "deprive[d] these controversies of the immediacy which is an indispensable condition of constitutional adjudication."[3] Despite the Court's pronouncement, Griswold and Buxton knew that the 1879 Connecticut law, which proscribed both using contraception and counseling others about contraception,[4] was a real imposition in the lives of Connecticut citizens, and not simply a case of

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1 *See* DAVID J. GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF *ROE V. WADE* 202–03 (1998).

2 *Id.* at 201.

3 Poe v. Ullman, 367 U.S. 497, 508 (1961).

4 The Connecticut ban consisted of two statutory provisions. Under the first provision, "any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned." Conn. Gen. Stat. § 53–32 (1958 rev.). Under the second provision: "Any 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." Conn. Gen. Stat. § 54–196 (1958 rev.).

"harmless, empty shadows."[5] Although the law was rarely enforced against private physicians, who often prescribed contraception to their patients,[6] it *was* used to prevent the operation of publicly-available birth control clinics that would make contraception accessible to those without the means to secure private medical care.[7] And because the state allowed a health exception to the law, which permitted condoms, but not oral contraceptives or diaphragms, to be sold throughout the state, the ban also imposed particular burdens on Connecticut women.[8] With these harms in mind, Griswold and Buxton opened their clinic in the hope that "someone will complain and that the State Attorney in New Haven will act to close the center."[9]

Now, as she ushered Detectives Blazi and Berg into her office, Griswold could not contain her excitement. In the ninety-minute police interview, she did most of the talking. As Blazi took notes, Griswold eagerly proffered multiple copies of the clinic's literature and pamphlets, all of which scrupulously detailed the clinic's services and operations (including the procedure for fitting and instructing women in the use of a diaphragm and contraceptive jelly).[10] Throughout the interview, she made clear her strong hope that she would be charged and prosecuted for violating the law, thereby creating the ideal conditions for a constitutional challenge.[11]

On November 10, she got her wish. Circuit prosecutor Julius Maretz issued arrest warrants for Griswold and Buxton. Accompanied by one of their lawyers, Catherine Roraback, the pair appeared at police headquarters that afternoon to surrender. Their crime? Aiding and abetting the violation of the Connecticut statute by providing women with instruction on and materials for contraception.[12]

Although it would require her arrest and a criminal prosecution, in the end, Estelle Griswold achieved her desired outcome. In 1965, the

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[5] *Poe*, 367 U.S. at 508.

[6] Lori Ann Brass, *An Arrest in New Haven, Contraception and the Right to Privacy*, YALE MED., Spring 2007, at 16, 16; Jonathan T. Weisberg, *In Control of Her Own Destiny: Catherine G. Roraback and the Privacy Principle*, YALE L. REP., Winter 2004, at 39, 40.

[7] *See* Cary Franklin, *The New Class-Blindness*, 128 YALE L.J. 2, 22–24 (2018) (discussing the law's impact on public birth control clinics). In this regard, *Griswold* was part of a long effort to secure access to birth control for all citizens, not simply those with access to private physicians. As Jill Lepore notes, "[f]rom the start, the birth control movement has been as much about fighting legal and political battles as it has been about staffing clinics, because, in a country without national healthcare, making contraception available to poor women has required legal reform." Jill Lepore, *Birthright*, NEW YORKER, Nov. 14, 2011, at 49.

[8] *See* Neil S. Siegel & Reva B. Siegel, *Contraception as a Sex Equality Right*, 124 YALE L.J. F. 349, 353–54 (2015) (discussing the way in which the law traded on well-worn gendered stereotypes about sex and parenting).

[9] *See* GARROW, *supra* note 1, at 201.

[10] *Id.* at 203.

[11] *Id.* at 203–04 (noting that Griswold told detectives "she welcomed arrest and a chance to settle the question of the Connecticut State Statute's legality").

[12] *Id.* at 206–07.

Supreme Court's decision in *Griswold v. Connecticut* struck down the Connecticut birth control ban and famously announced a right to privacy emanating from the "penumbras" of various constitutional guarantees.[13] Since then, *Griswold*'s logic has underwritten a broader commitment to reproductive rights—one that has expanded the right to contraception,[14] secured a woman's right to choose an abortion,[15] and paved the way for legal recognition of same-sex marriages.[16]

For a case that stands at the core of the constitutional law canon, *Griswold* is surprisingly spare—the majority opinion occupies a mere seven pages in the U.S. Reports. Critically, its spareness is not limited to its length. *Griswold*'s logic, some have argued, is conceptually underdeveloped, inviting a multitude of interpretations. For some, *Griswold* is a meditation on the relationship between enumerated and unenumerated rights.[17] For others, it is a reproductive rights case, laying a foundation for greater recognition of bodily autonomy.[18] It has also been cast as a sex equality case, underscoring the gendered nature of the Connecticut contraceptive ban and gesturing toward the relationship between privacy and equality.[19] For still others, it stands as a warning about the perils of judicial overreaching and creating rights out of whole cloth.[20]

This Essay offers an alternative interpretation of *Griswold*—one that has been woefully overlooked. Although we have come to regard it as a constitutional law case, or as a reproductive rights case, at bottom, *Griswold* was a criminal law case. Put differently, despite the majority's

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[13] 381 U.S. 479, 484 (1965).

[14] Eisenstadt v. Baird, 405 U.S. 438 (1972).

[15] Roe v. Wade, 410 U.S. 113 (1973).

[16] Obergefell v. Hodges, 576 U.S. ___, 135 S. Ct. 2584 (2015).

[17] *See* David Helscher, Griswold v. Connecticut *and the Unenumerated Right of Privacy*, 15 N. ILL. U. L. REV. 33, 58 (1994) (arguing that *Griswold* is "significant for giving breadth and life to the idea that individuals have rights inherent in their existence, in being human and in being persons"); *see also* Robert G. Dixon, Jr., *The* Griswold *Penumbra: Constitutional Charter for an Expanded Law of Privacy?*, 64 MICH. L. REV. 197, 198 (1965) (noting that the *Griswold* opinion "ranged broadly through the Bill of Rights" to identify where the right to privacy was "directly or peripherally protected").

[18] *See* Lackland H. Bloom, Jr., *The Legacy of* Griswold, 16 OHIO N.U. L. REV. 511, 534 (1989) (maintaining that *Griswold* "came to stand—in doctrine as well as in fact—for a relatively broad principle of constitutionally protected autonomy with respect to contraceptive and procreative matters").

[19] *See* Siegel & Siegel, *supra* note 8, at 350 ("Because *Griswold* was decided before the sex equality claims and cases of the 1970s, the *Griswold* Court did not expressly appeal to equality values in explaining the importance of constitutionally protected liberty . . . . Yet as some contemporaries appreciated, in protecting decisions concerning the timing of childbearing, the *Griswold* Court was protecting the foundations of equal opportunity for women, given the organization of work and family roles in American society.").

[20] *See* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 9 (1971) ("*Griswold*, then, is an unprincipled decision, both in the way in which it derives a new constitutional right and the way it defines that right, or rather fails to define it."); *see also* Michael J. McConnell, *Ways to Think About Unenumerated Rights*, 2013 U. ILL. L. REV. 1985, 1989 (2013) (characterizing *Griswold*'s reasoning as "turning somersaults in an unpersuasive attempt to ground the right of married couples to use contraceptives in the First, Third, Fourth or another part of the Fifth, Amendments").

discussion of penumbras and privacy, *Griswold* was, first and foremost, a case about prosecutions and policing. The challenged Connecticut statute carried a criminal penalty; and, critically, Griswold and Buxton were arraigned, charged, and tried before a court for violating it.

More importantly, *Griswold* was not simply a decision conjured out of whole cloth, as critics have suggested. Rather, it was a case born of and rooted in a criminal law reform movement that sought to design limits on the state's authority to police and enforce sexual mores. In this regard, Griswold and Buxton's constitutional challenge was not merely about expanding access to birth control, but also part of a broader effort to reimagine the state's use of criminal law as a means of enforcing moral conformity. Although criminal law has routinely been used to mark the boundary between licit and illicit sex, not all uses of the criminal law for regulating sex and sexuality have been viewed as desirable. Generally, the use of criminal law for marking and punishing coercive and nonconsensual sex has been deemed acceptable and appropriate, while criminal law's use in marking and punishing consensual sex—particularly between two adults—has encountered more skepticism. The facts of *Griswold* bear this out.

In overlooking *Griswold*'s criminal law antecedents, we have neglected this important aspect of the case and its legacy. This Essay recovers this history and situates *Griswold* in this historical debate about the scope and limits of the state's authority to use the criminal law to enforce moral and sexual conformity. Expanding *Griswold*'s narrative to include its ties to the criminal law reform movement brings into focus the concerns about contraceptive access that predated *Griswold*—and continue to shape the contemporary debate over public funding for contraception. As importantly, the contrast between the 1960s, when the state used the criminal law to curtail contraceptive access and use, and the present, when contraceptive use is lawful but access to contraception remains uneven, calls into question decriminalization's efficacy as a means of law reform.

PRIVACY AND CRIMINAL LAW REFORM

Since the founding, American jurisdictions have relied on the criminal law to regulate sex and sexuality.[21] Crucially, however, the state's efforts to regulate sex and sexuality focused primarily on criminalizing sex outside of marriage. On this account, the criminalization of contraceptive use did not occur until the period following the ratification of the Fourteenth Amendment, amidst fears about the decline in the birth rate among native-born white women. In 1873, as part of a broader "Purity" campaign, Congress passed the Comstock Act, which criminalized the use of the federal postal service for

[21] *See, e.g.*, State v. Green, 1 Kirby 87 (Conn. Super. Ct. 1786) (upholding conviction for violation of adultery statute, which provided that "if any man be found in bed with another man's wife, the man and woman so offending, being thereof convicted, shall be severely whipt [sic], not exceeding thirty stripes.").

distribution of contraception and other "obscene" materials.[22] In the aftermath of the Comstock Act, roughly half of the states promulgated their own "mini-Comstock laws," criminalizing contraceptive use and codifying the view that sex and procreation were inextricably linked.[23] Enacted in 1879, under the sponsorship of P.T. Barnum, the circus promoter who was then serving in the Connecticut legislature,[24] the contraceptive ban was part of this wave of "Comstockery." But even as it was part of the postbellum effort to combat declining birthrates, the ban, which codified the view that sex *should* be procreative, was part of a broader state effort to define the boundaries of normative sex and sexuality under laws prohibiting fornication, adultery, sodomy, and abortion. Critically, few questioned the state's power to legislate sexual mores, as the regulation of sexual morality was widely acknowledged to be within the scope of the state's police power to promote the health, safety, and general welfare of citizens.

But by the 1940s and 1950s, scholars were beginning to question this traditional authority. In two groundbreaking sex studies, *Sexual Behavior in the Human Male* and *Sexual Behavior in the Human Female*, Indiana University's Alfred Kinsey drew back the curtain on the intimate lives of everyday Americans. As Kinsey explained, Americans routinely engaged in sexual acts and practices that violated the criminal laws of most jurisdictions.[25] The problem was not the acts themselves, which, in Kinsey's view, were commonplace and therefore "normal," but rather a religiously-inflected legal regime that criminalized these acts in the name of morality.

Kinsey's research revealed not only the gulf between the law's expectations and the people's actual practices, but also the fact that most of these morality-tinged prohibitions went unenforced. If they were enforced, it was done selectively, targeting vulnerable populations. As such, these statutes "instilled cynicism toward the law," diminishing respect for the legal system.[26] Not content simply to note the disjunction between law's expectations and the reality of quotidian life, Kinsey began

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[22] Comstock Act, ch. 258, 17 Stat. 598 (1873) (repealed 1909); *see also* Reva B. Siegel, *Reasoning From the Body: A Historical Perspective on Abortion Regulation and Questions on Equal Protection*, 44 STAN. L. REV. 261, 314–15 (1992). For a discussion of the "purity campaign" waged by Anthony Comstock and the Committee for the Suppression of Vice, see Margaret Blanchard, *The American Urge to Censor: Freedom of Expression Versus the Desire to Sanitize Society—From Anthony Comstock to 2 Live Crew*, 33 WM. & MARY L. REV. 741, 745–49 (1992).

[23] Siegel & Siegel, *supra* note 8, at 350–51.

[24] GARROW, *supra* note 1, at 16.

[25] WILLIAM N. ESKRIDGE, JR., DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA 1861–2003 109 (2008) (discussing Kinsey's presentation of a discussion paper entitled "Biological Aspects of Some Social Problems," which argued that the law was divorced from the reality of intimate life and calling for law reform).

[26] LEIGH ANN WHEELER, HOW SEX BECAME A CIVIL LIBERTY 106 (2013).

advocating for legal reform. Private, consensual sexual acts, he argued, should be beyond the purview of the criminal law.[27]

Kinsey's was not the only voice challenging the state's authority to use criminal law to enforce traditional sexual mores. In 1954, in response to a series of controversial prosecutions of prominent Londoners on charges of homosexual sodomy, the British Parliament convened the Wolfenden Committee. Tasked with considering the ongoing efficacy of laws criminalizing homosexual sodomy and prostitution, the Committee issued a report to the British Parliament recommending the decriminalization of consensual same-sex sodomy.[28] In doing so, the Report emphasized limits on the state's authority to criminalize private, consensual conduct, noting that "there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business."[29]

The Wolfenden Report prompted a series of debates between the legal philosopher H.L.A. Hart and Lord Patrick Devlin, a prominent conservative on Britain's High Court, on the role that majoritarian social mores should play in the criminal law.[30] Devlin argued that, irrespective of harm or injury to persons or property, the criminal law legitimately could be used to discourage deviations from commonly held notions of morality.[31] In response, Hart argued that although the criminal law could be used to address immoral acts that posed harm to third parties or property (like murder or theft), it should not be used to criminalize all departures from majoritarian mores, including departures from conventional mores regarding out-of-wedlock sex.[32]

Meanwhile, on the other side of the Atlantic, the American Law Institute (ALI), a group of prominent lawyers, judges, and legal scholars charged with clarifying and simplifying the American common law, was also launching its own effort to reform and modernize American criminal law. Led by Columbia Law School professor Herbert Wechsler, the ALI's Model Penal Code (MPC) project sought to draft a modern criminal code that could be adopted in whole or in part by individual states. Although the MPC's drafters would consider a wide range of reforms, they took particular interest in laws governing sexual offenses. In doing so, the drafters were influenced by Kinsey's research and the Wolfenden Report.

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[27] *Id.* at 105.

[28] THE WOLFENDEN REPORT: REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION ¶ 62, at 48 (Stein & Day 1963). Notably, the Committee recommended the continued criminalization of prostitution.

[29] *Id.* ¶ 61, at 48.

[30] *See* Mary Anne Case, *Of "This" and "That" in* Lawrence v. Texas, 2003 SUP. CT. REV. 75, 123–24 (noting that the Hart-Devlin debates were a response to the Wolfenden Report).

[31] *See* PATRICK DEVLIN, THE ENFORCEMENT OF MORALS 2–3 (1965).

[32] *See* H.L.A. HART, LAW, LIBERTY AND MORALITY 57 (1963). Understood as a major exposition of themes at the heart of criminal law, the Hart-Devlin Debates were excerpted in leading criminal law casebooks of the day. *See* BREST, ET. AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING 1382 n.12 (7th ed. 2018).

Specifically, the MPC drafters worried that laws criminalizing private sexual conduct between consenting adults intruded too far into private life. As importantly, they were sensitive to concerns that enforcing victimless sex offenses diverted scarce public resources from more pressing criminal justice issues, like rising rates of violent crime.

At the ALI's annual meeting in 1962, a draft of the MPC was presented to the membership for approval. The draft urged substantial changes in the laws governing adultery, fornication, prostitution, abortion, contraception, and private acts of sodomy between consenting adults. Under the proposal, fornication and adultery would no longer be criminalized, nor would the use and distribution of contraception. State regulation of abortion would be liberalized to permit "therapeutic" abortions in cases of rape, incest, and harm—broadly conceived—to the mother. Criminalization of sodomy would be reserved for circumstances involving force and/or public conduct. Eventually approved by a vote of the ALI's membership, the ALI's effort to reform sexual offenses also spawned similar legislative reform efforts in other jurisdictions, including Illinois and New York.[33]

CREATING CONSTITUTIONAL PRIVACY

Critically, these calls for criminal law reform—from Alfred Kinsey's work to the Wolfenden Report and the MPC draft—all emphasized a sphere of private, intimate life secluded from state oversight and insulated from criminal regulation. By the 1950s and 1960s, the concept of a zone of privacy beyond the state's regulatory ambit began to coalesce in ways that were meaningful for both criminal law reform and the effort to liberalize access to birth control.

In two cases concerning the scope of constitutional protections for criminal defendants, the United States Supreme Court began exploring the idea of a zone of privacy into which the government could not intrude. *Rochin v. California* involved a criminal conviction based upon evidence obtained when police officers entered the bedroom of a suspect and his wife, forcibly opened the suspect's mouth to remove recently swallowed materials, and ordered the "forcible extraction of his stomach's contents."[34] Concluding that the officers' actions "shock[ed] the conscience," the Court reversed the conviction, holding that evidence obtained through such "brutal conduct" violated the Fourteenth Amendment's Due Process Clause.[35]

Nearly a decade later, *Mapp v. Ohio*[36] offered the Court an opportunity to elaborate the contours of the constitutional protections established in *Rochin*. Like *Rochin*, *Mapp* involved an intrusive search of

[33] ESKRIDGE, JR., *supra* note 25, at 123–24 (2008); *see also* Melissa Murray, Griswold*'s Criminal Law*, 47 CONN. L. REV. 1045, 1051–52 (2015).

[34] 342 U.S. 165, 172 (1952).

[35] *Id.* at 173.

[36] 367 U.S. 643 (1961).

an individual's home. Brandishing a fabricated warrant, Cleveland police officers initiated a thorough search of Dollree Mapp's home, including her bedroom, her "child's bedroom, the living room, the kitchen and a dinette," ultimately discovering a cache of pornographic material in a trunk. Although Mapp disclaimed ownership of the trunk and its contents, she was arrested, prosecuted, and found guilty of "knowingly having had in her possession and under her control certain lewd and lascivious books, pictures, and photographs" in violation of state law. Despite the fact that it was nominally an obscenity case, Mapp's ACLU lawyers argued that the state's intrusion into the private sphere—Mapp's home—was, by itself, a constitutional violation. In overturning Mapp's conviction, the Court seemed receptive to this line of argument. Referencing *Rochin*, the *Mapp* Court articulated a "freedom from unconscionable invasions of privacy" rooted in the Fourth and Fifth Amendments.[37]

Although *Rochin* and *Mapp* were principally concerned with procedural protections for criminal defendants, criminal law reformers interested in substantive limits on the state's use of the criminal law saw great promise in the Court's assertion that "the security of one's privacy against arbitrary intrusion by the police is implicit in the concept of ordered liberty."[38] In 1964, at the ACLU's Biennial Conference in Boulder, Colorado, Harriet Pilpel, who would later serve as general counsel for both the ACLU and Planned Parenthood, sought to bring together the logic of privacy, criminal law reform, and the ACLU's efforts to secure civil liberties in the face of the government's nascent "war on crime."[39] The ACLU's neglect of sex laws in its conception of civil liberties was, in Pilpel's view, regrettable and shortsighted. "An intelligent appraisal of the sex laws," she implored the ACLU, "could aid in the war on crime by carving out a definition of crime behavior which there is no rational or social, i.e. *secular*, reason for making criminal—behavior in private between consenting adults."[40] On this account, unless and until the ACLU was willing to take on sex laws as part of its broader agenda to secure civil liberties, these laws would "continue to be, as they are now, a dagger aimed at the heart of some of our most fundamental freedoms."

For Pilpel, the concept of privacy could be used to bridge the ACLU's efforts to secure civil liberties in cases like *Rochin* and *Mapp* and the effort to reform criminal sex laws, including birth control bans. On this account, privacy was not simply a means of securing procedural rights in criminal cases, but rather was a substantive limit on the state's authority to use the criminal law to regulate private conduct and enforce morality. Now, as the federal government launched a national war on crime, the

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[37] *Id.* at 657.

[38] *Id.* at 650 (quoting Wolf v. Colorado, 338 U.S. 25, 27–28 (1949)).

[39] Harriet Pilpel, Civil Liberties and the War on Crime, Biennial Conference of the American Civil Liberties Union, 71 ACLUP, 1964.

[40] *Id.*

interest in a right to privacy as a bulwark against an encroaching state had become even more urgent. In light of the government's keen interest in cracking down on crime, outmoded sex laws posed an enormous threat. As Kinsey had earlier noted, morals-driven sex laws were easy to violate and, more troublingly, were prone to selective enforcement against vulnerable and marginalized communities. In this regard, a constitutional right to privacy could provide both procedural protections for criminal defendants *and* substantive limits on the state's authority to criminalize certain conduct.

CHALLENGING THE CONNECTICUT STATUTE IN THE STATE HOUSE AND THE COURTHOUSE

The language of the criminal law reform movement—and privacy in particular—came to frame efforts to reform and repeal the Connecticut contraceptive ban. By the late 1950s, birth control activists were eager to harness the logic of the criminal reform effort—and the underlying interest in privacy as a bulwark against the state—to challenge prohibitions on contraception. In a provocative 1955 advertisement, the PPLC underscored that the Connecticut contraceptive ban was about more than access to birth control. The ad, which depicted police officers hiding under beds, warned that "[a] policeman in every home is the only way to enforce this law." In doing so, the ad suggested that the law's enforcement *demanded* the state's presence in the most intimate recesses of the home. In this regard, the ad emphasized that, in allowing the state into the home to police sexual mores, the law imposed upon the rights and privacy of *all* citizens, not just women in need of birth control.

PPLC attacked the law through legislative advocacy *and* litigation. The earliest effort at judicial reform came in the 1940 case *State v. Nelson*, which sought to read into the statutes an exemption that would allow physicians to prescribe contraceptives to married women. On appeal, the Connecticut Court of Errors declined to follow this interpretation of the law, upholding the convictions of two doctors and a nurse under the 1879 law.[41] Still reeling from the loss in *Nelson*, a few years later, PPLC launched a new challenge, seeking an exemption for physicians in circumstances where pregnancy would pose a danger to the patient's life.[42] As before, the Connecticut high court held that the statute contained no implied exceptions for prescribing contraceptives in situations where pregnancy would endanger a patient's life. The case was appealed to the United States Supreme Court, which dismissed the matter on standing grounds.[43]

On the advocacy front, over the course of fifteen years, PPLC, in tandem with Planned Parenthood Foundation of America (PPFA), would make sixteen attempts to revise or repeal the contraception ban in the

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41 126 Conn. 412, 11 A.2d 856 (1940).

42 *See* Tileston v. Ullman, 26 A.2d 582 (Conn. 1942), *appeal dismissed*, 318 U.S. 44 (1943).

43 Tileston v. Ullman, 318 U.S. 44 (1943).

legislature. Initially, these legislative efforts focused on complete repeal. When this strategy failed spectacularly, the birth control movement refocused its efforts on a more modest reform—legislating an exception to the law that would allow physicians to prescribe contraception to married women—the kind of exemption it unsuccessfully sought to read into the law in *Nelson*. Although this alternative would have the practical effect of freeing physicians from the threat of criminal prosecution, it would only make contraceptives available to those with access to private physicians.[44] Despite this limitation, the modest reform was seen as deeply threatening, and conservative forces, in tandem with the Catholic Church, stubbornly thwarted this effort at legislative reform.[45]

After years of pressing the legislature, PPLC eventually conceded defeat. Recognizing that the Catholic Church and conservative groups would continue to resist legislative reform, PPLC, now under the leadership of its energetic new executive director Estelle Griswold, launched new plans for yet another court challenge—one that would reach the U.S. Supreme Court, where it would be successfully resolved on the merits. PPLC envisioned a new legal challenge that would focus both on doctors who wished to advise patients about birth control, *and* on married couples for whom pregnancy would entail serious health risks and complications.

To achieve its goals, PPLC partnered with Yale Law School professor Fowler Harper and recent Yale Law School graduate Catherine Roraback[46] to bring a lawsuit. Harper and Roraback worked with Lee Buxton, PPLC's medical director, to recruit as plaintiffs married couples for whom a pregnancy posed a severe risk to the wife's health and life.[47] The case—*Poe v. Ullman*[48]—argued that the Connecticut contraceptive ban violated the patients' and physicians' due process rights under the Fourteenth Amendment. In making this claim, Harper and Roraback, with input from national ACLU lawyers Harriet Pilpel and Morris Ernst, elaborated the privacy arguments glimpsed in *Rochin* and *Mapp*, contending that the Connecticut law was a significant intrusion into intimate life.

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[44] For a discussion of the socioeconomic consequences of the contraception ban, see Cary Franklin, Griswold *and the Public Dimension of the Right to Privacy*, 124 YALE L.J. F. 332 (2015).

[45] *See* GARROW, *supra* note 1, at 137–43.

[46] After her work challenging the contraceptive ban, Roraback would continue litigating on behalf of reproductive rights in Connecticut. She litigated a string of cases challenging Connecticut's criminal ban on abortion, leading to the law's invalidation by a three-judge panel in 1972, just a few months before *Roe v. Wade*. *See* Abele v. Markle, 351 F. Supp. 224 (D. Conn. 1972). In challenging the Connecticut abortion statute, Roraback "started developing some of these ideas that a woman has a right to control her own destiny." Weisberg, *supra* note 6, at 42. Meaningfully, these strains of women's liberation had been largely absent in the *Griswold* litigation.

[47] Weisberg, *supra* note 6, at 40.

[48] 367 U.S. 497, 508 (1961).

In addition to the pseudonymous *Poe* plaintiffs, Harper and Roraback also recruited two married Yale Law students, David and Louise Trubek, to front an ancillary legal challenge to the ban.[49] If the *Poe* plaintiffs presented a more traditional view of marriage, with breadwinner husbands and homemaker wives, then David and Louise Trubek were a point of departure—as were their legal arguments. Like the *Poe* plaintiffs, the Trubeks appealed to privacy in challenging the ban, but their privacy arguments also struck notes of sex equality.[50] For the Trubeks, access to contraception was not a matter of (the wife's) life or death—pregnancy posed no known health challenges to the couple. Instead, their interest in contraception was rooted in their desire to plan their family in a manner that made sense for their marriage, and, just as importantly, allowed both of them to establish and build careers as practicing lawyers. As they explained in their briefs, access to contraception would allow them the space and autonomy to make crucial decisions about how their marriage would be organized, including how to plan a family in a way that made sense for both of their legal careers.[51] On this account, marital privacy was not simply about excluding the state from the most intimate aspects of daily life; it was a precondition for structuring marriage along more egalitarian lines. In this regard, in both *Poe* and *Trubek v. Ullman*, the privacy argument sparked by the criminal law reform movement and tested in the context of procedural protections for criminal defendants was now deployed to challenge a substantive criminal law in registers that sounded in both liberty and equality.

In the end, the Supreme Court dismissed both cases. Treating the papers filed in *Trubek* as a petition for certiorari, the Court declined to review the case.[52] *Poe v. Ullman* was dismissed on jurisdictional grounds, with the Court concluding that because there was no threat of enforcement, the case was not yet ripe for review.[53] Still, the *Poe* plaintiffs' privacy argument resonated with Associate Justices William O. Douglas and John Marshall Harlan—although not necessarily as a limit on *all* state uses of the criminal law. In considering the Connecticut ban, Douglas imagined a world where "full enforcement of the law . . . would reach the point where search warrants issued and officers appeared in bedrooms to find out what went on."[54] Such an invasion of "the innermost sanctum of the home," in Douglas' view, constituted "an invasion of the privacy that is implicit in a free society."[55]

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[49] Trubek v. Ullman, 165 A.2d 158 (Conn. 1960).

[50] *See* Melissa Murray, *Overlooking Equality on the Road to* Griswold, 124 YALE L.J. F. 324, 326 (2015).

[51] *See* Complaint at 2, Trubek v. Ullman, 367 U.S. 907 (1961) (No. 847).

[52] *Trubek*, 367 U.S. 907.

[53] 367 U.S. at 508–09.

[54] *Id.* at 519–20 (Douglas, J., dissenting).

[55] *Id.* at 520–21.

Although Harlan agreed that the Connecticut ban presented an imposition on privacy rights,[56] his dissent also forthrightly engaged the question of the state's authority to legislate morality.[57] Critically, Harlan did not dispute the state's authority to legislate in order to promote its "people's moral welfare," including laws that prohibited "adultery, homosexuality, fornication and incest."[58] But the Connecticut ban, which "determined that the use of contraceptives is as iniquitous as any act of extra-marital sexual immorality" was "surely a very different thing indeed from punishing those who establish intimacies which the law has always forbidden and which can have no claim to social protection."[59]

Both Douglas and Harlan echoed aspects of the broader criminal law reform debate that had raged over the last fifteen years. Should the state use the criminal law to police morality? And, if the state could use the criminal law to police morals, how far could it go to do so? Did the Constitution impose any restraints on the exercise of state police power in intimate life? For Harlan, state regulation of sexual morality was permissible, but the state's authority was not unfettered. The state could not go so far as to intrude upon marriage, an institution that the state valued, protected, and promoted as the licensed site of sex and sexuality. Douglas, although he did not endorse state criminal regulation of adultery and fornication, also appeared convinced that state intervention into the home to police contraceptive use violated the Constitution.

Because it dismissed *Poe v. Ullman* on jurisdictional grounds, the Court did not have the opportunity to consider these questions against the backdrop of the federal Constitution. However, soon after the Court's decision in *Poe*, the PPLC opened a birth control clinic in New Haven.[60] As expected, the birth control clinic drew law enforcement attention. In just a few days, Griswold and Buxton were arrested and charged under Sections 53–32 and 54–196, setting the stage for *Griswold v. Connecticut*.

As *Griswold* made its way through the Connecticut legal system, it became clear that this litigation was unlike the prior legal challenges. As an initial matter, Griswold and Buxton had different legal representation. Of the lawyers who had represented the plaintiffs in *Poe v. Ullman*, only Catherine Roraback remained on the *Griswold* legal team. Fowler Harper, who had spearheaded the *Poe* and *Trubek*

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[56] *See id*. at 553 (Harlan, J., dissenting) (rejecting "the intrusion of the whole machinery of the criminal law into the very heart of marital privacy, requiring husband and wife to render account before a criminal tribunal of their uses of that intimacy").

[57] *See id*. at 539 ("In reviewing state legislation, whether considered to be in the exercise of the State's police powers, or in provision for the health, safety, morals or welfare of its people, it is clear that what is concerned are the powers of government inherent in every sovereignty. Only to the extent that the Constitution so requires may this Court interfere with the exercise of this plenary power of government.") (internal quotations and citation omitted).

[58] *Id*. at 552–53.

[59] *Id*. at 553.

[60] *See* Mary L. Dudziak, *Just Say No: Birth Control in the Connecticut Supreme Court Before* Griswold v. Connecticut, 75 IOWA L. REV. 915, 936 (1990).

challenges and argued *Poe* before the Supreme Court, succumbed to cancer in 1965. Thomas Emerson, Harper's Yale Law School colleague, took up the cause, joining Roraback to defend Griswold and Buxton.[61]

The change in representation was not the only difference. As they pushed toward the Supreme Court, Emerson and Roraback refined their legal strategy. Again, privacy figured prominently as a limit on the state's authority. Critically, however, Griswold, Buxton, and their amici bolstered the privacy claim with other arguments that were rooted in the larger debate about criminal law reform and state enforcement of morals. In their briefs, the appellants went beyond privacy to explain that morals legislation, like the Connecticut laws at issue, was prone to arbitrary and discriminatory enforcement.[62] The concern with selective and discriminatory enforcement had also loomed large in the ALI's efforts to reform sexual offenses in the MPC. Indeed, Emerson and Roraback seemed to be parroting the concerns that the ALI drafters, Pilpel, and others had long articulated about the abuse of sexual offense laws when they noted that the challenged Connecticut statutes could be used "for blackmail, or for paying off a grudge, or for harassment of an unpopular citizen. It is not capable of rational administration."[63]

In addition to these concerns about selective enforcement, Emerson and Roraback argued that the challenged Connecticut statutes had the perverse effect of encouraging other criminal behavior. As they explained in their brief on behalf of Griswold and Buxton, "[t]he statutes tend to produce an increase in the number of illegal abortions." This point was likely due to the input of PPFA, the parent organization to the PPLC, which also assisted Emerson and Roraback and wished to link concerns about the birth control ban with broader concerns about family planning and population control. Indeed, PPFA filed its own amicus brief[64] in which it elaborated this concern. As it explained, as an alternative to contraception for married couples, abstinence was unrealistic and undesirable—and was likely to lead to more objectionable criminal conduct, like adultery, prostitution, and abortion.

Importantly, all of these arguments had been raised throughout the criminal law reform debate. Although it focused on the constitutionality of the contraceptive ban, as it headed to the Supreme Court, *Griswold* also bore the imprint of the criminal law reform movement and its interest in designing limits on state authority.

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[61] *See* GARROW, *supra* note 1, at 230–32 (describing Fowler's transition of the case to his "longtime friend and colleague Tom Emerson" as he succumbed to his illness).

[62] Brief for Appellants at 70–71, Griswold v. Connecticut, 381 U.S. 479 (1965) (No. 496).

[63] *Id.* at 71–72.

[64] Brief and Appendices for Planned Parenthood Fed'n of Am. as Amicus Curiae, Griswold, 381 U.S. 479 (No. 496), 1965 WL 115612.

PRIVACY AND MORAL CONFORMITY

On June 7, 1965, the Court announced its 7–2 decision invalidating the Connecticut ban and announcing a right to privacy that, in the majority's view, emanated from the penumbras of the "specific guarantees in the Bill of Rights" and inhered in the marital relationship.[65] It was perhaps unsurprising that privacy figured so prominently in the decision. After all, the *Poe* dissenters, who now formed the core of the Griswold majority—with Douglas writing for the Court—had emphasized the idea of a space insulated from state encroachment. Further, Emerson and Roraback raised the privacy principle in their briefs—and did so in a manner that sounded in the register of criminal law reform. Specifically, they emphasized the idea of privacy as an essential feature of limited government. As they explained in their brief before the Court:

> The concept of limited government has always included the idea that governmental powers stopped short of certain intrusions into the personal and intimate life of the citizen. This is indeed one of the basic distinctions between absolute and limited government. Ultimate and pervasive control of the individual, in all aspects of his life, is the hallmark of the absolute state. A system of limited government safeguards a private sector, which belongs to the individual, and firmly distinguishes it from the public sector, which the state can control.[66]

Although the majority opinion embraced the notion of privacy as a bulwark against an encroaching state, it tethered the right to the institution of marriage and the marital couple—an abrupt departure from the individual-focused conception of privacy cultivated in the criminal reform debate. While Emerson and Rorabeck discussed marriage in their briefs, they did so to augment a broader argument about the right of all citizens to be secluded—in most places, but especially in the home—from the all-encompassing authority of the state. To this end, the appellants' brief, like the briefs filed in *Mapp* and *Rochin*, highlighted marriage and privacy, but harnessed these concepts to a more robust notion of individual rights. On this account, privacy's protections were not reserved exclusively for married couples, but were "a vital element" of the Constitution's efforts to "safeguard[ ] the private sector of the citizen's life,"[67] whether in marriage or outside of it.

For the *Griswold* majority, however, marriage provided a limiting principle for the newly announced right to privacy. The court recognized that an implicit right to privacy could logically license a wider range of sexual conduct, including more controversial crimes like sodomy, adultery, and fornication. In a likely effort to cabin its reach, Douglas'

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[65] 381 U.S. at 484.

[66] Brief for Appellants, *supra* note 62, at 79.

[67] *Id.*

majority opinion rhetorically linked the privacy right with marriage and underscored that the challenged Connecticut laws were problematic not because they invited the state to demand moral conformity by intruding too far into the lives of citizens, but because they "operate[d] directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation."[68]

But even as marital privacy undergirded *Griswold*, there were telling nods throughout the opinion to the criminal reform debate's interest in designing limits on the state's use of the criminal law. As an initial matter, the opinion's conclusion spoke directly to the question of restraining an intrusive state. Musing "[w]ould we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives?," the response was emphatic: "The very idea is repulsive."[69] The idea of jackbooted police officers marching through the bedroom was likely no coincidence. The provocative image recalled the facts of *Mapp v. Ohio*—a decision that Douglas had favorably cited only a few pages earlier. In referencing *Mapp*, and sketching the sinister image of the police in the bedroom, Douglas doubled down on an idea that the criminal law reform movement had championed: a right to privacy in the most intimate aspects of life.

But a space of seclusion from state intrusion was not the only link between the *Griswold* opinion and the criminal law reform movement. In defending the newly articulated right to privacy, Justice Douglas dispelled claims that there were no precedents for unenumerated rights by meticulously cataloging earlier cases, like *Meyer v. Nebraska*, *Pierce v. Society of Sisters*, *NAACP v. Alabama*, and *West Virginia State Board of Education v. Barnette*. In pairing *Griswold* with these earlier cases, which concerned parental rights and associational rights, Douglas was not simply aligning the right to privacy with other recognized constitutional guarantees. All of these earlier decisions concerned challenges to the state's attempt to enforce—often by resort to criminal law—conformity among its citizens. For example, *Meyer* struck down a Nebraska law that, in an effort to ensure that English, rather than the native languages of newly arrived immigrants, "should . . . become the mother tongue of all children reared in [the] state,"[70] criminalized German instruction in public schools. In *Pierce*, the Court invalidated a ballot initiative that, in seeking to cultivate a common American culture and ethos,[71] made it a crime for parents to send their children to private and parochial schools.

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[68] *Griswold*, 381 U.S. at 481.

[69] *Id.* at 485–86.

[70] Meyer v. Nebraska, 262 U.S. 390, 398 (1923).

[71] In both *Meyer* and *Pierce*, the challenged laws were animated by anti-immigrant, nativist impulses. *See* Paula Abrams, *The Little Red Schoolhouse:* Pierce*, State Monopoly of Education and the Politics of Intolerance*, 20 CONST. COMMENT. 61 (2004).

In both cases, the Court took a dim view of the state's attempts to "foster a homogenous people"[72] and "standardize . . . children."[73]

The laws struck down in *West Virginia State Board of Education v. Barnette* and *NAACP v. Alabama* also spoke to government efforts to compel conformity among its citizens. In *Barnette*, the Court struck down on First Amendment grounds a state resolution requiring public school students to salute the American flag.[74] In *NAACP v. Alabama*, the Court held that the state could not require the NAACP to disclose the names of its members.[75] In both cases, the Court emphasized First Amendment protections for those dissenting from majoritarian viewpoints, whether the dissenters were Jehovah's Witnesses expressing their antipathy for the Pledge of Allegiance, or members of the NAACP, an unpopular political group in 1950s Alabama.

With this in mind, Douglas' invocation of these cases was not simply about implied fundamental rights, but rather intimated an affinity for the underlying logic of the criminal law reform movement. In all of these cases, the Court recognized the individual's right to be nonconforming, whether in terms of the state's educational program or the individual's political life. Put differently, all four cases framed the logic of privacy in terms of limiting the state's authority to enforce moral, educational, and political conformity among citizens.

In 1972's *Eisenstadt v. Baird*, the Court would elaborate *Griswold*'s subtle nod to individual freedom and constitutional protection from state efforts to compel moral conformity. There, the Court invalidated a Massachusetts law prohibiting contraceptive use by unmarried persons, and expanded *Griswold*'s privacy logic beyond the marital couple to focus instead on "the right of the individual, whether married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[76] In so doing, the Court recuperated the understanding of privacy as an individual right against state encroachment that undergirded the criminal law reform debate and the appellants' briefs in *Griswold*. A year later, in *Roe v. Wade*, the Court would further underscore the individual nature of the privacy right, concluding that the right to privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[77]

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[72] *Meyer*, 262 U.S. at 402.

[73] Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925).

[74] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). As the Court noted, "[f]ailure to conform [with the resolution] is 'insubordination' dealt with by expulsion. Readmission is denied by statute until compliance. Meanwhile the expelled child is 'unlawfully absent' and may be proceeded against as a delinquent. His parents or guardians are liable to prosecution, and if convicted are subject to fine not exceeding $50 and jail term not exceeding thirty days." *Id.* at 629 (footnotes omitted).

[75] 357 U.S. 449 (1958).

[76] Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

[77] 410 U.S. 113, 153 (1973).

But while *Eisenstadt* and *Roe* extended the privacy right to the individual, they did so by focusing on procreation—an act that, for many, was consonant with *Griswold*'s focus on marriage. As *Griswold* and the right to privacy came to be understood as inextricably bound to marriage and procreation, they became unmoored from the broader conversation about the criminal regulation of morals and the state's authority to compel conformity. Indeed, this more limited understanding of privacy as "a fundamental individual right to decide whether or not to beget or bear a child," rather than a broader notion of sexual liberty and restraint on state authority, was evident in the Court's decision in *Bowers v. Hardwick*,[78] a 1986 challenge to a Georgia sodomy prohibition. In rejecting the claim that *Griswold* and its progeny conferred a right to engage in private consensual same-sex sodomy, the *Bowers* majority insisted that there was "[n]o connection between family, marriage, or procreation . . . and homosexual activity."[79] In this way, *Griswold*'s invocation of the "sacred precincts of [the] marital bedroom[ ]" transformed it from a case about limits on state intervention in intimate life into a case that was almost exclusively about preventing state interference with marriage and procreation. Indeed, it was this more limited framing that allowed *Griswold*, and its articulation of a protected zone of privacy, to coexist alongside *Bowers*' repudiation of that zone for those deemed ineligible for marriage and incompatible with procreation.

But *Griswold*'s effort to design limits on the state did not go unnoticed by all members of the *Bowers* Court. In a stirring dissent, Justice William Brennan focused on the right to privacy as a protection for those who did not conform to majoritarian norms. As he explained:

> The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many 'right' ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to choose the form and nature of these intensely personal bonds.[80]

On this account, the right to privacy was about providing space for non-conformity and limiting the state's effort to demand compliance with social and sexual mores.[81]

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[78] 478 U.S. 186 (1986).

[79] *Id.* at 191.

[80] *Id.* at 205.

[81] Brennan would echo these themes more forthrightly in his dissent from the plurality opinion in *Michael H. v. Gerald D.*, 491 U.S. 110, 141 (1989) (Brennan, J., dissenting) ("We are not an assimilative, homogeneous society, but a facilitative, pluralistic one, in which we must be willing to abide someone else's unfamiliar or even repellent practice because the same tolerant impulse protects our own idiosyncrasies. Even if we can agree, therefore, that 'family' and 'parenthood' are part of the good life, it is absurd to assume that we can agree on the content of those terms and destructive to pretend that we do. In a community such as ours, 'liberty' must include the freedom not to conform."). Similarly, Justice John Paul Stevens' dissent in *Bowers* also emphasized "the origins of the

It would take almost twenty years for these concerns to come to the fore in the Court's jurisprudence and its conception of the right to privacy. In 2003's *Lawrence v. Texas*, the Court confronted another challenge to a state statute criminalizing same-sex sodomy.[82] The case, like *Griswold* before it, prompted arguments about the state's use of the criminal law to police and enforce traditional sexual mores. In overruling *Bowers* and invalidating the challenged statute, the *Lawrence* majority appeared to expand *Griswold*'s notion of privacy beyond marriage to include adult relationships, whether married or not. But critically, *Lawrence* went even further to explicitly delineate limits on the state's use of criminal law as a means of policing sex and enforcing morals and moral conformity. As the *Lawrence* majority framed the issue, the question was "whether the majority may use the power of the State to enforce [majoritarian sexual mores] on the whole society through operation of the criminal law."[83] That issue seemed well settled. Writing for the majority, Justice Kennedy explained that socio-legal developments over "the past half century" reflected "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."[84] As evidence of this "emerging awareness," the majority cited, among other developments, the MPC, which "made clear that it did not recommend or provide for 'criminal penalties for consensual sexual relations conducted in private.' "[85]

Five years after *Lawrence*, a federal appellate court would harness this logic to invalidate a criminal law prohibiting the sale of sex toys. In striking down the law, the appellate court aligned its decision with *Lawrence*, and, perhaps less obviously, *Griswold*. As it explained, "the State here wants to use its laws to enforce a public moral code by restricting private intimate conduct . . . . because the State is morally opposed to a certain type of private consensual intimate conduct."[86] Although the court did not reference it explicitly, one could not help but imagine *Griswold*'s visceral image of the police officer in the bedroom. Married or not, *Griswold* and its progeny were rightly understood as going beyond procreation and abortion to design sharp limits on the state's authority to impose conformity in intimate life.

CONCLUSION

Today, *Griswold v. Connecticut* is regarded as a stalwart of the constitutional law canon. This is fitting, as the decision's articulation of a right to privacy set in motion a "privacy revolution" that ultimately

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American heritage of freedom—the abiding interest in individual liberty that makes certain state intrusions on the citizen's right to decide how he will live his own life intolerable." *Bowers*, 478 U.S. at 217 (internal citations and quotations omitted) (Stevens, J., dissenting).

82 539 U.S. 558 (2003).

83 *Id.* at 571.

84 *Id.* at 559.

85 *Id.* at 572.

86 Reliable Consultants, Inc. v. Earle, 517 F.3d 738, 746 (5th Cir. 2008).

reshaped constitutional law and its understanding of individual rights. But *Griswold* was not simply a constitutional law case; it was also a criminal law case, and its place in the criminal law canon should be recognized. Indeed, the privacy revolution that *Griswold* birthed was one that was rooted in the criminal law reform movement and its efforts to limit the state's ability to use the criminal law to enforce moral and social conformity. On this account, *Griswold*'s privacy revolution was one that relied on decriminalization as a means of limiting state authority in intimate life. In *Griswold*'s wake came *Eisenstadt v. Baird*, *Roe v. Wade*, and *Lawrence v. Texas*—all cases in which the right to privacy was marshaled to invalidate state criminal prohibitions designed to compel conformity with majoritarian sexual mores.

The question of course is whether limiting the state's use of criminal law in intimate life is sufficient to limit the state's authority to compel moral and sexual conformity. Today, more than fifty years after *Griswold* began the process of decriminalizing contraception, access to contraception remains a subject of intense debate and contestation in the United States. Most recently, much of this debate has focused on the contraceptive mandate of the Patient Protection and Affordable Care Act of 2010 (ACA). The law, enacted as part of President Barack Obama's sweeping health care reforms, requires health insurance plans to cover a wide variety of preventative health services. Recognizing that, historically, women's out-of-pocket costs for preventative services have been higher than men's, the ACA explicitly required that women's preventative health services—including contraceptive coverage—be included among those services that health insurance plans must provide without cost. Critically, this "contraceptive mandate" also included accommodations for religious houses,[87] and eventually, non-profits and closely-held corporations that objected to contraceptive coverage on religious grounds.[88] In October 2017, the Trump Administration, after failing to legislatively repeal the ACA, issued administrative rules that offer an exemption to the contraceptive mandate to any employer that objects to covering contraceptive services on the basis of sincerely-held religious beliefs or moral convictions.[89]

The effect of these developments on access to contraception is undeniable. By allowing objecting employers to shift the cost of contraception to consumers, the exemptions make contraception—especially certain forms, like the intrauterine device (IUD)—cost-prohibitive. Accordingly, some fear that the exemptions will impede access to contraception by making certain forms of contraception too

[87] 45 C.F.R. § 147.132(a)(1)(i)(A).

[88] *See* Zubik v. Burwell, 136 S. Ct. 1557 (2016) (non-profits); Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (closely held corporations).

[89] Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47838 (Oct. 13, 2017).

costly for women to obtain privately.[90] These material concerns about financial accessibility, interestingly, mirror many of the concerns that shaped the debate over contraception in the years preceding *Griswold*.[91]

Beyond recalling the accessibility concerns that preceded *Griswold*, the challenges to the contraceptive mandate suggest that the state has many options, beyond the criminal law, for compelling compliance with majoritarian sexual mores. By withholding public support for contraceptive access, whether through direct legislation or by allowing objectors to shift the cost of coverage, the state can continue to demand compliance with sexual mores that discredit contraception and non-procreative sex. Obviously, these civil and administrative restrictions are different in principle from the criminal ban struck down in *Griswold*. But in practice, these rules may accomplish the same goal as the criminal ban: precluding widespread access to contraception. And, as importantly, these forms of civil regulation communicate, albeit less robustly, the stigma and disapproval that undergirded criminal prohibitions.[92]

This is all to say that in overlooking *Griswold*'s criminal law antecedents, we have overlooked many things. We have missed an opportunity to locate this decision within the broader context of the criminal law reform debate that was taking place in the 1950s and 1960s—one that sought to limit the state's use of criminal law as a means of policing and enforcing compliance with majoritarian sexual mores. In doing so, we have failed to appreciate that the case was not simply about birth control, but rather, about designing limits on the state.

Recuperating *Griswold*'s place in the criminal law reform debate brings these interests into focus. It makes clear that *Griswold* and the right to privacy it announced was not conjured out of whole cloth, as critics suggest, but rather emerged out of a concerted effort to theorize and enforce limits on the state's use of criminal law. With this context in mind, the theme of privacy as a protection for nonconformity is easier to discern, even amidst the opinion's lofty paean to marriage and the marital couple.

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[90] GUTTMACHER INSTITUTE, DESPITE LEAVING KEY QUESTIONS UNANSWERED, NEW CONTRACEPTIVE COVERAGE EXEMPTIONS WILL DO CLEAR HARM (Oct. 17, 2017), *available at* https://www.guttmacher.org/article/2017/10/despite-leaving-key-questions-unanswered-new-contraceptive-coverage-exemptions-will; *see also* Robert Pear et al., *Trump Administration Rolls Back Birth Control Mandate*, N.Y. TIMES (Oct. 6, 2017), https://www.nytimes.com/2017/10/06/us/politics/trump-contraception-birth-control.html; Complaint for Declaratory and Injunctive Relief at 14–15, Massachusetts v. U.S. Dep't of Health & Human Servs., No. CV 17-11930-NMG, 2018 WL 1257762 (D. Mass. Mar. 12, 2018) (citing estimations that tens of thousands of women could lose access to contraception as a result of the exemptions, resulting in over $18 million in out-of-pocket costs for care).

[91] *See, e.g.*, Brief and Appendices for Planned Parenthood Fed'n of Am., supra note 64, at *21, Griswold v. Connecticut, 381 U.S. 479 (1965) (No. 496) (discussing the impact of the Connecticut ban on low-income women).

[92] *See* Melissa Murray, *Rights and Regulation: The Evolution of Sexual Regulation*, 116 COLUM. L. REV. 573 (2016).

But perhaps most importantly, when we focus on the criminal law aspects of *Griswold*'s history, we are able to glimpse the similarities between the present day and the period that preceded *Griswold*. Then, as now, access to contraception remains uneven, especially for those who lack the resources to privately fund their contraceptive use. As importantly, the stigma and disapproval that once attended contraceptive use can still be felt—albeit in more muted forms—in the new forms of state regulation that have emerged to replace the criminal ban struck down in *Griswold*. These insights make clear the limitations of decriminalization as a means of law reform, and underscore the many vehicles, beyond the criminal law, that the state may deploy in its efforts to enforce a particular vision of sex and sexuality.