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Griswold and the Public Dimension of the Right to Privacy

Cary Franklin

Fifty years ago, the Court in *Griswold v. Connecticut*[1] invalidated Connecticut's ban on birth control. The various opinions in *Griswold* were in many ways products of their time. For instance, none of the Justices focused on the implications of the Connecticut law for women's equality. Constitutional sex discrimination law had yet to be developed—and the National Organization for Women had yet to be founded—at the time *Griswold* was decided, so the ways in which the state's regulation of contraception affected women's social and economic roles failed to attract the Court's notice. It is only over time, and thanks in significant part to the women's movement, that courts have begun to recognize the gender dimension of questions involving reproductive health care.

While the passage of time has revealed aspects of the question in *Griswold* that were not apparent to the Justices half a century ago,[2] it has also obscured constitutional frames that were more visible in the 1960s than they are now. This Essay focuses on one such frame: that of poverty, or social and economic disadvantage.

Of course, Americans today know in some sense that access to birth control is deeply intertwined with class, but concerns of this kind surface only rarely in contemporary legal and political discourse about *Griswold*. This is largely because of the way *Griswold* has been categorized and canonized. *Griswold* helped give rise to *Roe v. Wade*,[3] *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[4] and the whole line of modern reproductive rights cases, and it has, to

1. 381 U.S. 479 (1965).

2. *See* Neil S. Siegel & Reva B. Siegel, *Contraception as a Sex Equality Right*, 124 YALE L.J. F. 349 (2015), http://www.yalelawjournal.org/forum/contraception-as-a-sex-equality-right [http://perma.cc/ZV72-CLRS] (recovering the history of Connecticut's birth control ban and showing the ways in which it reflected and reinforced traditional gender roles).

3. 410 U.S. 113 (1973).

4. 505 U.S. 833 (1992).

some extent, been subsumed into this line of cases. So today when we talk about *Griswold*, we are often really talking about *Roe* and *Casey*: about the right to abortion, or about more abstract doctrinal questions involving substantive due process. This is understandable. *Griswold was* a progenitor of the modern reproductive rights cases; it makes sense to locate the case in this line.

But when *Griswold* was decided, in 1965, *Roe* and *Casey* did not yet exist. *Griswold* was not yet part of the modern line of reproductive rights cases. When the Court struck down Connecticut's birth control ban, its decision was part of a different set of cases—a set of cases that reflected some of the deepest concerns of the Warren Court and that did not have to do with reproductive rights at all. This Essay focuses on *Griswold*'s status as part of this other set of cases. Its aim is not to minimize the relationship between *Griswold* and the subsequent development of the Court's reproductive rights jurisprudence, but rather to suggest that situating *Griswold* in this other set of cases can ultimately help us to appreciate aspects of reproductive rights law that often get lost, or at least terribly obscured, in our current discourse.

I. THE WARREN COURT'S POVERTY CASES

Before *Griswold* became part of the line of modern reproductive rights cases, it was part of a series of Warren Court decisions that suggested the Constitution, properly understood, was concerned with certain forms of material deprivation and economic injustice.

These decisions were not limited to a single doctrinal context. Some of them involved access to justice. The Court held in *Griffin v. Illinois*[5] that indigent defendants have a right to transcripts of their trials, even if they cannot pay for them; and in *Gideon v. Wainwright*[6] and *Douglas v. California*,[7] the Court held that indigent criminal defendants have a constitutional right to counsel, to be provided by the state if necessary. Other decisions involved the right to travel. The Court struck down statutes that required residents to live in-state for a year before becoming eligible for welfare benefits,[8] or in-county for a year before they could receive nonemergency medical care at the county's expense.[9]

5. 351 U.S. 12 (1956).

6. 372 U.S. 335 (1963) (right to counsel when charged with a crime).

7. 372 U.S. 353 (1963) (right to counsel on criminal appeal).

8. Shapiro v. Thompson, 394 U.S. 618 (1969).

9. Memorial Hosp. v. Maricopa Cnty., 415 U.S. 250 (1974).

Concerns about economic disadvantage also played a major role in the context of voting rights. The year after the Court invalidated Connecticut's birth control ban, it struck down the poll tax.[10] The Court explained that

> [l]ines drawn on the basis of wealth or property, like those of race, are traditionally disfavored. To introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor. . . . [Thus] the requirement of fee paying causes an "invidious" discrimination.[11]

Note that the Court refers here to the poll tax as a "line[] drawn on the basis of wealth" and a form of "invidious discrimination." Of course, a poll tax is not formally a line drawn on the basis of wealth. Virginia required everyone to pay $1.50 in order to vote.[12] There were no overt classifications involved. The same was true in many of the Warren Court's poverty decisions. The decision to charge a fee for trial transcripts did not explicitly single anybody out. The decision not to provide criminal defendants with attorneys free of charge did not formally discriminate on the basis of class. Yet the Court found these laws constitutionally infirm in part because they placed a special burden on the poor.[13]

Some scholars in the mid- to late-1960s posited that class had become a suspect classification like race, subject to heightened scrutiny.[14] Others—most notably, Frank Michelman in his *Harvard Law Review Foreword*[15]—argued that it made more sense to read these decisions as guaranteeing certain minimum entitlements. All of this scholarship proceeded from the assumption that economic disadvantage had become a central concern of Fourteenth Amendment jurisprudence.

This was the constitutional moment in which *Griswold* was decided. Connecticut's ban on birth control did not explicitly target any particular social group. But it had special bite for low-income women, because its most direct and tangible regulatory effect was to prevent the opening of birth control clinics—the chief purpose of which was to provide contraception and counseling to

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10. Harper v. Va. Bd. of Elections, 383 U.S. 663 (1966).

11. *Id.* at 668 (internal citations omitted).

12. *Id.*

13. *Griffin*, 351 U.S. at 18; *Gideon*, 372 U.S. at 344.

14. *See, e.g.*, John E. Coons et al., *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 CALIF. L. REV. 305, 348, 358-71 (1969); *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1124 (1969); Note, *Discriminations Against the Poor and the Fourteenth Amendment*, 81 HARV. L. REV. 435 (1967).

15. Frank I. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

women who lacked practical access to private doctors.[16] For this reason, opponents of the law, including Estelle Griswold, the Executive Director of the New Haven Planned Parenthood clinic whose closure gave rise to *Griswold*, often claimed that it discriminated against the poor.[17]

II. *GRISWOLD* AS A POVERTY CASE

Planned Parenthood made the same claim in its brief in *Griswold*, arguing that the Connecticut law was "grossly discriminatory," because its "real impact is on those most in need of family planning service, *i.e.*, the indigent and under-educated, whose medical help must come from public clinics."[18]

The fact that *Griswold* involved a public clinic was not peripheral to the case. A few years earlier, in *Poe v. Ullman*,[19] the Court had dismissed a challenge to Connecticut's birth control ban for lack of standing, finding that the plaintiffs—a doctor and several middle-class couples—had failed to demonstrate any real risk of prosecution, as private doctors regularly prescribed contraceptives to patients without getting into trouble.[20] Justice Brennan con-

16. *See* Catherine G. Roraback, Griswold v. Connecticut*: A Brief Case History*, 16 OHIO N.U. L. REV. 395, 397 (1989) (noting that, under the Connecticut law, "[i]t was the physicians and medical personnel operating in public clinics who were subjected to public scrutiny and threat of prosecution. And because it was here that these statutes impacted, it was the poor people of this state who were deprived of medically supervised contraceptive advice and services."). Importantly, Roraback, who was the lawyer for Planned Parenthood in *Griswold*, noted that although the Connecticut statute burdened poor women disproportionately, it constrained access to contraception in ways that affected women from all walks of life. *See id.* at 396 (noting, for example, that unmarried women lacked access to birth control, even through private doctors, and that some doctors refused to make birth control available even to married women). Thus, although this Essay focuses on the class dimension of *Griswold*, one could also read *Griswold* as a gender case. *See, e.g.*, Siegel & Siegel, *supra* note 2.

17. DAVID J. GARROW, LIBERTY AND SEXUALITY 197 (1994) (quoting Griswold, who claimed that "[i]t is the woman of the lower socio-economic group who does not know she can space her children, who cannot afford to go to a private doctor, who is being discriminated against by the Connecticut law").

18. Brief for Planned Parenthood as Amicus Curiae Supporting Appellants at *21, Griswold v. Connecticut, 381 U.S. 479 (1965) (No. 496).

19. 367 U.S. 497 (1961).

20. *See* Roraback, *supra* note 16, at 396, 400 (noting that some private doctors in Connecticut provided birth control advice and services to patients in contravention of the law, but none were prosecuted for it). The question of standing in *Poe* is more complicated than the majority's disposition of the case suggests. The Connecticut law did have some effect on private doctors and their middle-class plaintiffs: despite the lack of prosecutions, even "private care was often circumspect and clandestine, . . . some private physicians refused to provide these services at all . . . [and] these services were not available to unmarried persons." *Id.* at 396. Thus, had the Justices in *Poe* wanted to decide the case, they certainly could have found that the plaintiffs had standing. *See* Ryan C. Williams, *The Paths to* Griswold, 89 NOTRE DAME L. REV. 2155, 2160-66 (2014) (suggesting that the finding of justiciability in *Griswold* and not in

curred in the dismissal but wrote separately to note that the "true controversy in this case is over the opening of birth-control clinics on a large scale; it is that which the State has prevented in the past, not the use of contraceptives by isolated and individual married couples."[21] Justice Brennan suggested that if a case involving clinics rather than "isolated and individual married couples" were presented to the Court, it would undeniably be justiciable.[22]

Griswold was that case. The fact that *Griswold* involved a clinic was not only important procedurally; it also influenced the Justices' thinking in substantive ways. Thomas Emerson, the lawyer for Planned Parenthood, repeatedly emphasized at oral argument that the law was enforced against public clinics rather than private doctors, and that "what this means is not only that contraceptive devices are not available to such persons who cannot afford to go to private doctors, but that the whole range of medical services which are supplied by a clinic are not available to those people."[23]

This argument found traction in Chief Justice Warren's chambers. John Hart Ely, the Chief's clerk, urged the Chief Justice to find the law unconstitutional on the ground that it was enforced in a discriminatory manner against those who were reliant on clinics for birth control.[24] Ely cited as precedent *Yick Wo v. Hopkins*,[25] a nineteenth-century case in which the Court invalidated a law that was race-neutral on its face but administered in a prejudicial way.[26] Ely argued that the statute in *Griswold* was like the statute in *Yick Wo*: class-neutral

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Poe had less to do with the particular litigants in these cases and more to do with the evolution of standing doctrine in this period). Regardless of the fact that the Court could have found standing in *Poe*, however, the fact that it did not had the effect of underscoring that *Griswold*, unlike its predecessor, was a case about a public clinic.

21. *Poe,* 367 U.S. at 509 (Brennan, J., concurring). In response to questions about standing, Fowler Harper, lawyer for the plaintiffs in *Poe*, argued that although the state was not in the habit of prosecuting individuals under the law, "[t]he people in Connecticut who need contraceptive advice from doctors most, the people in the lower income brackets and the lower education brackets, the people who need it most do not get it because there are no clinics available." Transcript of Oral Argument at *14, *Poe*, 367 U.S. 497 (1961) (Nos. 60 & 61), http://www.oyez.org/cases/1960-1969/1960/1960_60 [http://perma.cc/6AQQ-9CC5].

22. *Poe,* 367 U.S. at 509.

23. Transcript of Oral Argument at *16, Griswold v. Connecticut, 381 U.S. 479 (1965) (No. 496).

24. Bench Memorandum from J.H. Ely to Chief Justice Earl Warren 27-28 (Feb. 26, 1965) (on file with Library of Congress, Earl Warren Papers, box 267, folder 2) [hereinafter Bench Memo]; Memorandum from J.H. Ely to Chief Justice Earl Warren re Justice Douglas' Opinion in No. 496, Griswold v. Connecticut 3-5 (Apr. 27, 1965) (on file with Library of Congress, Earl Warren Papers, box 520, folder 3) [hereinafter Memo re Douglas Opinion].

25. 118 U.S. 356 (1886).

26. Bench Memo, *supra* note 24, at 28; Memo re Douglas Opinion, *supra* note 24, at 3-5.

on its face, but discriminatory in practice because its effects fell much more heavily on the poor than the middle-class.[27]

The Chief Justice was poised, in the spring of 1965, to write a concurrence in *Griswold* expounding the "*Yick Wo* theory,"[28] but Justice White beat him to it. In his draft opinion, Justice White asserted:

> [T]he clear effect of these statutes, as enforced, is to deny disadvantaged citizens of Connecticut, those without either adequate knowledge or resources to obtain private counseling, access to medical assistance and up-to-date information in respect to proper methods of birth control. In my view, a statute with these effects bears a substantial burden of justification when attacked under the Fourteenth Amendment.[29]

Very likely at the urging of the Chief Justice,[30] Justice White added a citation to *Yick Wo* here[31]—driving home the point that the extra burden the birth control ban placed on public clinics was a problem of constitutional magnitude.

Today, of course, we do not think of *Griswold* as a poverty case, but as a privacy case. One advantage of looking at the case through the lens of the 1960s, before it became entangled in arguments about abortion and substantive due process, is that it is easier to recognize the extent to which the case vindicated the rights of poor women.

Recognizing the role poverty played in *Griswold* can, in turn, help us to better understand its privacy holding. The opinion famously focuses on privacy within the marital bedroom. But *Griswold* did not concern only what Justice Brennan referred to in *Poe v. Ullman* as the "isolated and individual married couple." It concerned a clinic that was open to the public and designed especially to serve low-income women.

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27. Bench Memo, *supra* note 24, at 27 ("It is the poor and ill-informed who most need contraception and advice on family planning. Clinics are of course the answer. Yet it is only against the clinics that the law is enforced . . . ."); Memo re Douglas Opinion, *supra* note 24, at 4 (same).

28. Bench Memo, *supra* note 24 (handwritten annotation on final, non-numbered page, apparently by Chief Justice Warren, stating of the appellants' claim: "I might sustain it on a *Yick Wo* theory or on the basis that the statute is not tightly drawn"); *cf.* Memo re Douglas Opinion, *supra* note 24, at 3 (urging the Chief Justice to "wait and see what is written," as "[p]erhaps someone will circulate an opinion you can join").

29. Draft of Justice Byron White's Concurring Opinion in Griswold v. Connecticut 3 (undated) (on file with Library of Congress, Byron R. White Papers, box 67, folder 13) (citation omitted).

30. *See* Memorandum from J.H. Ely to Chief Justice Earl Warren re Justice White's Concurrence in No. 496, Griswold v. Connecticut 2 (May 19, 1965) (on file with Library of Congress, Earl Warren Papers, box 520, folder 3) (suggesting that Justice White might be persuaded to include a citation to *Yick Wo* in his opinion).

31. *See* Griswold v. Connecticut, 381 U.S. 479, 503 (1965) (White, J., concurring).

At first glance, it might seem ironic that the decision that gave rise to contemporary *privacy* doctrine served primarily to safeguard *public* access to birth control. But perhaps it is not so ironic. Privacy has never entailed merely the right to be left alone. This is particularly true of the kind of decisional autonomy the Court protected in *Griswold*. Such autonomy often depends, as it does here, on an infrastructure of provision. In order to make autonomous decisions about sexuality and reproduction, women need access to birth control. As *Griswold* recognized, some women gain this access through private doctors; others require public clinics.

It remains unclear today just how far the state's obligations extend in regard to this infrastructure of provision in the context of reproductive rights. Fifteen years after *Griswold*, the Court upheld limitations on the use of public funds for abortion, concluding that the state is not constitutionally obligated to fund the procedure.[32] But such holdings do not answer the question of whether a state—say, Texas—can lay waste to an entire infrastructure of Planned Parenthood clinics, among other venues, and in so doing deprive millions of women of access to reproductive health care of all sorts.[33] That is why it seems so timely, on this fiftieth anniversary, to revisit *Griswold* and to remember that the case that gave us modern privacy doctrine was predominantly concerned with public access to birth control. The case teaches us that an infrastructure of provision—including public clinics, even if run by groups such as Planned Parenthood rather than the state—may sometimes be essential to the vindication of Fourteenth Amendment rights.

Cary Franklin is Assistant Professor of Law, University of Texas School of Law. *She thanks Joey Fishkin, Neil Siegel, Reva Siegel, and Louise Trubek for helpful comments and questions about this Essay, and Kelsey Chapple for outstanding research assistance.*

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32. Harris v. McRae, 448 U.S. 297 (1980).

33. *See* Whole Woman's Health v. Lakey, 2014 WL 4346480, at *7 (W.D. Tex. 2014) (striking down, as an undue burden, a Texas statute imposing elaborate new restrictions that would have resulted in the closure of most abortion providers in the state; the district court found that the "practical impact" of these closures, for a large number of women, would be "just as drastic[] as a complete ban on abortion"). The Fifth Circuit enjoined the district court's decision pending appeal, 769 F.3d 285 (5th Cir. 2014), but the Supreme Court summarily vacated the injunction, with Justices Scalia, Thomas, and Alito noting their dissent, 135 S. Ct. 399 (2014). The case remains on appeal. *See also* Jenny Kutner, *GOP's Texas Health Disaster: Millions of Women Left Without Access to Care*, SALON (Oct. 3, 2014), http://www.salon.com/2014/10/03/gops_texas_health_disaster_millions_of_women_left_without_access_to_care [http://perma.cc/FV4K-PSZD] (explaining why the closure of these providers would also cause millions of women to lose access to reproductive health examinations and procedures other than abortions).

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