1. The Birth of Privacy

a. Meanings of Privacy

GRISWOLD v. CONNECTICUT

381 U.S. 479 (1965)

Mr. Justice DOUGLAS delivered the opinion of the Court.

Appellant Griswold is Executive Director of the Planned Parenthood League of Connecticut. Appellant Buxton is a licensed physician and a professor at the Yale Medical School who served as Medical Director for the League at its Center in New Haven. [Appellants were arrested and charged with giving information, instruction, and medical advice to married persons on means of preventing conception.]

The [statute] whose constitutionality is involved . . . provides:

> 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. . . .

The appellants were found guilty as accessories and fined $100 each, against the claim that the accessory statute as so applied violated the Fourteenth Amendment. . . . We think that appellants have standing to raise the constitutional rights of the married people with whom they had a professional relationship. . . .

Coming to the merits, we are met with a wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment. Overtones of some arguments suggest that Lochner v. New York, 198 U.S. 45 [(1905)], should be our guide. But we decline that invitation. We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. This law, however, operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation.

The association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parents' choice—whether public or private or parochial—is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of those rights.

By Pierce v. Society of Sisters, [268 U.S. 510 (1925),] the right to educate one's children as one chooses is made applicable to the States by the force of the First and Fourteenth Amendments. By Meyer v. Nebraska, [262 U.S. 390 (1923),] the same dignity is given the right to study the German language in a private school. . . .

In NAACP v. Alabama, 357 U.S. 449, 462 [(1958),] we protected the "freedom to associate and privacy in one's associations," noting that freedom of association was a peripheral First Amendment right. . . . In other words, the First Amendment has a penumbra where privacy is protected from governmental intrusion. . . . Association . . . is a form of expression of opinion; and while it is not expressly

included in the First Amendment its existence is necessary in making the express guarantees fully meaningful.

The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. See Poe v. Ullman, 367 U.S. 497, 516-522 [(1961)] (dissenting opinion). Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." . . . We have had many controversies over these penumbral rights of "privacy and repose." See, e.g., Skinner v. Oklahoma, 316 U.S. 535, 541 [(1942)]. . . .

The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the use of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." NAACP v. Alabama, 377 U.S. 288, 307 [(1964)]. Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.

We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions. Reversed.

Mr. Justice GOLDBERG, whom THE CHIEF JUSTICE and Mr. Justice BRENNAN join, concurring.

I agree with the Court that Connecticut's birth-control law unconstitutionally intrudes upon the right of marital privacy. . . . I add these words to emphasize the relevance of [the Ninth] Amendment to the Court's holding. . . . The Amendment is almost entirely the work of James Madison. . . . It was proffered to quiet expressed fears that a bill of specifically enumerated rights could not be sufficiently broad to cover all essential rights and that the specific mention of certain rights would be interpreted as a denial that others were protected. . . .

. . . To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is

to ignore the Ninth Amendment and to give it no effect whatsoever. [T]he Ninth Amendment simply lends strong support to the view that the "liberty" protected by the Fifth and Fourteenth Amendments from infringement by the Federal Government or the States is not restricted to rights specifically mentioned in the first eight amendments. . . .

Mr. Justice HARLAN, concurring in the judgment. . . .

In my view, the proper constitutional inquiry in this case is whether this Connecticut statute infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values "implicit in the concept of ordered liberty," Palko v. Connecticut, 302 U.S. 319, 325 [(1937)]. For reasons stated at length in my dissenting opinion in Poe v. Ullman, [367 U.S. 497, 522 (1961)], I believe that it does. . . .

. . . Judicial self-restraint will . . . be achieved in this area, as in other constitutional areas, only by continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms. . . .

[In a separate concurring opinion, Justice White agrees that the statute violates the liberty protected by the Due Process Clause, questioning how the statutory ban serves the state's asserted interest in deterring illicit sexual relationships.]

Mr. Justice BLACK, with whom Mr. Justice STEWART joins, dissenting. . . .

The Court talks about a constitutional "right of privacy" as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge the "privacy" of individuals. But there is not. . . . I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision. . . .

My Brother Goldberg has adopted the recent discovery[12] that the Ninth Amendment as well as the Due Process Clause can be used by this Court as authority to strike down all state legislation which this Court thinks violates "fundamental principles of liberty and justice," or is contrary to the "traditions and [collective] conscience of our people." He also states, without proof satisfactory to me, that in making decisions on this basis judges will not consider "their personal and private notions." One may ask how they can avoid considering them. Our Court certainly has no machinery with which to take a Gallup Poll. And the scientific miracles

12. See Patterson, The Forgotten Ninth Amendment (1955). . . . In Redlich, Are There "Certain Rights . . . Retained by the People"?, 37 N.Y.U. L. Rev. 787 [(1962)], Professor Redlich, in advocating reliance on the Ninth and Tenth Amendments to invalidate the Connecticut law before us, frankly states:

> But for one who feels that the marriage relationship should be beyond the reach of a state law forbidding the use of contraceptives, the birth control case poses a troublesome and challenging problem of constitutional interpretation. He may find himself saying, "The law is unconstitutional—but why?" There are two possible paths to travel in finding the answer. One is to revert to a frankly flexible due process concept even on matters that do not involve specific constitutional prohibitions. The other is to attempt to evolve a new constitutional framework within which to meet this and similar problems which are likely to arise.

Id., at 798.

of this age have not yet produced a gadget which the Court can use to determine what traditions are rooted in the "[collective] conscience of our people." . . .

Mr. Justice STEWART, whom Mr. Justice BLACK joins, dissenting.

. . . I think this is an uncommonly silly law. As a practical matter, the law is obviously unenforceable, except in the oblique context of the present case. As a philosophical matter, I believe the use of contraceptives in the relationship of marriage should be left to personal and private choice, based upon each individual's moral, ethical, and religious beliefs. As a matter of social policy, I think professional counsel about methods of birth control should be available to all, so that each individual's choice can be meaningfully made. But we are not asked in this case to say whether we think this law is unwise, or even asinine. We are asked to hold that it violates the United States Constitution. And that I cannot do. . . . With all deference, I can find no such general right of privacy in the Bill of Rights, in any other part of the Constitution, or in any case ever before decided by this Court.

At the oral argument in this case we were told that the Connecticut law does not "conform to current community standards." But it is not the function of this Court to decide cases on the basis of community standards. . . . If, as I should surely hope, the law before us does not reflect the standards of the people of Connecticut, the people of Connecticut can freely exercise their true Ninth and Tenth Amendment rights to persuade their elected representatives to repeal it. That is the constitutional way to take this law off the books.

Michael Grossberg, Governing the Hearth: Law and the Family in Nineteenth-Century America

156-157, 175-177, 189-193 (1985)

At the heart of the nineteenth-century controversy over family limitation lay the quiet determination of American mothers and fathers to reduce the number of children they reared. They initiated what historical demographers now designate the "demographic transition": a reduction in family size that characterized most Western nations. In America, white female fertility, the critical measure of family size, declined in each decade of the century, falling from 7.04 in 1800 to 3.56 a hundred years later. . . .

Although the exact sources [of this transition] remain uncertain, some characteristics of the republican household offer clues. . . . These include the child-centered nature of the republican home in which numerous offspring seemed to inhibit proper child care; the rise of what historian Daniel Scott Smith terms "domestic feminism," or the determination of women to assert their individuality and household authority by regulating pregnancy and marital sexuality; the economic incentives of market capitalism in which large families seemed a burden and in which moderation and self-control became prized virtues; the companionate nature of republican matrimony, which fostered the separation

of sexual pleasure from protection; and the emerging American insistence on overcoming what had previously been considered natural forces beyond human control. . . .

Though it is difficult to pierce the privacy surrounding family limitation, at the beginning of the nineteenth century, husbands and wives apparently still relied on age-old methods of birth control such as delayed marriage, breast feeding, and abstinence (as well as *coitus interruptus* and other active contraceptive practices). . . .

Although statutes prohibiting various forms of abortion had been on the books since the 1820s, there were few explicit restrictions on contraception until the 1870s. But federal and state acts labeling both abortion and contraception obscene capped the growing determination of family savers to ban all forms of family limitation. [For example, although] he sympathized with women's fears about childbirth and rearing large families, [Augustus] Gardner confidently insisted that efforts made "to avoid propagation, are ten thousand-fold more disastrous to the health and constitution, to say nothing of the demoralization of mind and heart. . . ." Gardner [and his followers] looked to the criminal law for relief.

Self-appointed purity campaigners led the drive against contraception. New Yorkers created the first purity society in 1872, the New York Society for the Suppression of Vice. [T]he society's point man for purity reform was a little known ex-dry goods salesman, Anthony Comstock. The son of devout Connecticut parents, he tried unsuccessfully to make his fortune as a businessman in New York City. The flagrant vices he encountered in the city shocked him into a highly publicized vigilante campaign. It culminated in his appointment as the antivice society's chief agent, thus launching his career as late nineteenth-century America's self-avowed savior of public morals.

Comstock regarded the feeble statutes then on the books as the weakest link in his war on vice. . . . In 1872 he convinced the antivice society to send him to Washington to press for a rigorous national statute. [There] the vice crusader succeeded beyond his wildest expectations. Armed with a display case of vice paraphernalia and vivid tales of his fights with the panderers of obscenity, Comstock enlisted the aid of Vice President Henry Wilson and Supreme Court Justice William Strong to draft a new obscenity law. The bill passed with little debate and became law on 1 March 1873. [It became known as the "Comstock law."]

The act's primary purpose was to ban the circulation and importation of obscene materials through the national mails. Specifically included on the list of banned goods was every article designed, adapted, or intended "for preventing conception or producing abortion, or for indecent or immoral use; and every article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for preventing conception or producing abortion, or for any indecent or immoral purpose. . . ." The act set punishment at a $5,000 fine, one to ten years at hard labor, or both. . . .

[P]urity crusaders also prodded state legislators into action. Antivice societies, and after 1885 the Social Purity Alliance, succeeded in persuading twenty-two legislatures to enact general obscenity laws and another twenty-four to specifically ban birth control and abortion. [Courts upheld convictions under these laws.]

Let loose by Congress, state legislatures, and the courts, vice hunters prowled the nation sniffing out their prey. Posing as customers or using decoy letters, federal agents and local societies purchased proscribed items and then arrested sellers. . . . Comstock in fact caught his most famous victim with a birth-control ploy. Having been warned not to tangle with the infamous Madame Restell, he took her capture as a personal challenge. In the guise of an impoverished father, Comstock pleaded for contraceptive information because his meager finances could support no more children. When she obliged, he arrested her. Faced with the almost certain prospect of jail at the age of 67, Restell slit her throat with a carving knife. Comstock experienced no remorse: "a bloody end to a bloody life."

. . . Congress strengthened the federal ban in 1908. By the 1930s eight states specifically prohibited the flow of contraceptive information while the rest acted through broadened obscenity laws. Contraception remained a taboo subject, even though, much like prohibition, the statutes expressed a moral standard clearly at odds with actual practices. . . . Birth control, no matter how essential family limitation had become to the republican family, still violated the nation's code of proper domestic behavior. Fears aroused by the immigration of seemingly fecund non-Protestant women, charges of race suicide leveled against non-immigrant mothers who regulated their child bearing, and the ever-present concern over changes in gender responsibilities reinvigorated the stigma attached to the practice.

The constitutionality of the ban was also impenetrable. [Judicial cases] demonstrated the formidable opposition facing birth-control advocates. . . . Birth control continued to be an obscene subject banished from polite society. . . .

Catherine G. Roraback, Griswold v. Connecticut: A Brief Case History

16 Ohio N.U. L. Rev. 395, 395-401 (1989)

Estelle Griswold (left) and Planned Parenthood colleague Cornelia Jahncke celebrate the Supreme Court victory.

The [Connecticut] ban on the use of contraceptives had been on the statute books of this state for some *eighty-six* years. Many other jurisdictions had similar laws, but by the late 1950's these laws had been either repealed or their impact minimized by judicial interpretation. In 1958 only Connecticut had an absolute ban on contraceptive devices, one without an exception even for situations where the life of the mother might be endangered by a pregnancy. [T]here were regular attempts to obtain legislative repeal of the statute. In each biennial session of the General Assembly a repealer

bill was introduced, vociferous and vituperative hearings were held, and the bill was eventually voted down. . . .

[I]t is hard to remember the attitudes toward birth control in the 1950's. The statutory prohibition on the use of contraceptives even by married persons was accepted by many as a legitimate exercise of the police powers of the state. That is not to say that private doctors did not provide such advice and services to their private patients, nor that patients able to afford private medical care did not obtain contraceptive advice. However, even that private care was often circumspect and clandestine, and some private physicians refused to provide these services at all. Certainly these services were not available to unmarried persons.

Although contraceptives were available for purchase in drugstores throughout the state, that availability was usually "under-the-counter." Druggists also sold such items on prescription of a private physician. The activities of the state Planned Parenthood League were limited to educational and legislative programs and a referral service to clinics in neighboring New York and Rhode Island, with transportation furnished by volunteers to enable the women to take advantage of the out-of-state services.

But no medical source of contraceptive advice or services was available in this state to those dependent on publicly provided health care. It 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. [After 1940, when nine Planned Parenthood clinics were closed, no public or private facility provided free birth control.]

In 1957, Estelle Griswold, a dynamic, vivacious woman, had only recently become the executive director of the Planned Parenthood League of Connecticut. She found herself frustrated by the legal situation in Connecticut and her inability to organize Planned Parenthood clinics in the state.

In the course of preparations that year for the biennial legislative hearing on repeal of the anti-birth-control statute, she arranged for C. Lee Buxton to testify. Buxton had only recently come to New Haven as professor and chairman of the Department of Obstetrics and Gynecology at the Yale University School of Medicine. . . . He felt deeply that the statute banning the use of contraceptive devices and the accessory statute preventing him from giving what he felt to be the advice and care his patients deserved were gross invasions of his patients' rights, and highly improper impediments on his ability to practice his profession.

It was at this point, as legend has it, that Estelle invited both Lee Buxton and Fowler Harper to her home one day in the fall of 1957 and introduced them over cocktails. Fowler, then a professor at the Yale Law School, taught—among other subjects—family law. He was a social activist, involved in the community, always ready to take on a cause and to use his full energies and legal skills to cure an inequity. . . . He most certainly reacted with verve and gusto as Lee spoke of his frustrations about the Connecticut law banning the use of contraceptives and his inability to properly serve his patients. And, the legend holds, it was from this conversation that the litigation which culminated in *Griswold* originated. . . .

[The chosen strategy was for Dr. Buxton and some of his married patients to seek in state court a declaratory judgment that the statute was unconstitutional or should not apply when pregnancy threatened a woman's life or health.] One of the patients bringing suit was Jane Doe, a young twenty-five year old housewife. . . . While hospitalized [for pregnancy complications] she had suffered a stroke, her pregnancy could not be aborted, and she had had to continue the pregnancy until at term she had a stillbirth. As a result she was permanently paralyzed on her right side, her speech was impaired and she had residual kidney damage. It was Dr. Buxton's opinion that she would not survive another pregnancy.

The other plaintiff-patients were two married couples. One, the Poes, had had three abnormal children, none of whom had survived more than ten weeks. They sought contraceptive advice because they did not feel they could emotionally survive the birth of another such child. The other couple, the Hoes, had conflicting blood groupings and were considered unlikely to have a normal child born to them.

When these suits were begun in May of 1958, there was . . . no discussion of rights of privacy. . . . The due process arguments in the briefs filed in the Connecticut courts stressed rights to life and liberty, to health, to happy marital relationships, free of governmental intrusion. But the obverse of that phrase—privacy—was not used. . . .

It was in the due process arguments presented on the appeal [by the law's challengers] to the United States Supreme Court in this case that the first specific mention of "privacy" occurred in this litigation. However, the Supreme Court never reached this or any of the other substantive arguments raised on this appeal. Rather, it held [in Poe v. Ullman, 367 U.S. 497 (1961),] that there was no controversy before the Court, that there had been an absence of any prosecutions under the statutes, and that therefore Dr. Buxton and his patients faced no realistic threat of prosecution.

In Connecticut the implications of this disconcerting outcome were pondered. . . . After much consultation and discussion it was finally decided that the Planned Parenthood League of Connecticut would open one facility in New Haven, and that if no prosecution ensued it would expand such services to other cities. Thus on November 1, 1961, the Planned Parenthood League of Connecticut opened the first birth control clinic in [Connecticut] since 1940, with Estelle T. Griswold as its director and C. Lee Buxton was its medical director. [Ten days later, they were arrested and charged with aiding and abetting] certain married women to "use a drug, medicinal article and instrument, for the purpose of preventing conception." The clinic closed its doors. . . .

From the beginning of this prosecution the defense attacked the statutory contraceptive ban, repeating in depth all of the prior arguments as to the unconstitutionality of the statute but adding now, specifically the infringement which it imposed on the patient's right to privacy. In doing so we drew on the development of that right as it had been expounded at length in the two dissenting opinions in *Poe*. Mr. Justice Douglas's dissent found such a right in "the totality of the constitutional scheme under which we live," [367 U.S. at 521,] while Mr. Justice Harlan found its protection in the due process protections of the fourteenth amendment [id. at 540].

Notes and Questions

1. Sources. What are the constitutional sources of the right to privacy, according to *Griswold*? According to the concurring opinions? Explain the majority's difficulty in identifying the source of this right. On what basis do the dissenters disagree?

2. State intrusion. What aspect of the statute disturbs the majority? If Connecticut had sought to prevent use of contraceptives by, say, banning the manufacture or sale of such materials, what result? How significant is the fact that Connecticut prohibited couples' behavior with regard to contraceptive use, as distinguished from some other sex-related activity? What of possession of pornography, for example? Compare Stanley v. Georgia, 394 U.S. 557 (1969), with Osborne v. Ohio, 495 U.S. 103 (1990). Access to sex toys? Compare Reliable Consultants, Inc. v. Earle, 517 F.3d 738, 744 (5th Cir. 2008), with 1568 Montgomery Highway, Inc. v. City of Hoover, 45 So. 3d 319, 340 (Ala. 2010).

3. Role of marriage? How critical is the marital status of the contraceptive users? To whom does the right to privacy belong, according to *Griswold*? Each spouse? The marital unit? See Martha Albertson Fineman, What Place for Family Privacy?, 67 Geo. Wash. L. Rev. 1207, 1212 (1999) (*Griswold* shows that the "idea of the entity of the family as something 'private' predates, and is analytically separate from, the constitutional idea of individual privacy"). Suppose the spouses disagree. May the state resolve the disagreement?

4. State interests. Why did Connecticut enact this legislation? What do the excerpts by historian Michael Grossberg and attorney Catherine Roraback (counsel to Planned Parenthood League of Connecticut during *Griswold*) suggest? See also, e.g., Janet Farrell Brodie, Contraception and Abortion in Nineteenth-Century America (1994); Andrea Tone, Devices and Desires: A History of Contraceptives in America (2001). What role do the state's reasons play in *Griswold*?

5. Privacy's origins. In an omitted footnote, Justice Black's dissent claims that the concept of a "right to privacy" originated in an 1890 article by Samuel Warren and his then law partner Louis Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890). Reportedly written in response to press coverage of the wedding of Warren's socialite daughter, the article sought a legal basis for the protection of privacy. The authors settled on the common law of copyright as a shield against threats posed by new technology, such as "instantaneous photographs" and "mechanical [eavesdropping or broadcasting] devices." Id. at 195. They recommended tort damages for breaches and injunctions in limited cases. As a Supreme Court Justice, Brandeis later cited the Constitution for "the right to be let alone." See, e.g., Olmstead v. United States, 277 U.S. 438, 478 (1928) (dissenting opinion) (recognizing Fourth Amendment protection against governmental wiretapping). See also Katz v. United States, 389 U.S. 347, 353 (1967) (adopting Brandeis's reasoning). Justice Goldberg's concurrence in *Griswold* invokes Brandeis's understanding.

How closely does the *Griswold* majority's concept of privacy resemble that of Warren and Brandeis? Does *Griswold*'s notion of privacy protect the right not to

have information made public? The right to be let alone? The right to self-determination? For a contemporary taxonomy, see generally Daniel J. Solove, Understanding Privacy 101-170 (2008).

6. Privacy and technology. Given Warren's and Brandeis's fears about new technology, how should their proposed right evolve in response to still newer developments? See, e.g., Lori Andrews, I Know Who You Are and I Saw What You Did: Social Networks and the Death of Privacy (2011); Daniel Schlein, New Frontiers for Genetic Privacy Law: The Genetic Information Nondiscrimination Act of 2008, 19 Geo. Mason U. Civ. Rts. L.J. 311 (2009).

7. Birth control movement. The radical birth control movement in the United States emerged as part of the Socialist Party's agenda in the early 1900s. Activist Margaret Sanger's role in the movement grew out of her encounter as a visiting nurse with a poor woman who died because she could not avoid another pregnancy. But an appreciation of larger issues also motivated Sanger, who recognized the historical, political, and feminist implications of birth control, according to historian Linda Gordon:

> Most American socialists at this time, primarily oriented to class relations, saw birth control . . . in terms of economics. They were concerned to help raise the standard of living of workers and thus increase their freedom to take political control over their own lives. Measured against this goal, birth control was at most an ameliorative reform. Seen in terms of sexual politics, however, birth control was revolutionary because it could free women entirely from the major burden that differentiated them from men and made them dependent on men. Sanger gained this perspective in Europe from the sexual liberation theorists such as Havelock Ellis. . . . His idealism about the potential beauty and expressiveness of human sexuality and his rage at the damage caused by sexual repression fired Sanger with a sense of the overwhelming importance, urgency, and profundity of the issue of birth control. . . .

Linda Gordon, The Moral Property of Women: A History of Birth Control Politics in America 145 (2002). Sanger founded the American Birth Control League, which later became Planned Parenthood. See generally Jean H. Baker, Margaret Sanger: A Life of Passion (2011).

8. Birth control and race. Grossberg recounts how fears of "race suicide," that is, a declining birth rate among whites at a time of growing immigration, supported laws restricting birth control. In contrast to their white counterparts' almost exclusive focus on access to birth control, women of color embraced a larger agenda. African-American women's understanding of reproductive rights was shaped by the history of sexual exploitation during slavery, sterilization abuse, and societal inattention to high maternal and infant mortality rates; many supported birth control and abortion rights, despite opposition in the 1970s from Black Nationalist organizations, which condemned such measures as tools for genocide. Puerto Rican activists' advocacy for women's autonomy and state-supported health care stemmed from U.S.-sponsored sterilization there and the harm suffered by some Puerto Rican participants in the development of the birth control pill. Native American women also have worked for birth control as part of a wider mission to

improve health care. See Jennifer Nelson, Women of Color and the Reproductive Rights Movement 19, 186 (2003); Dorothy Roberts, Killing the Black Body: Race, Reproduction, and the Meaning of Liberty 22-55 (1999); Jael Silliman et al., Undivided Rights: Women of Color Organize for Reproductive Justice 143 (2004).

EISENSTADT v. BAIRD

405 U.S. 438 (1972)

Activist William Baird speaks to the press after his birth control lecture at Boston University.

Mr. Justice BRENNAN delivered the opinion of the Court.

Appellee William Baird was convicted at a bench trial in the Massachusetts Superior Court under Massachusetts General Laws Ann., c. 272, §21, first, for exhibiting contraceptive articles in the course of delivering a lecture on contraception to a group of students at Boston University and, second, for giving a young woman a package of Emko vaginal foam at the close of his address. The Massachusetts Supreme Judicial Court unanimously set aside the conviction for exhibiting contraceptives on the ground that it violated Baird's First Amendment rights, but by a four-to-three vote sustained the conviction for giving away the foam. Commonwealth v. Baird, 355 Mass. 746, 247 N.E.2d 574 (1969). . . .

Massachusetts General Laws Ann., c. 272, §21 [provides] a maximum five-year term of imprisonment for "whoever . . . gives away . . . any drug, medicine, instrument or article whatever for the prevention of conception," except as authorized in §21A. . . . As interpreted by the State Supreme Judicial Court, these provisions make it a felony for anyone, other than a registered physician or pharmacist acting in accordance with the terms of §21A, to dispense any article with the intention that it be used for the prevention of conception. [M]arried persons may obtain contraceptives to prevent pregnancy, but only from doctors or druggists on prescription; . . . single persons may not obtain contraceptives from anyone to prevent pregnancy. . . .

The question for our determination in this case is whether there is some ground of difference that rationally explains the different treatment accorded married and unmarried persons under Massachusetts General Laws Ann., c. 272, §§21 and 21A.[7] . . .

First. [W]e cannot agree that the deterrence of premarital sex may reasonably be regarded as the purpose of the Massachusetts law.

It would be plainly unreasonable to assume that Massachusetts has prescribed pregnancy and the birth of an unwanted child as punishment for fornication,

7. Of course, if we were to conclude that the Massachusetts statute impinges upon fundamental freedoms under *Griswold*, the statutory classification would have to be not merely *rationally* related to a valid public purpose but *necessary* to the achievement of a *compelling* state interest. E.g., Loving v. Virginia, 388 U.S. 1 (1967). But . . . we do not have to address the statute's validity under that test because the law fails to satisfy even the more lenient equal protection standard.

which is a misdemeanor under Massachusetts General Laws Ann., c. 272, §18. Aside from the scheme of values that assumption would attribute to the State, it is abundantly clear that the effect of the ban on distribution of contraceptives to unmarried persons has at best a marginal relation to the proffered objective. . . . Like Connecticut's laws [in *Griswold*], §§21 and 21A do not at all regulate the distribution of contraceptives when they are to be used to prevent, not pregnancy, but the spread of disease. Nor, in making contraceptives available to married persons without regard to their intended use, does Massachusetts attempt to deter married persons from engaging in illicit sexual relations with unmarried persons. Even on the assumption that the fear of pregnancy operates as a deterrent to fornication, the Massachusetts statute is thus so riddled with exceptions that deterrence of premarital sex cannot reasonably be regarded as its aim. . . .

Second. . . . If health were the rationale of §21A, the statute would be both discriminatory and overbroad. . . . The Court of Appeals [stated]: "If the prohibition [on distribution to unmarried persons] . . . is to be taken to mean that the same physician who can prescribe for married patients does not have sufficient skill to protect the health of patients who lack a marriage certificate, or who may be currently divorced, it is illogical to the point of irrationality." 429 F.2d, at 1401. Furthermore, we must join the Court of Appeals in noting that not all contraceptives re potentially dangerous. . . ." If [health] was the Legislature's goal, §21 is not required" in view of the federal and state laws *already* regulating the distribution of harmful drugs. . . .

Third. If the Massachusetts statute cannot be upheld as a deterrent to fornication or as a health measure, may it, nevertheless, be sustained simply as a prohibition on contraception? . . . We need not and do not, however, decide that important question in this case because, whatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike.

If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, 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. See Stanley v. Georgia, 394 U.S. 557 (1969). See also Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942); Jacobson v. Massachusetts, 197 U.S. 11, 29 (1905).

On the other hand, if *Griswold* is no bar to a prohibition on the distribution of contraceptives, the State could not, consistently with the Equal Protection Clause, outlaw distribution to unmarried but not married persons. In each case the evil, as perceived by the State, would be identical, and the underinclusion would be invidious.

. . . We hold that by providing dissimilar treatment for married and unmarried persons who are similarly situated, Massachusetts General Laws Ann., c. 272, §§21 and 21A, violate the Equal Protection Clause. The judgment of the Court of Appeals is affirmed.

Notes and Questions

1. Beyond *Griswold*. How does *Eisenstadt* resolve the issues left open in *Griswold*: the *distribution* of contraceptives to *unmarried* individuals?

2. Privacy's meaning. How does *Eisenstadt* define "privacy"? How does the meaning of "privacy" articulated in *Eisenstadt* differ from that in *Griswold*?

3. Whose privacy? Does *Eisenstadt* answer the question whether the right to privacy belongs to the family unit or each member of the family? Does it indicate how to resolve conflicts between family members over "private" matters? For a relational understanding of privacy and autonomy, see Jennifer Nedelsky, Law's Relations: A Relational Theory of Self, Autonomy, and Law (2011).

4. The equal protection basis. Why does the Court rely on the Equal Protection Clause instead of the parts of the Constitution invoked in *Griswold*? Does *Eisenstadt*'s approach provide a firmer basis for the right to privacy? To what extent does *Eisenstadt* implicitly reflect concerns about gender equality?

5. State interests: privacy versus privatization. Why did Massachusetts enact the law challenged here? How does the Court address these state interests? What does the Massachusetts law contribute to the understanding of family law as part of a systematic effort to channel sexual activity into marriage? See generally, e.g., Richard A. Posner, Sex and Reason 243-266 (1992).

Consistent with this view, several commentators see family law as regulation aimed at keeping dependency private (the privatization of dependency). See, e.g., Martha Albertson Fineman, The Autonomy Myth: A Theory of Dependency (2004); Anne L. Alstott, Private Tragedies? Family Law as Social Insurance, 4 Harv. L. & Pol'y Rev. 3 (2010). Does this theory help explain the significant state intrusion experienced by poor families and their members, whom critics say must often bargain away their privacy for state assistance? See, e.g., Khiara M. Bridges, Privacy Rights and Public Families, 34 Harv. J.L. & Gender 113, 171 (2011) (positing that the privacy right is a function of class).

6. Scope of protection. States routinely create legal distinctions based on marriage. See, e.g., Varnum v. Brien, 763 N.W.2d 862, 902 n.28 (Iowa 2009) (noting marriage's numerous benefits in a successful challenge to same-sex couples' exclusion). How far does *Eisenstadt* go in barring discrimination based on marital status?

7. Access. The Court subsequently addressed the substantive issue avoided in *Eisenstadt*. Carey v. Population Services International, 431 U.S. 678 (1977), struck down a statute barring distribution of all contraceptives except by licensed pharmacists. The majority explained that limitations on access to contraceptives impose burdens similar to limitations on use; hence, both must satisfy the compelling state interest test.

8. "The pill." Why did contraception become a constitutional issue at this time in history? The birth control pill, approved by the FDA in 1960, quickly

came to symbolize the sexual revolution and "women's liberation." Even before *Eisenstadt* (which concerned a different form of contraception), Congress enacted the Family Planning and Population Research Act of 1970, which encouraged, inter alia, the development of accessible family planning services. 42 U.S.C. §300. See generally Elaine Tyler May, America and the Pill: A History of Promise, Peril, and Liberation (2010). To date, no male contraceptive "pill" is available, and critics have dubbed contemporary legislative and political efforts to restrict access to contraception part of a "war on women."

Problems

1. You work on the staff of a state legislator. She seeks your advice on two different proposed state laws regulating access to contraceptives. One proposal would require pharmacists to fill all legal prescriptions, including those for contraceptives. The proponents of this bill cite recent cases in which pharmacists refused on moral grounds to dispense emergency contraception even for patients prescribed such treatment following an unexpected miscarriage or a rape. The other proposal would enact a "conscience clause" giving pharmacists the right to refuse to fill any prescriptions that conflict with their personal beliefs and values. The proponents of this bill assert that pharmacists in states without such protections have lost their jobs for acting in accordance with their religious and moral opposition to contraception, particularly emergency contraception. Which law would you recommend that the legislator support? On what legal or constitutional grounds? What additional facts would you need to investigate? Is it relevant to your answer whether emergency contraception (a high dose of ordinary birth control pills taken within 72 hours of unprotected intercourse) disables sperm, prevents ovulation, prevents fertilization, or prevents implantation? Why? Are there alternative measures that the legislator ought to consider proposing herself?

Compare, e.g., Stormans, Inc. v. Selecky, 844 F. Supp. 2d 1172 (W.D. Wash. 2012), with, e.g., Morr-Fitz, Inc. v. Blagojevich, 901 N.E.2d 373 (Ill. 2008). See also 45 C.F.R. pt. 88; Elizabeth Sepper, Taking Conscience Seriously, 98 Va. L. Rev. 1501 (2012). (The standard of review that now governs state restrictions on abortion is covered infra in section A3.)

2. Suppose an employer provides employees with a comprehensive prescription drug plan that includes Viagra, which allows sexual intercourse for some men, but not contraceptives, which accomplish a similar objective for some women. Has the employer violated laws that prohibit sex-based discrimination in the workplace (Title VII and the Pregnancy Discrimination Act)? See Standridge v. Union Pac. R.R. Co., 479 F.3d 938 (8th Cir. 2007). If the plan excludes both Viagra and contraceptives, has the employer eliminated any discrimination? See Erickson v. Bartell Drug Co., 141 F. Supp. 2d 1266 (W.D. Wash. 2001); Sylvia A. Law, Sex Discrimination and Insurance for Contraception, 73 Wash. L. Rev. 363 (1998). Suppose the employer's objections rest on his personal religious beliefs. Compare O'Brien v. U.S. Dept. of Health & Human Servs., 2012 WL 4481208 (E.D. Mo. 2012), with Legatus v. Sebelius, 2012 WL 5359630 (E.D. Mich. 2012). How might the analysis change if the employer is a religiously affiliated entity, such as a hospital or university? See, e.g., Catholic Charities of the Diocese of Albany v. Serio,

859 N.E.2d 459 (N.Y. 2006). (Such issues have arisen under the contraception-coverage mandate under the Affordable Care Act, discussed infra, pp. 57-58.)

b. Roots of Privacy

Griswold and *Eisenstadt* break new ground in explicitly recognizing a constitutional right to privacy. Yet some 40 years earlier the Supreme Court expressed an understanding of the family that established a foothold for this right, as the cases below reveal.

MEYER v. NEBRASKA

262 U.S. 390 (1923)

Mr. Justice McReynolds delivered the opinion of the Court.

Plaintiff in error was tried and convicted . . . under an information which charged that on May 25, 1920, while an instructor in Zion Parochial School he unlawfully taught the subject of reading in the German language to Raymond Parpart, a child of 10 years, who had not attained and successfully passed the eighth grade. [A Nebraska statute prohibited any person from teaching languages other than English, except to pupils who had successfully completed the eighth grade, and classified a violation as a misdemeanor, punishable by a fine and/or imprisonment. The state supreme court affirmed the conviction.]

The problem for our determination is whether the statute as construed and applied unreasonably infringes the liberty guaranteed to the plaintiff in error by the Fourteenth Amendment: "No state . . . shall deprive any person of life, liberty or property without due process of law."

While this court has not attempted to define with exactness the liberty thus guaranteed, [w]ithout doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect. Determination by the Legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts.

The American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted. . . . Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life; and nearly all the states, including Nebraska, enforce this obligation by compulsory laws.

Practically, education of the young is only possible in schools conducted by especially qualified persons who devote themselves thereto. The calling always has been regarded as useful and honorable, essential, indeed, to the public welfare. Mere knowledge of the German language cannot reasonably be regarded as

harmful. . . . Plaintiff in error taught this language in school as part of his occupation. His right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the Amendment. . . . Evidently the Legislature has attempted materially to interfere with the calling of modern language teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own.

It is said the purpose of the legislation was to promote civic development by inhibiting training and education of the immature in foreign tongues and ideals before they could learn English and acquire American ideals, and "that the English language should be and become the mother tongue of all children reared in this state." It is also affirmed that the foreign born population is very large, that certain communities commonly use foreign words, follow foreign leaders, move in a foreign atmosphere, and that the children are thereby hindered from becoming citizens of the most useful type and the public safety is imperiled.

That the state may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected. The protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue. Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution—a desirable end cannot be promoted by prohibited means. . . . No emergency has arisen which renders knowledge by a child of some language other than English so clearly harmful as to justify its inhibition with the consequent infringement of rights long freely enjoyed. We are constrained to conclude that the statute as applied is arbitrary and without reasonable relation to any end within the competency of the state.

As the statute undertakes to interfere only with teaching which involves a modern language, leaving complete freedom as to other matters, there seems no adequate foundation for the suggestion that the purpose was to protect the child's health by limiting his mental activities. It is well known that proficiency in a foreign language seldom comes to one not instructed at an early age, and experience shows that this is not injurious to the health, morals or understanding of the ordinary child. [Reversed.]

PIERCE v. SOCIETY OF SISTERS

268 U.S. 510 (1925)

Mr. Justice McReynolds delivered the opinion of the Court. . . .

[The Compulsory Education Act, effective September 1, 1926,] requires every parent, guardian, or other person having control or charge or custody of a child between 8 and 16 years to send him "to a public school for the period of time a public school shall be held during the current year" in the district where the child resides; and failure so to do is declared a misdemeanor. . . . The manifest purpose is to compel general attendance at public schools by normal children, between 8