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Overlooking Equality on the Road to *Griswold*

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This year marks the fiftieth anniversary of *Griswold v. Connecticut*,[1] the Supreme Court decision that famously articulated a right to privacy.[2] As we celebrate *Griswold*, it is easy to overlook what preceded it—and what was surrendered in *Griswold*'s embrace of the right to privacy. In 1960, five years before *Griswold* reached the Supreme Court, Yale law professor Fowler V. Harper and civil rights attorney Catherine Roraback launched a series of federal challenges to Connecticut's ban on contraceptive use and counseling. Like *Griswold*, these cases, *Poe v. Ullman*[3] and *Trubek v. Ullman*,[4] eventually reached the United States Supreme Court. The Court, however, dismissed both of these pre-*Griswold* challenges.[5] Five years later, after the Planned Parenthood League of Connecticut opened a birth control clinic, prompting the arrests of its executive director, Estelle Griswold, and its chief physician, C. Lee Buxton,[6] the Court reached the merits of the contraceptive ban in *Griswold*.

Not surprisingly, *Poe v. Ullman* and *Trubek v. Ullman* have lived in *Griswold*'s shadow. Today, *Poe v. Ullman* is rarely mentioned, except as a footnote to *Griswold* and as an illustration of the jurisdictional requirement of ripeness. *Trubek v. Ullman*, which was dismissed alongside *Poe*,[7] now receives even less

1. 381 U.S. 479 (1965).
2. *Id*. at 486 ("We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system.").
3. 367 U.S. 497 (1961).
4. 367 U.S. 907 (1961).
5. The Court dismissed *Poe v. Ullman* on procedural grounds, concluding that because Connecticut rarely enforced the contraceptive ban—and had not enforced it against the plaintiffs—there was no ripe case or controversy to be decided. *Poe*, 367 U.S. at 502. The Court provided no rationale for its dismissal of *Trubek v. Ullman*. *Trubek*, 367 U.S. 907.
6. *See* Mary L. Dudziak, *Just Say No: Birth Control in the Connecticut Supreme Court Before* Griswold v. Connecticut, 75 IOWA L. REV. 915, 936-37 (1990).
7. 367 U.S. at 907.

attention.[8] *Trubek*'s liminal position in the narrative of reproductive rights is unfortunate. As this brief Essay argues, this often-overlooked case offered an alternative framing for the development of reproductive rights and our understanding of marriage—a framing that, unlike *Griswold*, gestured toward the concept of women's equal citizenship even as it embraced the notion of marital privacy.

Like *Poe*, *Trubek* featured a married couple as plaintiffs. But despite this commonality, the plaintiffs in the two cases were different in important ways. The married couples at the heart of *Poe* represented a very traditional view of marriage and the gender roles attendant to marriage. The husbands were working breadwinners, while the wives were homemakers.[9] Each couple's interest in contraception stemmed from the fact that a pregnancy would result in serious health challenges for the wife or child.[10]

The Trubeks, by contrast, were recently married, and both were enrolled as students at Yale Law School[11]—indeed, Louise Trubek was one of only six women in her law school class.[12] 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.[13] Put differently, contraception was an essential tool for effective family planning in a marriage that was organized as a partnership of equals. Louise Trubek later elaborated the point: "I was no sexual radical: I was married, a 'good girl' uninterested in sexual freedom."[14] Instead, she and her husband approached the lawsuit "from the question of equal marriage."[15] This vision of husband and wife as equal partners was "the motivating factor."[16]

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8. Indeed, as the Trubeks observed, the case is "a footnote to a footnote." Interview by Kristin Luker with Louise Trubek and David Trubek, at the Berkeley Law Center for Reproductive Rights and Justice (Nov. 8, 2013) [hereinafter Interview with Trubeks].

9. *See* Brief for Appellants at 5-7, *Poe*, 367 U.S. 497 (No. 61) [hereinafter *Poe* Appellants' Brief].

10. *Id*.

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

12. *See* Louise G. Trubek, Op-Ed, *The Unfinished Fight Over Contraception*, N.Y. TIMES, Mar. 1, 2012, http://www.nytimes.com/2012/03/02/opinion/contraception-war-goes-on.html [http://perma.cc/DZS8-BMDN].

13. *Trubek* Complaint, *supra* note 11, at 3.

14. *See* Trubek, *supra* note 12.

15. Interview with Trubeks, *supra* note 8.

16. *Id*.; *see also* Catherine Roraback Notes on *Trubek v. Ullman* (on file with author).

In this way, unlike the *Poe* plaintiffs, who modeled traditional marital roles and accepted marriage as an institution for procreation, the Trubeks reflected a different marital model. Far from being a relationship that prioritized procreation and cultivated and enshrined unequal gender roles, the Trubeks envisioned marriage as an institution that could be premised on—and integral to operationalizing—sex equality. Access to birth control was central to achieving the Trubeks' vision of an egalitarian marriage. As Louise Trubek observed more than fifty years later:

> I believed women should have access to birth control so they could have both a career and a family. . . . I was planning to have a family and a career as a lawyer. I believed I should be free to choose the timing of my children's births so I could do both.[17]

The briefs filed in both cases reflected the different factual circumstances of the two sets of plaintiffs, as well as these different visions of marriage. The *Poe* plaintiffs embraced the concept of marital privacy, which secluded the marital couple and their decisions, including the decision to use contraception, from the state's reach.[18] The Trubeks also emphasized marital privacy.[19] However, they did so in a manner that differed from the privacy argument that the *Poe* plaintiffs offered. Newly married, the Trubeks wanted "to have an opportunity to adjust themselves, mentally, spiritually and physically to each other, so as to establish a secure and permanent marriage,"[20] before taking on the challenges of children and child-rearing. Under the Trubeks' logic, marital privacy allowed couples the space and autonomy to make crucial decisions about how their marriages would be organized, including whether and when to have children and how to allocate familial labor. 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.[21]

But perhaps more radically, marital privacy could be a precondition for women's liberation from the traditional domesticity to which wives were con-

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17. Trubek, *supra* note 12.

18. *See Poe* Appellants' Brief, *supra* note 9, at 28-29.

19. *See* Jurisdictional Statement at 7-8, Trubek v. Ullman, 367 U.S. 907 (1961) (No. 847).

20. *Trubek* Complaint, *supra* note 11, at 2.

21. In her notes on the case, lawyer Catherine Roraback linked the concept of marital privacy to access to contraception. As she noted, "the general proposition here" is "that married couples have a right to determine the size of their families and the spacing of their children and to use the best scientific means to achieve that goal." Catherine Roraback Notes on *Trubek v. Ullman*, *supra* note 16.

signed.[22] As the Trubeks noted in their complaint, access to contraception would allow Louise to avoid a pregnancy that "would mean disruption of [her] professional education" and career.[23] In this regard, decision-making about contraception and family planning permitted wives to forego marriage's gendered expectations in order to pursue their own ambitions in and outside of the home. In so doing, birth control could not only liberate women to pursue their own ambitions, it could completely reorder the meaning and structure of marriage.[24]

The connections between birth control and women's liberation were clear not only to the Trubeks, but also to the state of Connecticut. In a brief filed in *Poe*, Connecticut referenced *Trubek*, which was then "pending in the Connecticut Supreme Court of Errors."[25] According to the State, marriage was a status that required the necessary curtailment of individual rights and liberties: "The State and society expects that the parties will, as a result of voluntarily entering the marital status, carry out the duties and obligations required of such a relationship."[26] Access to contraception was therefore not within the liberty rights of married couples.

But what were the "definite obligations and responsibilities" of marriage that obviated the exercise of individual rights and liberties? Connecticut did not say explicitly, but its disdain for contraception[27] and defense of marriage suggested that procreation and adherence to traditional marital roles were among the duties and obligations to which married people submitted upon entering the institution. Because marriage was a status, and not a contract the

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22. To be clear, the domestic roles with which marriage was associated confined men as well—a point emphasized by Ruth Bader Ginsburg in the sex equality cases of the 1970s. *See generally* Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83 (2010) (discussing Justice Ginsburg's deployment of sex stereotyping theory).

23. *Id*.

24. Although the Trubeks identified the connections between contraception and women's liberation in their litigation materials, these linkages were made even earlier by first-wave feminists and birth control advocates. *See* Margaret Sanger, *Morality and Birth Control*, 1 BIRTH CONTROL REV. 11, 14 (1918); *see also* Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 280-323 (1992) (discussing the early criminalization of contraception and abortion, which explicitly linked reproductive control to women's liberation and equality).

25. Brief for Appellee at 10, Poe v. Ullman, 367 U.S. 497 (1961) (No. 61).

26. *Id*.

27. To be clear, the state's disdain for contraception was gender-specific. The state's contraceptive ban was targeted at *women's* contraceptive use. Tellingly, the ban included a health exception that permitted condoms to be sold for "disease prevention." *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].

terms of which could be negotiated and bargained for, these "rights and obligations of marriage are over and above the parties themselves and are fixed by society in accordance with the natural law."[28] In other words, procreation and adherence to traditional marital roles were non-negotiable marital duties that could not be avoided through the use of contraception.

In this way, the Trubeks and Connecticut put forth two competing visions of marriage that diverged not only in their prioritization of procreation, but also in their acceptance of the relationship between procreation, marriage, and sex equality. The Trubeks recognized birth control's potential to reshape women's lives and aspirations, and, in the process, to reshape marriage as an institution. By contrast, Connecticut was holding the line on a traditional vision of procreative marriage complete with a gender-specific division of labor that spouses could neither renegotiate nor avoid. According to the State, it seemed, Louise Trubek's interest in using contraception so that she might achieve her professional ambitions amounted to shirking the duties and status obligations demanded of wives.

Access to contraception was thus doubly radical and threatening. It was not simply about stripping marriage of its procreative character; it was about restructuring marriage by allowing wives to step out of the confines of domesticity to participate in spheres traditionally reserved for their husbands. If the *Poe* plaintiffs reflected contraception's benign potential — saving lives in the face of pregnancy-related health risks — then the Trubeks represented something more alarming. By liberating wives — and marriage itself — contraception threatened the disruption of marriage and the family, the foundations of civil society.

In the end, the Supreme Court never had the opportunity to consider the connections between birth control, marriage, and women's liberation. *Poe* and *Trubek* were dismissed for want of jurisdiction,[29] setting the stage for *Griswold* and its embrace of the right to privacy. Critically, *Griswold* did not feature any married couples as plaintiffs. As a consequence, the petitioners' arguments were more abstract in their articulation of what was at stake in Connecticut's ban on contraception. The *Griswold* petitioners and their amici emphasized marital privacy, the rights of physicians to appropriately advise their patients,

28. Brief for Appellee, *supra* note 25, at 12.

29. For years, scholars have sought to make sense the Court's puzzling manipulation of justiciability doctrine in *Poe v. Ullman*. *See, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 146 (1962) (suggesting that the Court's decision in *Poe* was intended to avoid resolving "issues on which the political process are in deadlock"); Jonathan D. Varat, *Variable Justiciability and the* Duke Power *Case*, 58 TEX. L. REV. 273, 317 (1980) ("[T]he Court occasionally appears to use justiciability doctrine, as in *Poe v. Ullman*, to avoid decision of controversial constitutional issues that the Court would rather decide at a later, more politically acceptable time, if at all."). The threatening nature of the Trubeks' claim for access to birth control perhaps explains the reasons why the Court went to such great lengths to avoid deciding these cases on the merits.

and the right of married couples to use contraception, in consultation with their physicians, if they wished.[30] But there were no Louise Trubeks in *Griswold* and hence no way to make concrete the stakes for women in the battle over birth control.[31]

CONCLUSION

Trubek v. Ullman reveals the overlooked equality narrative that *Griswold*'s prioritization of marital privacy occluded. While the recovery of this narrative helps to render a more accurate historical account of these cases, recent events make clear that the issue of sex equality continues to shadow the issue of contraceptive access. In 2014, more than fifty-five years after *Poe v. Ullman* and *Trubek v. Ullman* were dismissed on jurisdictional grounds, the Supreme Court decided *Burwell v. Hobby Lobby Stores, Inc.*,[32] a challenge to the Affordable Care Act's contraceptive coverage mandate.[33] Although a general ban on contraceptives was not at issue in *Hobby Lobby*, this recent case raised questions about who was responsible for providing access to birth control—questions that implicated the relationship among contraception, gender roles, and women's liberation even as other issues took precedence. In *Hobby Lobby*, religious employers objected to the ACA's contraceptive mandate insofar as it required insurance coverage of certain types of contraception for female employees.[34] As the employers explained, the mandate required them to subsidize so-called "abortifacients" in violation of their religious principles.[35]

In the face of these religious liberty claims, the federal government defended the contraceptive mandate as necessary to ensure that "all women have access to all FDA-approved contraceptives."[36] But in striking down the mandate's application to certain employers, the *Hobby Lobby* majority seemed less convinced, "finding it unnecessary to adjudicate" whether "public health" and

30. *See* Brief for Appellants, Griswold v. Connecticut, 381 U.S. 479 (1965) (No. 496).

31. In an amicus brief, the American Civil Liberties Union made a valiant effort to resuscitate the sex equality dimensions of marital privacy. *See* Brief for the American Civil Liberties Union and Connecticut Civil Liberties Union as Amici Curiae, *Griswold*, 381 U.S. 479 (No. 496), 1965 WL 115616, at *15-16. For further discussion of the *Griswold*'s equality dimensions, see Siegel & Siegel, *supra* note 27.

32. 134 S. Ct. 2751 (2014).

33. *Id.* at 2762-63.

34. *Id.* at 2764-67.

35. *Id.* at 2759.

36. *Id.* at 2779.

"gender equality" in the provision of health services constituted compelling interests under the Religious Freedom Restoration Act (RFRA).[37]

Other members of the Court, however, were convinced that "ensuring that all women have access to all FDA-approved contraceptives" constituted a compelling governmental interest. In a stirring dissent, Justice Ginsburg, joined by three justices,[38] affirmed that the interest in gender equality in the provision of health services was a compelling governmental interest under RFRA.[39] More importantly, in so doing, Justice Ginsburg identified what the majority had overlooked: the relationship between access to contraception and women's equality. As Justice Ginsburg explained, quoting a well-known line in *Planned Parenthood v. Casey*, "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."[40] This insight, Justice Ginsburg observed, guided Congress's formulation of the ACA's contraceptive mandate[41] and should have informed "the Court's resolution of these cases."[42]

Indeed, Justice Ginsburg's appeal to *Casey* suggests that the interests at stake in *Hobby Lobby* go beyond individual women's access to contraception to include broader societal interests. While different in form, religious exemption claims, like those advanced in *Hobby Lobby*, recall earlier criminal prohibitions on contraception, like the Connecticut ban challenged in *Poe*, *Trubek*, and *Griswold*. Although these religious liberty claims do not directly ban contraceptive use, as the criminal statutes did, they nonetheless cultivate social meanings about contraception and contraceptive use. In this regard, sanctioning religious claimants' objections to contraception, as the Court did in *Hobby Lobby*, may reiterate older messages that mark contraceptive use as illegitimate, while stig-

37. *Id.* at 2780. Ultimately, the Court concluded that the mandate was not sufficiently narrowly tailored to meet the government's desired objectives. *Id.* at 2782.

38. The three Justices were Sotomayor, Breyer, and Kagan. Some scholars argue that Justice Kennedy represents a fifth vote for the view that ensuring women's access to contraception is a compelling governmental interest. *See* Neil S. Siegel & Reva B. Siegel, *Compelling Interests and Contraception*, 47 CONN. L. REV. (forthcoming 2015) (noting that "Justice Kennedy, who joined the majority opinion in full, also wrote separately in part to affirm the existence of a compelling interest").

39. *Hobby Lobby*, 134 S. Ct. at 2787-90 (Ginsburg, J., dissenting).

40. *Id.* at 2787 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 856 (1992)).

41. *Id.* at 2788 ("Congress acted on that understanding when, as part of a nationwide insurance program intended to be comprehensive, it called for coverage of preventive care responsive to women's needs. Carrying out Congress' direction, the Department of Health and Human Services (HHS), in consultation with public health experts, promulgated regulations requiring group health plans to cover all forms of contraception approved by the Food and Drug Administration (FDA).").

42. *Id.*

matizing those women who, for professional reasons or out of simple desire, seek to avoid motherhood by using contraception.[43]

With all of this in mind, even as we celebrate *Griswold* and its constitutionalization of the right to privacy, we should take heed of the equality dimensions that the question of access to contraception presents. Justice Ginsburg's admonition in *Hobby Lobby* is instructive. But also instructive is the example of Louise Trubek, who understood in 1960 that privacy and equality could coexist to create a legal landscape where women could aspire to more than traditional marriage and motherhood.

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43. For a cogent discussion of religious-based conscience exemptions and their role in reinscribing social meanings about contraception and contraceptive use, see Douglas NeJaime & Reva B. Siegel, Feature, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. (forthcoming 2015), http://ssrn.com/abstract=2560658 [http://perma.cc/5C9W-5XZC].