University of Southern California Law School
Legal Studies Working Paper Series

Year 2010 *Paper* 68

Just Say No: Birth Control in the Connecticut Supreme Court Before Griswold v. Connecticut

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Abstract

This essay examines the right to use birth control in Connecticut before Griswold v. Connecticut (1965). It is often assumed that the Connecticut birth control ban was not enforced, and consequently did not affect access to birth control in the state. Accordingly, the cases challenging the state statute have been viewed as not real cases or controversies deserving of court attention. This essay demonstrates that this view is erroneous. Connecticut law was enforced against the personnel of birth control clinics for aiding and abetting the use of contraceptives. Enforcement of the statute against those working in clinics kept birth control clinics closed in Connecticut for twenty-five years. The lack of birth control clinics may not have greatly affected middle-class and wealthy people who could afford private medical care, since doctors would often ignore the laws. The lack of clinics primarily harmed lower-income women who needed the free or low-cost services birth control clinics provided. It was the impact of birth control restrictions on the poor that led Dr. C. Lee Buxton, along with Estelle Griswold, to publically violate the law by opening the clinic that resulted in their arrests, and ultimately in the Supreme Court ruling in Griswold.

Beyond its importance to the history of reproductive rights, this essay illuminates the history of rights under state constitutional law. Until 1965, the United States Supreme Court largely avoided cases involving reproductive rights, with the notable exception of sterilization. Appeals to the Supreme Court in cases involving constitutional challenges to state restrictions on contraceptives were regularly dismissed for want of a substantial federal question or due to lack of standing, so that substantive rulings in birth control cases were confined to the state courts and, on

questions of federal law, to the lower federal courts. Because the Supreme Court did not hear these cases, the right to use birth control was determined by state law until 1965, when the Court decided Griswold v. Connecticut. Consequently, an examination of this area of law enables us to see the independent treatment of constitutional rights by one state court without meaningful input from the U.S. Supreme Court.

Just Say No: Birth Control in the Connecticut Supreme Court Before *Griswold v. Connecticut*†

*Mary L. Dudziak**

> "[I]t may well be that the use of contraceptives is indicated as the best and safest preventive measure which medical science can offer these plaintiffs. That fact does not make it absolutely necessary for the Legislature to accept such a solution in all cases, where there is . . . another alternative, abstinence from sexual intercourse."
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> *Buxton v. Ullman*, 147 Conn. 48, 58 (1959).

I. Introduction**

In the area of reproductive rights, attention has been turning to the states. In *Webster v. Reproductive Health Services*,[1] the United States Supreme Court severely restricted the scope of the right to abortion originally recognized in *Roe v. Wade*.[2] With federal constitutional protection diminished, the states have become the battleground in the struggle over the

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**I am very grateful to Brooks Ammerman, Martha Chamallas and Linda Kerber for their helpful comments on previous drafts of this essay. I also benefitted from discussions about the essay with participants in the symposium "In Search of a Usable Past," held at Albany Law School in October 1988. Thanks also go to Larry Burch, Kate Corcoran, Pat McCarley, Peter Parry and Jim Spounias, who contributed to the research, and Rita Jansen and Kris Davis who typed the final drafts.

1. 109 S. Ct. 3040 (1989).

2. 410 U.S. 113 (1973). In *Webster*, the Solicitor General of the United States argued that the Supreme Court should overturn *Roe*. 57 U.S.L.W. 3715-16 (1989); N.Y. Times, April 27, 1989, at B14, col. 1. Although the Court declined to overturn *Roe* in that case, three members of the Court have called for the decision to be overruled. *See Webster*, 109 S. Ct. at 3064 (Scalia, J., concurring); Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 788 (1986) (White, J., dissenting) (joined by Justice Rehnquist). In addition, Justice O'Connor harshly criticized *Roe*'s reasoning in City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 452- 59 (1983) (O'Connor, J., dissenting).

The Court continued the trend of giving states greater leeway in restricting abortion rights in Hodgson v. Minnesota, 110 S. Ct. 2926 (1990) (upholding the constitutionality of a Minnesota statute that requires a forty-eight hour waiting period for the performance of an abortion following notification to the parents that the minor intends to obtain an abortion) and Ohio v. Akron Center for Reproductive Health, 110 S. Ct. 2972 (1990) (upholding the constitutionality of an Ohio statute that makes it a crime for a physician or any other person to perform an abortion on an "unmarried, unemancipated, minor woman" unless the physician notifies one of the minor's parents in a timely manner, or a juvenile court authorizes the minor's consent by a court order).

right to abortion.[3] As states face the question of whether to exercise their expanded authority to regulate abortion, the initial focus has been on the state legislative process. Once state laws are on the books, state courts may then consider whether their own state constitutions offer broader protection of reproductive rights. The growing importance of state courts in protecting reproductive rights in such cases is not a new phenomenon, however. When the Supreme Court has restricted access to abortion in the past, most notably public funding for abortion, some state courts have held that the right to abortion is protected more broadly under state constitutional law.[4] Historically, state courts and state constitutions have sometimes been an important source of protection for women's rights in other areas.[5] While state courts may provide a useful alternative in some contexts, they are no safe haven.

This essay will explore an important aspect of the history of protection of reproductive rights under state constitutional law: the Connecticut Supreme Court's treatment of the right to use contraceptives. Until 1965, the United States Supreme Court largely kept its hand out of cases involving reproductive rights. The notable exception was sterilization; the

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3. *See* Newsweek, July 17, 1989, at 16-24; Time, July 17, 1989, at 64; N.Y. Times, July 4, 1989, at 1, col. 5.

4. In Harris v. McRae, 448 U.S. 297, 326 (1980), the United States Supreme Court held that the Hyde Amendment, which prohibited federal Medicaid reimbursement for abortions unless the life of the woman was endangered by pregnancy or the pregnancy was the result of rape or incest, was constitutional. In Maher v. Roe, 432 U.S. 464, 474 (1977), the Court upheld a Connecticut statute providing state Medicaid reimbursement for childbirth, but not for abortions that were not medically necessary. In contrast, some state courts have found similar funding restrictions under state law to violate state constitutions. *See* Committee to Defend Reproductive Rights v. Myers, 29 Cal. 3d 252, 285, 625 P.2d 779, 799, 172 Cal. Rptr. 866, 886 (1981); Doe v. Maher, 40 Conn. Supp. 394, 450, 515 A.2d 134, 162 (1986); Moe v. Secretary of Admin. & Fin., 382 Mass. 629, 654, 417 N.E.2d 387, 402 (1981); Right to Choose v. Byrne, 91 N.J. 287, 318, 450 A.2d 925, 941 (1982); Planned Parenthood v. Department of Human Serv., 63 Or.App. 41, 62, 663 P.2d 1247, 1261 (1983), aff'd on other grounds, 297 Or. 562, 687 P.2d 785 (1984); *see also* Dodge v. Department of Social Serv., 657 P.2d 969 (Colo. Ct. App. 1982) (ruled against taxpayers' argument that state practice of funding all abortions was not authorized by state statutes); Kindley v. Governor of Md., 289 Md. 620, 426 A.2d 908 (1981) (same). *But see* Fischer v. Department of Pub. Welfare, 509 Pa. 293, 502 A.2d 114 (1985) (state funding formula based on Hyde Amendment criteria does not violate Pennsylvania Constitution); *but see also* Stam v. State of North Carolina, 302 N.C. 357, 275 S.E.2d 439 (1981) (county tax to fund elective abortions exceeded statutory authority). *See generally* Note, The Evolution of the Right to Privacy after Roe v. Wade, 13 Am. J. of L. & Med. 365, 436-66 (1987).

5. For example, the courts of some states were more likely to admit women to the practice of law in the late 19th century. The U.S. Supreme Court upheld the Illinois Supreme Court's denial of a license to practice law to Myra Bradwell in 1872. Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1872). The Court denied Belva Lockwood admission to the bar of the Supreme Court itself in 1876 because "none but men are admitted to practice before it." K. Morello, The Invisible Bar: The Woman Lawyer in America, 1638 to the Present 33 (1986). In contrast, the Iowa Supreme Court admitted Belle Mansfield to the state bar in 1869, even though Iowa law restricted bar admission to "any white male person" meeting other qualifications. Id. at 12. The Territory of Washington admitted Mary Leonard to the practice of law in the 1880s. Id. at 28. Clara Foltz was admitted to practice before the Supreme Court of California in 1879. Babcock, Clara Shortridge Foltz: "First Woman," 30 Ariz. L. Rev. 673, 715 (1988). *See generally*, K. Morello, supra, at 11-38; Babcock, supra, at 701-05.

Court in 1927 upheld eugenical sterilization,[6] and in 1942, the Court overturned punitive sterilization of persons considered to be "habitual criminals."[7] Cases involving birth control were confined to the state courts[8] and, on questions of federal law, to the lower federal courts.[9] Appeals to the Supreme Court in cases involving constitutional challenges to state restrictions on contraceptives were regularly dismissed for want of a substantial federal question[10] or due to lack of standing.[11] Because the Supreme Court would not hear these cases, the right to use birth control was determined by state law until 1965, when the Court decided *Griswold v. Connecticut*.[12] Consequently, an examination of this area of law enables us to see the independent treatment of constitutional rights by one state court without meaningful input from the U.S. Supreme Court.

This essay will examine the right to use birth control in Connecticut before *Griswold*. The cases challenging Connecticut birth control restrictions have been derided by some scholars as irrelevant.[13] The assumption often held is that the Connecticut laws were not enforced, and consequently did not affect access to birth control in the state. Accordingly, the cases challenging the state statutes are thought of as not real cases or controversies deserving of court attention.[14] As a result, Robert Bork has argued that *Griswold* was "framed by Yale professors" simply "because they like this type of litigation."[15] Such a view of the Connecticut birth control cases is erroneous. Connecticut law was enforced against the personnel of birth control clinics for aiding and abetting the use of contraceptives. Enforcement of the statute against those working in clinics kept birth control clinics closed in Connecticut for twenty-five years. The lack of birth control clinics may not have greatly affected middle-class and wealthy people who could afford private medical care, since doctors would often break the laws.[16] The lack of clinics primarily harmed lower-income women who needed the free or low-cost services birth control clinics provided. As historian C. Thomas Dienes has argued, the effect of the Connecticut restrictions was that "while birth control services were generally available, the poor, dependent on free

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6. Buck v. Bell, 274 U.S. 200 (1927); *see* Dudziak, Oliver Wendell Holmes as a Eugenic Reformer: Rhetoric in the Writing of Constitutional Law, 71 Iowa L. Rev. 833 (1986).

7. Skinner v. Oklahoma, 316 U.S. 535 (1942).

8. *See* Comment, The History and Future of the Legal Battle Over Birth Control, 49 Cornell L.Q. 275, 285-88 (1964) (written by Peter Smith).

9. *See, e.g.*, United States v. One Package, 86 F.2d 737 (2d Cir. 1936).

10. *See, e.g.*, Commonwealth v. Gardner, 300 Mass. 372, 15 N.E.2d 222, appeal dismissed, 305 U.S. 559 (1938).

11. *See, e.g.*, Tileston v. Ullman, 129 Conn. 84, 26 A.2d 582 (1942), appeal dismissed, 318 U.S. 46 (1943).

12. 381 U.S. 497 (1965).

13. A recent example is statements made by Robert Bork in his confirmation hearings. *See* Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary, 100th Cong., 1st Sess. pt. 1, at 116, 241 (1987) [hereinafter Bork Hearings]; *see also* H. Pollack, "An Uncommonly Silly Law": The Connecticut Birth Control Cases in the U.S. Supreme Court (Ph.D. diss. Columbia University 1968).

14. This was essentially the view expressed by the Supreme Court in Poe v. Ullman, 367 U.S. 497 (1961).

15. Bork Hearings, supra note 13, at 116.

16. H. Pollack, supra note 13, at 67.

medical services, were effectively denied assistance."[17]

II. Restrictions on Birth Control

Reproductive freedom is at the heart of women's rights because having control over reproduction is critical to women's autonomy.[18] Throughout history women have tried different strategies to control when, whether, and how often they had babies.[19]

Searching for a way to have some control over how often they gave birth, many women in the 1920s wrote to birth control activist Margaret Sanger for answers. Some women had health problems associated with pregnancy. One woman wrote, "the doctor said at last birth we must be 'more careful,' as I could not stand having so many children." But how could she be "more careful?" She asked Sanger for answers her doctor would not or could not give her. The constant fear of pregnancy made sexuality a burden for many women, yet some longed for a day when they could again find pleasure in marital sex. One woman wrote, "for two years I have not allowed my husband a natural embrace for fear of another pregnancy which I feel I can never live through. You can readily guess that keeping my husband away from me thus is having its effect on the ideally happy home which was ours before . . . . So can you help me and tell me how to bring back the happiness to our home? Or at least give me a hint . . . ?"[20]

Margaret Sanger did her best to distribute information about birth control to women like these.[21] But every time she placed a birth control pamphlet in an envelope and sent it through the mail, Sanger committed a federal crime. The Comstock Law, passed by Congress in 1873, made it a crime to send through the mails any contraceptives, any information about contraceptives, or any information about how to find out about contraceptives. The penalty was a fine and/or one to ten years at hard labor.[22] Following the passage of the Comstock Law, many states enacted their own restrictions, barring the distribution of contraceptives or the dissemination of information about contraceptives.[23]

Eventually the courts eased most restrictions on birth control. Notwithstanding the blanket prohibition on contraceptives suggested by the language of the Comstock Law, the federal courts read into the law a limitation that it only forbade transmission of contraceptives for "illegal

17. C. Dienes, Law Politics and Birth Control 116 (1972); *see also* S. Hartmann, The Home Front and Beyond: American Women in the 1940s 171 (1982); Daniels, Birth Control and Democracy, The Nation, Nov. 1, 1941, at 429.

18. Sylvia Law powerfully develops the argument that restrictions on reproductive rights deny women their constitutional right to equality in Law, Rethinking Sex and the Constitution, 132 U. Pa. L. Rev. 955 (1984).

19. *See generally* L. Gordon, Woman's Body, Woman's Right: A Social History of Birth Control in America (1977).

20. M. Sanger, The New Motherhood 102, 109-10 (1922).

21. *See* C. Dienes, supra note 17, at 78-88. *See generally* D. Kennedy, Birth Control in America: The Career of Margaret Sanger (1970).

22. 17 Stat. 598 (1873).

23. *See* Stone & Pilpel, The Social and Legal Status of Contraception, 22 N.C.L. Rev. 212, 220 (1944).

contraception" but not for "proper medical use," freeing pharmacists to market contraceptives when ordered by a doctor.[24] State laws generally met a similar fate in the state courts. For example, in *People v. Sanger*,[25] decided in 1918, the New York Court of Appeals upheld the prosecution of Margaret Sanger for distributing contraceptives and copies of her article on birth control, "What Every Girl Should Know." In doing so, however, the court narrowly construed the permissible scope of the statute. New York law prohibited the sale of contraceptives, but the law allowed doctors to prescribe articles for the cure and prevention of disease.[26] The court broadly construed the word *disease* to include any illness,[27] so that doctors could prescribe contraceptives to prevent diseases associated with pregnancy and childbirth. The exception to the New York law essentially swallowed the rule so that, after *People v. Sanger*, the sale of contraceptives to married persons was legal in New York as long as they were prescribed by a physician.[28]

During the 1940s and 1950s, many areas of the country adopted a more permissive approach to birth control.[29] Until 1923, there were no birth control clinics. In 1944, there were at least eight hundred.[30] In 1938, a Ladies Home Journal survey found that seventy-nine percent of American women were in favor of birth control.[31] Meanwhile, the birth control movement lost its radical edge. Margaret Sanger and other reformers couched their rhetoric in conventional terms. They no longer argued, as they had in the 1910s and 1920s, that birth control was important because it would liberate women.[32] Rather, they argued that birth control would bring scientific rationality to the traditional family. It would allow families to use scientific expertise to bring order to the otherwise uncontrollable process of childbearing. In 1942, when the American Birth Control League changed its name to Planned Parenthood, the new title reflected the organization's focus on planning within the context of the traditional family structure.[33]

Contraception enabled couples to separate sex from reproduction. That gave rise to fears of rampant sexual immorality and a focus on what

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24. United States v. One Package, 86 F.2d 737 (2d Cir. 1936). "Illegal contraception" would include the use of contraceptives in sex outside of marriage.

25. 222 N.Y. 192, 118 N.E. 637 (1918).

26. *See* 222 N.Y. at 192, 118 N.E. at 637.

27. Id. at 192, 118 N.E. at 638. The alternative would be to construe "disease" to mean sexually transmitted diseases.

28. *See* Comment, supra note 8, at 285. Massachusetts was the one state other than Connecticut in which the state courts construed state law as forbidding the prescription of contraceptives by doctors when the health of a patient required them. *See* Commonwealth v. Gardner, 300 Mass. 372, 15 N.E.2d 222 (1938).

29. Use of contraceptives came to be more widely accepted during a period when, largely at the impetus of the medical profession, access to abortion was becoming more difficult. E. May, Homeward Bound: American Families in the Cold War Era 153 (1988).

30. Stone & Pilpel, supra note 23, at 215; E. May, supra note 29, at 149.

31. Pringle, What Do The Women of America Think About Birth Control? Ladies Home Journal, March 1938, at 14. *See also* Stone & Pilpel, supra note 23, at 218; J. D'Emilio & E. Freedman, Intimate Matters: A History of Sexuality in America 248 (1988).

32. *See* L. Gordon, supra note 19, at 186-245.

33. E. May, supra note 29, at 149; J. D'Emilio & E. Freedman, supra note 31, at 248.

Elaine Tyler May has called "sexual containment," the containment of sex within marriage.[34] But marital sex took on a new significance, at least in the eyes of psychologists and marriage counselors. According to John D'Emilio and Estelle Freedman, during the 1940s and 1950s the middle class embraced "sexual liberalism," sex for its own sake, as an important part of marriage. Many marriage counselors considered sexual fulfillment to be the measure of a happy and successful marriage.[35] At the same time, during these baby boom years, women and men were marrying at younger ages and having children earlier. Contraceptives gave couples some control over when they had children, and enabled them to be sexually active with less fear of pregnancy once they had the number of children they desired.[36] Accordingly, as May points out, "contraceptive technology actually reinforced existing mores and further encouraged a drop in the marriage age."[37] Increased use of contraceptives was therefore highly consistent with the postwar version of the ideology of domesticity.[38]

Although birth control was increasingly available and increasingly used in most parts of the country, the states of Connecticut and Massachusetts lagged behind in the area of law reform. Largely because of the influence of the Catholic church on state politics, those states retained very restrictive birth control statutes until the 1960s.[39]

III. Birth Control in Connecticut

In 1879, the Connecticut State Legislature passed a statute that would prove to be the most restrictive birth control law in the country.[40] Whereas most states with birth control statutes regulated sales and advertising, Connecticut forbade the *use* of contraceptives.[41] Standing alone, a statute restricting the *use* of birth control would obviously be difficult to enforce. But Connecticut had another statute that would prove to be crucial in its effort to restrict birth control usage: a general accessory statute. Under

34. May purposely uses the Cold War term "containment" to illustrate the connection between sexual values and postwar anti-communism. During the Cold War, many believed that "moral weakness was associated with sexual degeneracy, which allegedly led to communism. To avoid dire consequences, men as well as women had to contain their sexuality in marriage where masculine men would be in control with sexually submissive competent homemakers at their side." E. May, supra note 29, at 99.

35. J. D'Emilio & E. Freedman, supra note 31, at 265-74.

36. Id. at 249. Although the birth rate climbed during the 1940s and 1950s, the size of individual families only increased from an average of 2.4 to 3.2 children. "What made the baby boom happen was that *everyone* was doing it—and at the same time." E. May, supra note 29, at 136-37.

37. E. May, supra note 29, at 152.

38. *See* id., at 135-61.

39. *See* infra text accompanying notes 43-49, 86-105.

40. Comment, supra note 8, at 279.

41. The law was originally enacted as part of a broader obscenity statute. 1879 Conn. Pub. Acts ch. 78. In 1888, during a revision of Connecticut general statutes, the birth control law was removed from the general obscenity law and placed in a separate section. *See* Comment, supra note 8, at 279. The statute, which would remain unchanged until it was invalidated in *Griswold*, read as follows: "Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned." Conn. Gen. Stat. Rev. §53-32 (1958).

Connecticut law "[a]ny person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender."[42]

A. State v. Nelson

The role of religion in the battle over birth control in Connecticut was evident early on. The first prosecution under the Connecticut statutes would be at the instigation of Catholic priests in Waterbury. In 1938, the Connecticut Birth Control League opened a clinic in that heavily Catholic community. The clinic was to serve married women who could not afford private medical care.[43] Before opening the clinic, Connecticut birth control activists sought advice about the legality of a clinic under Connecticut law. They were told by a local attorney that, in light of recent federal court rulings, Connecticut law would be interpreted to have an implied medical exception.[44] The part-time clinic operated openly in the heart of town, serving an average of ten to twelve patients each week.[45]

Initially, the Waterbury Police Department left the clinic alone. Then, according to The New Republic, in June 1939 the Catholic Clergy Association of Waterbury "passed a resolution condemning birth control and demanding that the Waterbury Maternal Health Center be investigated and prosecuted 'to the fullest extent of the law.'"[46] On June 11, the resolution "was read at mass in every Roman Catholic Church in Waterbury."[47] A priest at the Church of the Immaculate Conception pointed out to town officials "that the clinic was operating in wanton disregard, not only of the laws of God, but of the State of Connecticut also."[48] The next day, the state obtained a warrant and raided the clinic. Doctors Roger B. Nelson and William B. Goodrich, the clinic's medical directors, and Clara McTernan, its nurse, were arrested and charged with aiding and abetting the use of contraceptives. Nelson and Goodrich were "panic stricken" after their arrest. "They were young, newly in practice, had very little money, and had families to support. If convicted they faced possible loss of their licenses, since the crime was one involving moral turpitude."[49]

Nelson, Goodrich and McTernan filed a demurrer to the charges, arguing that unless state law was construed as having an exception for prescription of contraceptives by doctors, the ban on contraceptives violated the state and federal constitutions by depriving citizens of liberty

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42. Conn. Gen. Stat. Rev. § 54-196 (1958).

43. H. Pollack, supra note 13, at 80. Pollack's account of the *Nelson* case is based on an interview with J. Warren Upson, counsel for Dr. Roger B. Nelson. Id. at 139 n.18.

44. Id. Their lawyer would be proven wrong. *See* infra text accompanying notes 49-58. This was not the first Connecticut Birth Control League clinic. One had been opened in Hartford in 1935, and there were others in Greenwich, New Haven, Stamford, Dambury, Westport, Norwalk and Bridgeport. Id. at 79.

45. Id. at 80.

46. Trowbridge, Catholicism Fights Birth Control, The New Republic, Jan. 22, 1945, at 107; *see also* C. Dienes, supra note 17, at 137.

47. Trowbridge, supra note 46, at 107.

48. H. Pollack, supra note 13, at 80-81.

49. Id.; C. Dienes, supra note 17, at 137; Trowbridge, supra note 46, at 107.

without due process of law. The superior court sustained the demurrer, finding that the statute could not be construed as having a medical exception and, consequently, it was unconstitutional.[50]

The State appealed, and in a three-to-two ruling, the Connecticut Supreme Court of Errors reversed the lower court and upheld the state law. The court first considered the question of whether the statute could be construed to have an implied medical exception. The court noted that the proper interpretation of a statute was "controlled by the intention of the Legislature." An implied exception could be made only "in recognition of long existing and generally accepted rights, . . . or to avoid consequences so absurd or unreasonable that the Legislature must be presumed not to have intended them." Religious beliefs and "sociological and psychological views" could not enter into the determination.[51] The court found that the possibility that the legislature had intended a medical exception "was negatived not only by the absolute language used originally and preserved ever since but also, signally, by its repeated and recent refusals to inject an exception." At every legislative session from 1921 through 1935, bills were introduced to amend the birth control law. No amendments to the statute were enacted. Accordingly, the court believed that "we may not now attribute to the Legislature an accidental or unintentional omission to include the exception . . . . Rejection by the Legislature of a specific provision is most persuasive that the act should not be construed to include it."[52]

The court then turned to the question of whether the statute, without an implied exception, was a constitutional exercise of the state's police power. The court invoked:

> familiar principles that the exercise by states of the police power to conserve the public safety and welfare, including health and morals, may not be interfered with if it has a real and substantial relation to these objects; and that the Legislature is primarily the judge of the regulations required to that end and its police statutes may only be declared unconstitutional when they are arbitrary or unreasonable attempts to exercise its authority in the public interest.

The police power could be employed "in aid of what is . . . held by the prevailing morality to be necessary to the public welfare."[53] The defendants had argued that people have a "natural right" to make decisions about childbearing, and consequently, a right to use contraceptives if they wished to avoid pregnancy. However, "[t]he civil liberty and natural rights of the

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50. State v. Nelson, 126 Conn. 412, 415-16, 11 A.2d 856, 858 (1940). The defendants also argued that the statute failed to fix a reasonably precise standard of guilt and failed to fix a maximum fine. 126 Conn. at 416, 11 A.2d at 858.

51. Id.

52. At biannual legislative sessions from 1921 through 1931, bills were introduced that would have allowed contraceptives when prescribed by a physician. In 1933 and 1935, bills were introduced that would have allowed physicians to prescribe birth control only when pregnancy would be harmful to the health of a woman or her child. Id. at 416-18, 11 A.2d at 858-59.

53. Id. at 422-24, 11 A.2d at 860-61.

individual under the federal and state constitutions are subject to the limitation that he may not use them so as to injure his fellow citizens or endanger the vital interest of society." As to the harm the Connecticut law redressed, the court found:

> [w]hatever may be our own opinion regarding the general subject, it is not for us to say that the Legislature might not reasonably hold that the artificial limitation of even legitimate child-bearing would be inimical to the public welfare and, as well, that use of contraceptives, and assistance therein or tending thereto, would be injurious to public morals, indeed, it is not precluded from considering that not all married people are immune from temptation or inclination to extra-marital indulgence, as to which risk of illegitimate pregnancy is a recognized deterrent deemed desirable in the interests of morality.[54]

The court dismissed the contention that the statute interfered with "the free exercise of conscience and the pursuit of happiness," noting that "a like claim could be made, with no more force, as to statutes prohibiting adultery, or fornication, or any one of many other crimes."[55]

Regarding the purpose underlying the Connecticut statute, the court did not delve into legislative history. Instead, the court believed that it was "reasonable to assume" that the legislature's motives were similar to those found by the Massachusetts Supreme Court to have motivated the Massachusetts legislature in passing its laws. The Connecticut court quoted with approval a statement in *Commonwealth v. Allison*[56] that the "plain purpose" behind restrictions on birth control was "to protect purity, to preserve chastity, to encourage continence and self restraint, to defend the sanctity of the home, and thus to engender . . . a virile and virtuous race of men and women."[57] If a purpose was to increase or maintain the population, that would not be improper. Finally, "if all that can be said is that it is unwise or unreasonably comprehensive, appeal must be made to the Legislature, not the judiciary."[58]

The court in *Nelson* left birth control activists with an opening, however. Though not finding a general medical exception in the statute, the court reserved judgment on the question of "whether an implied exception might be recognized when 'pregnancy would jeopardize life.'"[59]

After the Supreme Court of Errors upheld the Connecticut statute in *State v. Nelson*, the prosecuting attorney offered to *nolle prosequi* the case if the defendants would keep the clinic closed. The prosecutor believed that the defendants had acted in good faith upon the opinion of counsel that the state law had an implied medical exception. Further, the state's real interest

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54. Id. at 424, 11 A.2d at 861.
55. Id.
56. 227 Mass. 57, 62, 116 N.E. 265, 266 (1917).
57. *Nelson*, 126 Conn. at 425, 11 A.2d at 862 (quoting *Allison*, 227 Mass. at 62, 116 N.E. at 266).
58. Id. The court also rejected the defendants' arguments that the statute was unconstitutional because it did not set a maximum fine. Id. The dissenters in *Nelson* did not file an opinion. Id. at 427, 11 A.2d at 863.
59. Id. at 418, 11 A.2d at 859.

was not in punishing the defendants, but in closing down the clinic and in establishing the constitutionality of the statute as enforced against medical personnel.[60] In arguing in support of the motion to dismiss the prosecutions, the state prosecutor told the trial court that the purpose of prosecution was "the establishment of the constitutional validity and efficacy of the statutes under which these accused are informed against. Henceforth any person, whether a physician or layman, who violates the provisions of these statutes, must expect to be prosecuted and punished in accordance with the literal provisions of the law."[61] The defendants accepted the state's offer to drop the case, circumventing a potential United States Supreme Court appeal in *Nelson*.[62]

Following the *Nelson* ruling, the other birth control clinics operating in the state also closed their doors.[63] Doctors in the state were unwilling to violate the law openly. Consequently, birth control advocates turned to declaratory judgment actions as a way of challenging the validity of the state law without placing doctors and nurses at risk.[64]

B. Tileston v. Ullman

Two years after the conclusion of the *Nelson* litigation, Dr. Wilder Tileston, a professor at the Yale Medical School, brought a declaratory judgment action to determine the questions left open in *Nelson*: first, whether the state statute had an implied exception when pregnancy would endanger a woman's life or health, and second, if there was no exception, whether the statute was constitutional.[65] Tileston filed a complaint describing the case histories of three of his patients whose health would be dramatically impaired by pregnancy. The patients were all married women. One had high blood pressure so that, in the words of the Connecticut Supreme Court, "if pregnancy occurred there would be imminent danger of toxemia of pregnancy which would have a twenty-five percent chance of killing her." The second woman had "an arrested case of tuberculosis of the lungs of an acute and treacherous type, so that if she should become pregnant such condition would be likely to light up the disease and set back her recovery for several years, and might result in her death." The third woman was in good health except that she had been "weakened by having had three pregnancies in about twenty-seven months and a new pregnancy would probably have a serious effect upon her general health and might result in permanent disability."[66]

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60. H. Pollack, supra note 13, at 87. *See* Poe v. Ullman, 367 U.S. 497, 532-33 (Harlan, J., dissenting) (discussing the *Nelson* prosecution).

61. 367 U.S. at 532.

62. H. Pollack, supra note 13, at 87.

63. Trowbridge, supra note 46, at 107.

64. H. Pollack, supra note 13, at 89.

65. Tileston v. Ullman, 129 Conn. 84, 84-86, 26 A.2d 582, 583-84 (1942). Tileston worked with the Connecticut Birth Control League in bringing the suit. H. Pollack, supra note 13, at 89.

66. 129 Conn. at 86, 26 A.2d at 584.

The New Haven Superior Court reserved the questions in the case for the Supreme Court of Errors.[67] The Supreme Court first considered the argument that the statute had an implied medical exception when pregnancy threatened a woman's life or health. The court referred to its discussion of the statute's legislative history in *Nelson* and noted that another attempt to amend the law had failed since that case was decided. The court found the failed attempts to amend the statute to be significant, "for in the consideration of these bills year after year there was ample opportunity for the legislature to accept a compromise measure. It might have adopted a partial exception, as for instance, in cases where life might be in jeopardy if pregnancy occurred."[68] Because the legislature had not availed itself of its many opportunities to amend the statute, the court concluded that it was "[t]he manifest intention of the legislature" to have an "all-out prohibition" on contraceptives. "For us now to construe these plainly worded statutes as inapplicable to physicians, even under the limited circumstances of this case, would be to write into the statutes what is not there and what the legislature has thus far refused to place there."[69]

According to the court, "an implied limitation upon the operation of the statute may only be made in recognition of long existing rights or to avoid consequences so absurd or unreasonable that the legislature must be presumed not to have intended them."[70] Accordingly, the court implicitly found no "long existing rights" at stake in the case and found nothing absurd or unreasonable about the prohibition on birth control and recommendation of abstinence for married women for whom pregnancy posed serious risks.

Having construed the statute to ban all uses of contraceptives, even when pregnancy endangered a woman's life, the court then turned to the question of whether such a statute violated the state and federal constitutions. The court noted that the state argued that contraceptives were "not the only method open to the physician for preventing conception." The consensus of medical opinion was that the safest way for doctors to aid patients for whom pregnancy was life-threatening was to prescribe contraceptives. However,

> [t]he state claims that there is another method, positive and certain in result. It is abstention from intercourse in the broadest sense—that is, absolute abstention. If there is one remedy, reasonable, efficacious and practicable, it cannot fairly be said that the failure of the legislature to include another reasonable remedy is so absurd or unreasonable that it must be presumed to have intended the other remedy also.[71]

The case came down to the question of "whether abstinence from intercourse is a reasonable and practicable method of preventing the unfortunate consequences . . . . Do the frailties of human nature and the

67. Id. at 84, 87, 26 A.2d at 583, 585.
68. Id. at 87, 26 A.2d at 584-85.
69. Id.
70. Id. at 92, 26 A.2d at 586 (citations omitted).
71. Id.

uncertainties of human passions render it impracticable?" The court believed that "[t]hat is a question for the legislature, and we cannot say it could not believe that the husband and wife would and should refrain when they both knew that intercourse would very likely result in a pregnancy which might bring about the death of the wife."[72] In framing the issue this way, the court implied that the unreasonable behavior was on the part of married couples who had sex when pregnancy would be harmful to the woman, rather than on the part of the state legislature. A result of the court's ruling was that Connecticut law on contraceptives was more restrictive than Connecticut law on abortion, which allowed abortion when it was necessary to preserve a woman's life.[73]

Justices Christopher Avery and Newell Jennings dissented from the court's ruling. Justice Avery wrote that

> [i]t is argued that in all cases it is possible for a married woman to avoid conception by a policy of continence and abstention from marital intercourse. Even if it be conceded that such a course of conduct is reasonably practicable, taking into consideration the propensities of human nature, the resort to such a practice would frustrate a fundamental of the marriage state. The alternative suggested . . . would tend in many cases to cause unhappiness and discontent between parties lawfully married, would stimulate unlawful intercourse, promote prostitution, and increase divorce.[74]

The dissenters believed that "[a] proper respect for the legislature forbids an interpretation [of the statute] which would . . . be so contrary to human nature."[75]

Tileston appealed to the United States Supreme Court, but the case was dismissed on standing grounds. Tileston had not alleged that his own liberty or property rights were infringed by the statutes. "The sole constitutional attack . . . is confined to their deprivation of life—obviously not appellant's but his patients.' " The doctor's patients were not parties to the suit, however, and there was "no basis on which we can say that he has standing to secure an adjudication of his patients' constitutional right to life, which they do not assert in their own behalf."[76]

With the Supreme Court's dismissal of *Tileston*, the Connecticut court's interpretation of the state law remained in force. This did not mean that all uses of birth control in Connecticut were halted. The effects of the ban were more subtle but still pernicious. Some forms of contraceptives were easy to purchase in drugstores. If sold "for the prevention of disease" or for "feminine hygiene," and not for contraceptive purposes, condoms,

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72. Id. at 96, 26 A.2d at 588.

73. Conn. Gen. Stat. §§ 6056, 6057 (1930). The court believed that there was an important difference between medically necessary abortion and contraception. In the event that an ongoing pregnancy threatened a woman's life, "there was no alternative" other than abortion or harm to the woman's health. In contrast, before becoming pregnant, there was another alternative: abstinence from sex. 129 Conn. at 86-93, 26 A.2d at 584-87.

74. 129 Conn. at 102, 26 A.2d at 590.

75. Id.

76. Tileston v. Ullman, 318 U.S. 44, 46 (1943).

douches, suppositories and spermicide were not illegal.[77] Condoms could be used to prevent venereal disease, but diaphragms, which were more effective for contraception, could not, so the restrictions meant that only less effective forms of birth control were readily available. As Planned Parenthood General Counsel Harriet Pilpel put it, "the chief result of the most restrictive laws has been to put a premium on the use of inferior methods free from the supervision of the medical profession."[78] In addition, birth control restrictions had an effect on the quality of these products. A Fortune magazine report on the contraceptive industry found that "[t]he industry harbors hundreds of scoundrels who make small fortunes out of ignorance."[79] According to Pilpel, states having "the most rigid laws are least able to cope with the problem of wholesale trafficking in inadequate contraceptives."[80] The more effective forms of birth control, such as the diaphragm, and instructions in the proper use of contraceptives could be obtained from some physicians who would break the laws.[81] But not all women could afford private medical care. Consequently, the law's greatest impact was on the poor.[82] As Pilpel remembers it, "[t]he only way we could provide public access to contraception in those years was to have an underground railroad, transporting women in station wagons to Rhode Island or New York to get contraceptive materials."[83] For many women, the practical result was no birth control and unwanted pregnancy.[84]

IV. The Catholic Church and Birth Control Politics

The dissenters in *Tileston* assumed that the Connecticut legislature could not be so unreasonable as to enact a law that would forbid married persons access to birth control when pregnancy was life-threatening. In the years after *Tileston*, the state legislature would prove itself undeserving of such charitable thoughts. In every legislative session after *Tileston*, a bill to amend the birth control statute was introduced and, like clockwork, defeated.[85] The proposed changes were modest: they either authorized

77. *See* The Accident of Birth, Fortune, Feb. 1938, at 83, 108-14 [hereinafter Fortune]; Stone & Pilpel, supra note 23, at 219.

78. Stone & Pilpel, supra note 23, at 219.

79. Fortune, supra note 77, at 85. According to the report, "The reliable manufacturers . . . are surrounded by fly-by-nights with no scruples. The industry's conventional outlets are drugstores, but these keep prices jacked up beyond reason." Id. *See* J. Reed, From Private Vice to Public Virtue: The Birth Control Movement in American Society Since 1830, 239-46 (1978).

80. Stone & Pilpel, supra note 23, at 219.

81. Catholic and non-Catholic doctors often differed in their willingness to prescribe birth control, and women in the state would discuss among themselves the differences between doctors on the subject of birth control. Telephone interview with Louise Trubek, plaintiff in Trubek v. Ullman, 147 Conn. 633 (1960), appeal dismissed, 367 U.S. 907 (1961), (Aug. 30, 1988). *See* infra note 116 for a discussion of the *Trubek* case.

82. Telephone interview with Catherine Roraback, counsel to Planned Parenthood in Buxton v. Ullman, 147 Conn. 48, 156 A.2d 508 (1959), appeal dismissed sub. nom., Poe v. Ullman, 367 U.S. 497 (1961), reh'g denied, 368 U.S. 869 (1961), and Griswold v. Connecticut, 381 U.S. 479 (1965), (Sept. 2, 1988); Daniels, Birth Control and Democracy, The Nation, Nov. 1, 1941, at 429.

83. N.Y. Times, Sept. 19, 1987, at 10, col. 2. *Accord* H. Pollack, supra note 13, at 99.

84. *See* infra text accompanying notes 107-11.

85. *See* Buxton v. Ullman, 147 Conn. 48, 56-57 n.2, 156 A.2d 508, 513 n.2 (1959) (listing bills introduced and ultimately defeated in the 1943, 1945, 1947, 1949, 1951, 1953, 1955, 1957

doctors to prescribe contraceptives or, more narrowly, authorized doctors to do so only when pregnancy was life-threatening. At times, the legislation died in committee. Often, it would pass the Connecticut House, and be defeated in the Senate.[86]

The central reason for the repeated inability of the Connecticut legislature to modify its birth control statutes was the role of religion in state politics. C. Thomas Dienes has found that the Catholic church was the "primary obstacle" to birth control reform in Connecticut, and that "Catholic opposition constituted an effective impediment to change."[87]

The influence of the Catholic church was felt even without the church's overt involvement in the birth control controversy. During an unsuccessful attempt to modify birth control statutes in 1931, a commentator noted that "[t]he Catholic Church did not openly enter this controversy, but it was not obliged to; the legislators were fully aware of its position." Their "[r]eluctance to incur its disfavor and eagerness to win its approval were perhaps the chief factors in determining the outcome."[88] In later years, Catholic priests became heavily involved in the effort to defeat legislative attempts to ease birth control restrictions. Their efforts were not confined to anti-birth control sermons on Sundays. They engaged in voter registration drives, they encouraged parishioners to support anti-birth control candidates for the legislature, and they actively campaigned to defeat any changes in the birth control laws.

In 1947, as Time magazine put it, "Connecticut medicine was shaken by one of its biggest rows in years." The fight began when Connecticut doctors formed a "Committee of 100" to back a birth control reform bill that would enable doctors to give information on contraceptives to patients whose lives or health would be endangered by pregnancy. This time Catholic opposition was direct: "Roman Catholic spokesmen promptly opposed it."[89] Appropriately enough in the postwar period, during the 1947 legislative battle, the Catholic War Veterans figured prominently in the opposition to the legislation.[90] At first, the controversy was confined to speeches and letters to newspapers. Ultimately, however, "professional blood began to flow. Six angry doctors, members of the Committee of 100, announced that they had been kicked off the staff by the Roman Catholic hospitals in Waterbury, Stamford and Bridgeport" for refusing to remove their names from the petition.[91] Dr. Oliver Stringfield of Stamford testified in favor of the bill and then was removed from the staff of a Catholic hospital. He protested that the church forced him to choose dismissal or "with gross hypocrisy to conceal my sincere beliefs from disclosure to the

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and 1959 legislative sessions).

86. Comment, supra note 8, at 280-81 n.49.

87. Dienes, supra note 17, at 106, 147. The Church was also an important force in birth control politics in Massachusetts. Belisle, Birth Control in Massachusetts, The New Republic, Dec. 8, 1941, at 759.

88. Defeat in Connecticut, Outlook & Independent, April 15, 1931, at 518.

89. The Law in Connecticut, Time, April 21, 1947, at 58 [hereinafter Time].

90. 68 Years, The New Republic, May 19, 1947, at 8.

91. Id.; N.Y. Times, May 5, 1947, at 25, col. 2.

public, so as to escape [its] disapproval."[92] Father Lawrence E. Skelly, director of hospitals for the Hartford diocese, explained: "The [hospital's] action was self-defensive . . . . You gave your name publicly to the support of a movement which is directly opposed to the code under which the hospital operates."[93]

Catholic priests used the pulpit to try to influence the outcome of state legislative races in Connecticut in 1948. On October 31, the Sunday before election day, the pastors of all Catholic churches in the Hartford diocese called their parishioners' attention to an anti-birth control editorial in the diocesan newsletter. The New York Times reported that "[t]he editorial said it was the 'duty of every voter' to learn before casting his vote what 'commitments' had been made on the birth control issue by candidates for the General Assembly."[94] The Reverend John J. Kennedy, rector of St. Peter's Church in Danbury, said that "no Catholic person in conscience [sic] can support any candidate favoring such legislation."[95] The Reverend Austin B. Digman of Saint Mary's Church in Bethel told his parishioners that support for a candidate who favored reform of birth control laws "would be a violation of the natural moral law which Catholics and the Catholic Church are duty bound to uphold and would be a direct violation of God's Sixth Commandment."[96]

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92. Zimmerman, Contraception and Commotion in Connecticut, Look Magazine, Jan. 30, 1962, at 83.

93. Time, supra note 89, at 58. The removals were protested by ministers of other faiths. Seventeen Protestant ministers, two rabbis and a social worker signed a statement "commending the six doctors for refusing to retract 'a principle of conscience.'" Id.

Similar hospital firings happened in other states. For example, four staff physicians at Mercy Hospital in Springfield, Massachusetts were dismissed in 1947 for giving birth control advice to their patients. N.Y. Times, June 18, 1947, at 23, col. 2. In Poughkeepsie, New York, in 1952, seven doctors were told to sever their ties with Planned Parenthood or resign from the St. Francis Hospital staff. One doctor quickly resigned from the local chapter's medical advisory board because "he had 'four operation cases' in the hospital and did not want to 'distress them.'" N.Y. Times, Feb. 1, 1952, at 1, col. 6-7.

94. N.Y. Times, Nov. 1, 1948, at 15, col. 3.

95. Id.

96. Id.; N.Y. Times, Nov. 2, 1948, at 3, col. 1. The Sixth Commandment is "Thou shalt not commit adultery." Exodus 20:14.

Similarly, in 1942 and 1948, Catholic priests were heavily involved in fighting birth control referenda in Massachusetts. Both measures, which would have allowed doctors to prescribe contraceptives for their patients when pregnancy would jeopardize their health, were defeated. Belisle, The Cardinal Stoops to Conquer, The New Republic, Nov. 30, 1942, at 710; N.Y. Times, Nov. 3, 1948, at 2, col. 1. Archbishop Richard J. Cushing stated that those opposing the 1948 referendum had spent "well over $50,000" to defeat the measure. This disclosure prompted the Massachusetts Planned Parenthood League to question the church's tax-exempt status. N.Y. Times, Nov. 13, 1948, at 16, col. 6.

During the 1942 campaign, priests used the pulpit to encourage citizens to register to vote. The Springfield Union reported that parishioners at Sacred Heart Church were told that "Catholics had a moral obligation to vote against the referendum and *that any Catholic who knowingly voted in favor of it could not expect absolution*." Quoted in Belisle, supra, at 712. Monsignor Splaine told the St. Mary's Church congregation that it was a sin to vote in favor of the referendum. The newsletter of the Archdiocese of Boston ran weekly editorials against the measure from July of 1942 until the election. But the referendum's proponents sometimes had difficulty finding a forum. After the owner of radio station WESX in Salem sold air time to referendum supporters, a Salem priest urged parishioners not to listen to the station or to buy anything advertised on it. In another incident, eleven priests protested to the Catholic

The heavy involvement of the Catholic church in birth control politics was very effective in Connecticut. During the many unsuccessful attempts to amend the birth control law, proponents of the measure would sometimes succeed in the Connecticut House, but the Senate would then defeat the legislation. The reason given for the differential treatment of birth control by the House and Senate was that House members were elected by a primarily Protestant constituency, whereas Senators tended to represent areas with a more heavily Catholic constituency.[97] According to a report on the 1957 legislative session by the Legislative Committee of the Planned Parenthood League of Connecticut,

> the makeup of the Senate is from 36 districts and that many of its members come from the central city or town in these districts, where our opposition is strongest. These centers represent the more Roman Catholic segment of the State population, which at the time of our action was about 43% of the total population. House members, on the other hand, come from the smaller towns and rural areas, generally Protestant, and are, in the main, less influenced by party pressures and are closer to their constituents.[98]

Notwithstanding its biannual failures, the Planned Parenthood League of Connecticut continued its legislative efforts.

Although religion was a critical factor in the legislative process, the religious backgrounds of the Connecticut Supreme Court justices did not determine the outcome of the birth control cases. All five members of the court during the years the *Nelson* and *Tileston* cases were decided were Protestants.[99] Of greater importance was the close tie between the court and the legislature. Judges in Connecticut were nominated by the governor and elected by the General Assembly.[100] At least until the late 1940s, the custom was to appoint state politicians to the bench.[101] Another tradition until the late 1970s was that Connecticut governors almost always nominated to vacancies on the supreme court the state superior court judge with

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owner of an Italian newspaper after he sold space to the Mother's Health Committee, which supported the referendum. Id.

97. *See* N.Y. Times, May 19, 1963, at 81, col. 5.

98. Comment, supra note 8, at 281 (quoting report of the Legislative Committee of the Planned Parenthood League of Connecticut, from the files of the Planned Parenthood Federation of America, New Haven, Connecticut). *Accord* C. Dienes, supra note 17, at 144-47.

99. When State v. Nelson, 126 Conn. 412, 11 A.2d 856 (1940), was before the court, Justices Maltbie, Avery, Brown, Hinman and Jennings were members of Protestant churches. Alcorn, Obituary Sketch of William M. Maltbie, 148 Conn. 740, 745 (1961); Brown, Obituary Sketch of Christopher L. Avery, 143 Conn. 735, 736 (1956); Anderson, Obituary Sketch of Allyn L. Brown, 164 Conn. 713, 713 (1973); King, Obituary Sketch of George E. Hinman, 148 Conn. 737, 740 (1961); Biographical sketch of Newell Jennings, 52 National Cyclopedia of American Biography 576 (1970). When Tileston v. Ullman, 129 Conn. 84, 26 A.2d 582 (1942), was decided, Justice Ellis, also a member of a Protestant church, had replaced Justice Hinman. *See* Brown, Obituary Sketch of Arthur F. Ellis, 151 Conn. 747, 749 (1964).

100. Inglis, The Selection and Tenure of Judges, 22 Conn. B. J. 106, 111 (1948). In 1986, Connecticut adopted a constitutional amendment changing the judicial selection process to one in which the governor nominates judges recommended by a Judicial Selection Commission. Conn. Const. amend. XXV.

101. *See* Editorial, The Selection of Judges, 21 Conn. B. J. 355 (1947).

the most seniority.[102]

In 1947, the Connecticut Bar Journal questioned the state tradition of appointing politicians to the state courts. According to a Bar Journal editorial, when studying the backgrounds of the judges sitting at that time, "[r]are indeed will be the case in which the background of appointment has not been a narrative of political activity." The editorial questioned whether "politicians really make the best judges."[103] The Bar Journal editors felt that "[s]urely there are enough patronage jobs to be dealt out" to satisfy political needs so that judicial positions need not be among them.[104]

The tradition of selecting politicians for judicial appointments may have contributed to the state supreme court's deferential posture. Many members of the court had previously served in the state legislature.[105] In ruling on state legislation, the justices were reviewing the handiwork of a political body with which they had close connections. In upholding state laws, they affirmed the validity of a process they had previously participated in and the integrity of a group of people they knew. Accordingly, the customary judicial selection process operating in Connecticut during the time the birth control cases came before the court contributed to the likelihood that the Connecticut Supreme Court would be particularly deferential to the state legislature. Consequently, though religion may not have had a direct influence on the court, it had an indirect influence; the court's deferential posture meant that the confluence of religion and state politics in the legislature would be codified in Connecticut constitutional law.

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102. Between 1900 and 1977, 46 of the 48 people appointed to the state supreme court were superior court judges. Forty of them had the most seniority among superior court judges at the time. Adomeit, Selection by Seniority: How Much Longer Can a Custom Survive That Bars Blacks and Women From the Connecticut Supreme Court? 51 Conn. B. J. 295, 300 (1977).

Connecticut Governor Ella Grasso departed from this tradition and that of appointing politicians when she nominated Justice Ellen Peters, formerly a Yale Law School professor, to the Connecticut Supreme Court in 1978. *See* Connecticut State Register and Manual 140 (1979).

103. Editorial, supra note 101, at 355-57.

104. Id. at 357; *see also* Inglis, supra note 100, at 116 (suggesting that politics played an "important part" in judicial selection in Connecticut).

105. At the time *Nelson* was decided, three of the five justices on the Supreme Court of Errors had previously been elected to the General Assembly. Among them was Justice Christopher Avery, who dissented. *See* Alcorn, supra note 99, 148 Conn. at 741; Anderson, supra note 99, 164 Conn. at 713; Brown, supra note 99, 143 Conn. at 736. A fourth justice served for seven sessions as a clerk to the General Assembly. King, supra note 99, 148 Conn. at 737. The fifth member of the court, Justice Newell Jennings, did not serve in the state legislature. *See* Baldwin, Obituary Sketch of Newell Jennings, 152 Conn. 749, 749 (1965). Justice Jennings dissented in *Nelson*.

At the time *Tileston* was decided, only Justice Jennings, who dissented, had not been elected to the General Assembly. *See* Brown, supra note 99, 151 Conn. at 748; Alcorn, supra note 99; Anderson, supra note 99; Brown, supra note 99, 151 Conn. at 749; Baldwin, supra note 105.

During the years when Buxton v. Ullman, 147 Conn. 48 (1959), Trubek v. Ullman, 147 Conn. 633 (1960), and State v. Griswold, 151 Conn. 544 (1964), were decided, three of the five members of the court had previously served in the General Assembly either as law clerks or members of the legislature. *See* Connecticut State Register and Manual 107 (1959); Connecticut State Register and Manual 123 (1964).

V. *Buxton v. Ullman*

Fifteen years after *Tileston*, after their long series of unsuccessful attempts in the legislature, birth control advocates again turned to the courts. This time one of the plaintiffs was Dr. C. Lee Buxton, Chair of Yale Medical School's Department of Obstetrics and Gynecology.[106] Buxton became involved in efforts to challenge the Connecticut birth control ban because he considered it to be a "travesty."[107] He said that the statutes were "actually preventing us from giving birth control advice to ward patients in the hospital,"[108] and so kept doctors from giving birth control information to people who "desperately needed help."[109] The consequences, in Buxton's view, were "tragic." "Within a few months in 1955, several of our obstetrical patients suffering from severe medical complications of pregnancy either died or suffered vascular accidents which were permanently incapacitating. These patients should never have become pregnant in the first place but they had never been able to obtain contraceptive advice."[110] One case involved a twenty-eight-year-old woman with "severe mitral stenosis," a form of heart disease. "She had sought contraceptive advice in our clinic in vain at the time of her marriage. She died in the sixth month of pregnancy as a result of the added heart strain imposed by this condition, and in spite of several months of heroic efforts on the part of the medical and nursing staff to save her." Buxton considered the Connecticut statutes to be "largely responsible for the death of two individuals, the mother and the unborn baby." For him, "[t]he irony of this situation . . . [was] that following cardiac surgery she would have been able in all probability to have several children."[111]

In part because Yale was the only medical school in the state, Buxton, as Chair of Obstetrics and Gynecology, felt that it was his personal responsibility to do something about the situation.[112] In 1958, Buxton, along with Fowler Harper, a Yale Law School Professor and President of the Planned Parenthood League of Connecticut, Estelle Griswold, the Executive Director of the League, and Catherine Roraback, a Connecticut attorney, began to plan a legal challenge to the birth control statutes.[113]

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106. N.Y. Times, June 7, 1958, at 10, col. 2.

107. Buxton, Birth Control Problems in Connecticut: Medical Necessity, Political Cowardice and Legal Procrastination," 28 Conn. Med. 581 (August 1964). I am indebted to Marion Stillson, *see* infra note 139, for leading me to Buxton's very helpful article.

108. Spencer, The Birth Control Revolution, The Saturday Evening Post, Jan. 15, 1966, at 70.

109. Buxton, supra note 107, at 581.

110. Id. at 581-82.

111. Id. It was considered too dangerous to do cardiac surgery during this woman's pregnancy.

112. Id. at 583.

113. Telephone interview with Catherine Roraback, counsel to Planned Parenthood, supra note 82; Spencer, supra note 108, at 70. *See generally* Roraback, Griswold v. Connecticut: A Brief Case History, 16 Ohio N.U.L. Rev. 395 (1989).

In part because Planned Parenthood supporters gathered together and planned litigation strategy and because of the involvement of the Planned Parenthood organization in the birth control litigation, some have dismissed the cases as unimportant "test cases" that did not involve real issues. *See* Bork Hearings, supra note 13, at 116, 241. However, prelitigation strategy sessions and involvement of interested organizations have been an important aspect

They filed a series of lawsuits in New Haven Superior Court.

Buxton found individuals willing to bring suit anonymously.[114] Three were women with medical conditions that made pregnancy dangerous or unadvisable. Jane Doe had nearly died during a previous pregnancy, and "another pregnancy would be exceedingly dangerous to her life." Pauline Poe, who sued with her husband, had "borne three abnormal children, no one of whom lived more than ten weeks," making "another pregnancy extremely disturbing to both Mr. and Mrs. Poe." Hanna Hoe had given birth to four children, all of whom died. Mr. and Mrs. Hoe had incompatible Rh blood factors so that it was unlikely that they could bear a healthy child.[115] A fourth was a graduate student who wanted to avoid pregnancy for economic reasons.[116] Catherine Roraback acted as counsel in the cases, and Estelle Griswold and the Planned Parenthood League of Connecticut provided support.[117]

Abraham Ullman, the State's Attorney, was named as defendant in these cases. Ullman demurrered to the complaints, arguing that the declaratory judgment actions were improper because the issues in the cases had already been conclusively determined, and that the passage of time and changes in court personnel did not justify reconsideration of the issues. The demurrers were sustained by the trial court, and the plaintiffs appealed to the Connecticut Supreme Court.[118]

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of other twentieth century civil rights litigation efforts. *See, e.g.*, M. Tushnet, The NAACP'S Legal Strategy Against Segregated Education, 1925-1950 (1987). It was also not extraordinary at this time for a group to set its sights on invalidation of state laws in the United States Supreme Court. The school desegregation cases brought by the NAACP are perhaps the most well-known example of such a strategy. *See* id.; R. Kluger, Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality (1977).

114. Anonymity was important. At the time Tileston v. Ullman, 129 Conn. 84, 26 A.2d 582 (1942), was litigated, birth control advocates had difficulty finding people willing to participate in the case. H. Pollack, supra note 13, at 89-90. Some feared retaliation. One *Buxton/Poe* plaintiff was afraid her husband would lose his job if her participation in the case became public. Id. at 102 n.45.

115. Buxton v. Ullman, 147 Conn. 48, 52-53, 156 A.2d at 511 (1959), appeal dismissed, 367 U.S. 497 (1961), reh'g denied, 368 U.S. 869 (1961).

116. H. Pollack, supra note 13, at 101. This plaintiff's case was later mooted when she moved from the state. As a substitute, David and Louise Trubek, who were Yale Law Students, filed suit. A married couple, they stated that they wished to postpone childbearing for economic and personal reasons, and because pregnancy at that time would interfere with Louise Trubek's legal education. *See* Trubek v. Ullman, 147 Conn. 633, 636, 165 A.2d 158, 159 (1960), appeal dismissed, 367 U.S. 907 (1961); Comment, supra note 8, at 289; N.Y. Times, May 27, 1959, at 23, col. 5. A demurrer to their complaint was sustained by the trial court, and upheld by the Connecticut Supreme Court. *Trubek*, 147 Conn. at 635, 637, 165 A.2d at 159. The United States Supreme Court dismissed the appeal. Trubek v. Ullman, 367 U.S. 907 (1961). In contrast with other plaintiffs who wished to remain anonymous, the Trubeks "saw no reason not to" sue under their own names. Interview with Louise Trubek (Aug. 30, 1988).

117. H. Pollack, supra note 13, at 100-01. A separate suit was filed by three members of the clergy. They argued that the birth control ban interfered with their liberty, freedom of speech, and freedom of religion by making it illegal for them to counsel parishioners about birth control in premarital counseling. N.Y. Times, May 5, 1959, at 24, col. 6. This case was delayed pending the outcome of the other litigation and ultimately was never tried. *See* C. Dienes, supra note 17, at 153 n.10.

118. *Buxton*, 147 Conn. 48, 50, 156 A.2d 508, 510.

The Connecticut Supreme Court noted that the primary difference between *Buxton* and previous Connecticut birth control cases was that "here each plaintiff is asserting his own constitutional right, while in the *Nelson* and *Tileston* cases the doctors were attempting to assert the right of their patients to receive treatment."[119] Buxton argued that he had a "constitutional right, distinct from that of his patients, to practice his profession free from unreasonable restraint," and the patients asserted their right to use birth control.[120] The court believed that there was "no real difference in the nature of the right" claimed by Buxton and that of the patients. "The effect of regulation of a business or profession is to curtail the activities of both the dispenser and the user of goods or services. Both are deprived of some advantage they might otherwise have."[121]

The court again rejected the argument that a medical exception should be read into the statute. Such a construction would violate the separation of powers. "In our tripartite system of government, the judiciary accords to the legislature the right to determine in the first instance what is the nature and extent of the danger to the public health, safety, morals and welfare and what are the measures best calculated to meet the threat." Courts would overturn police power legislation only "when it clearly appears that the legislative measures taken do not serve the public health, safety, morals or welfare or that they deny or interfere with private rights unreasonably." According to the court, "[i]t was out of respect for these fundamental principles," that no medical exception was found in *Nelson* and *Tileston*.[122]

The court noted that the legislature had repeatedly refused to amend the birth control statutes since *Tileston*.[123] The continued rejection of changes in the laws was significant, for "[c]ourts cannot, by the process of construction, abrogate a clear expression of legislative intent, especially when, as here, unambiguous language is fortified by the refusal of the legislature, in the light of judicial interpretation, to change it."[124]

Turning to the constitutionality of the statute, the court acknowledged that "the claims of infringement of constitutional rights are presented more dramatically than they have ever been before." Nevertheless, the claims were essentially the same as those in previous cases. The court reaffirmed its ruling in *Tileston* that, although contraceptives were "the best and safest preventative measure" for the plaintiffs, the legislature did not have to allow it when there was "another alternative, abstinence from sexual intercourse."[125] According to the court,

> [w]e cannot say that the legislature, in weighing the considerations for and against an exception legalizing contraceptive measures in

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119. Id. at 54, 156 A.2d at 512.
120. Id.
121. Id.
122. Id. at 55, 156 A.2d at 512.
123. Id. at 56, 156 A.2d at 513. In a footnote, the court listed the unsuccessful birth control reform bills introduced in the legislature from 1943 through 1959. Id. at 56-57 n.2, 156 A.2d at 513 n.2.
124. Id. at 57, 156 A.2d at 513-14.
125. Id. at 58-59, 156 A.2d at 514.

> cases such as the ones before us, could not reasonably conclude that, despite the occasional hardship which might result, the greater good would be served by leaving the statutes as they are.[126]

In the court's view, the cases raised "an issue of public policy" reserved for the legislature: "Each of the separate magistracies of our government owes to the others a duty not to trespass upon the lawful domain of the others. The judiciary has a duty to test legislative action by constitutional principles, but it cannot, in that process, usurp the power of the legislature."[127] For the court, overturning the birth control statutes would be such an improper judicial usurpation. Once again, the Connecticut Supreme Court deferred to a legislature that would prove to be unwilling to amend its statute. Following its precedents and finding no constitutional problems posed by the birth control ban, the court kept birth control clinics closed.[128]

In June 1961, a divided Supreme Court dismissed the appeal from the Connecticut ruling. Justice Felix Frankfurter, writing for a four-member plurality, found the case nonjusticiable because he believed there was no realistic threat of prosecution under the statutes. "The Connecticut law prohibiting the use of contraceptives has been on the State's books since 1879. During the more than three-quarters of a century since its enactment, a prosecution for its violation seems never to have been initiated, save in *State v. Nelson*."[129] The "unreality" of the case was further illuminated by the fact that certain contraceptives could be purchased in Connecticut drugstores. Frankfurter believed that Connecticut had practiced an "undeviating policy of nullification."[130] He found that the lack of prosecutions under the statute "deprives these controversies of the immediacy which is an indispensable condition of constitutional adjudication. This Court cannot be umpire to debates concerning harmless, empty shadows." According to Frankfurter, "[to] find it necessary to pass on these statutes now, in order to protect appellants from the hazards of prosecution, would be to close our eyes to reality."[131]

Frankfurter appears to have been wrong regarding the lack of prosecutions other than *Nelson*. During oral argument, Connecticut Assistant Attorney General Raymond Cannon stated that he knew of "two cases in the police courts prosecuting proprietors of business establishments for having vending machines dispensing contraceptives."[132]

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126. Id.
127. Id.
128. Id. at 59, 156 A.2d at 514.
129. Poe v. Ullman, 367 U.S. 497, 501 (1961). According to Frankfurter, the circumstances of *Nelson* proved "the abstract character of what is before us." He considered *Nelson* to be a "test case . . . brought to determine the constitutionality of the Act." After the state law was upheld by the state court, the prosecutions were dismissed. Id. at 501-02. As Justice Harlan noted in his dissent, however, "the respect in which *Nelson* was a test case is only that it was brought [by the state] for the purpose of making entirely clear the State's power and willingness to enforce [the statute] against '*any* person, whether a physician or layman.' " 367 U.S. at 533 (Harlan, J., dissenting). *See* supra text accompanying notes 60-62.
130. 367 U.S. at 502, 508.
131. Id. at 508.
132. Poe v. Ullman, 29 U.S.L.W. 3257, 3259 (March 7, 1961) (arguments before the

Justice Brennan provided the fifth vote to dismiss *Poe*. He recognized the issue at stake in the case, but not its implications. He was

> not convinced, on this skimpy record, that these appellants as individuals are truly caught in an inescapable dilemma. 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.[133]

This impasse frustrated birth control advocates. As long as the law was on the books, it restricted the open prescription of contraceptives and therefore kept birth control clinics closed. As long as it was not actively enforced, its constitutionality could not be challenged, and birth control services would continue to be illegal.[134]

VI. *State v. Griswold*

Planned Parenthood activists considered their next step. If Frankfurter was right that the state laws were "harmless, empty shadows," they could open clinics and operate freely. If Frankfurter was wrong, there would be prosecutions, and they would find themselves in court again. They decided to open a clinic and see what happened.[135]

The Planned Parenthood League of Connecticut opened a birth control clinic on November 1, 1961, at its Trumbull Street headquarters in New Haven. Dr. Buxton was its Medical Director and Estelle Griswold served as Executive Director. Buxton told the New York Times that Frankfurter's opinion in *Poe* led him to believe that "all doctors in Connecticut may now prescribe child spacing techniques to married women when it is medically indicated."[136] If Buxton was wrong and clinic personnel were prosecuted, Planned Parenthood officials were not concerned. Fowler Harper believed that "it would be a state and community service if a criminal action were brought . . . . I think citizens and doctors alike are entitled to know if they are violating the law."[137] Meanwhile, the state's attorney in New Haven assumed that if there was a violation of the law, the local police would take action.[138]

The clinic served a heavy load of clients, and prescribed a variety of contraceptives, including the new birth control pills.[139] In addition to its

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Supreme Court); *see Poe*, 367 U.S. at 512-13 (Douglas, J., dissenting).

133. Id. at 509 (Brennan, J., concurring in the judgment). Justices Black, Douglas, Harlan, and Stewart dissented.

134. *See* N.Y. Times, Nov. 3, 1961, at 37, col. 4.

135. Telephone interview with Catherine Roraback, counsel to Planned Parenthood, supra note 82. According to Roraback, the Connecticut attorney who handled the *Buxton/Poe* and *Griswold* litigation in the state courts, the purpose behind opening the clinic "was to provide services in Connecticut," not to generate a lawsuit to give Yale law professors a chance to argue the case, as was suggested in the Bork hearings. Id. *See* Bork Hearings, supra note 13, at 116 (quoting Robert Bork as suggesting that the litigation was "framed by Yale professors" simply "because they like this type of litigation").

136. N.Y. Times, Nov. 3, 1961, at 37, col. 4.

137. Id.

138. Id.

139. *See* M. Stillson, The Confluence of Choice and Chance in the Construction of a

regular patients, on November 3, the clinic was visited by two detectives. The police acted after receiving a complaint by James G. Morris of West Haven, a Catholic who believed that "a Planned Parenthood Center is like a house of prostitution. It is against the natural law which says marital relations are for procreation and not entertainment."[140]

On November 10, police returned to arrest Griswold and Buxton. They were charged with violating the state birth control ban. The clinic was closed following the arrest. It had served seventy-five women in four sessions over the ten days it was open. At the time of the closing, the clinic was solidly booked for another month.[141]

Griswold and Buxton pled not guilty to the charges, and their attorney, Catherine Roraback, filed a demurrer, arguing that the prosecutions violated the state and federal constitutions.[142] Griswold and Buxton were tried on January 2, 1962. Three married women testified that they had attended the clinic, had received information and contraceptives, and had used the contraceptives.[143] The defendants were convicted of aiding and abetting the use of contraceptives. On appeal, the convictions were sustained by the Appellate Division of the Circuit Court. Roraback then filed an appeal to the Connecticut Supreme Court of Errors.[144]

The state supreme court disposed of the case briefly. The court found that the facts of the case indicated that there was "no doubt" that Griswold and Buxton "did aid, abet and counsel married women in the commission of an offense." The court was not sympathetic to their argument that Connecticut precedent on birth control should be reconsidered. According to the court, the state laws had "been under attack in this court on four different occasions in the past twenty-four years . . . . [E]very attack now made on the statute . . . has been made and rejected in one or more of these cases."[145] The court followed its line of cases. "[W]e adhere to the principle that courts may not interfere with the exercise by a state of the police power to conserve the public safety and welfare, including health and morals, if the law has a real and substantial relation to the accomplishment

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Successful Legal Strategy: A Case-Study of Griswold v. Connecticut, 22 (1986) (unpublished paper, Georgetown University Law Center). I am grateful to Wendy Williams for providing me with a copy of Stillson's helpful paper.

140. Zimmerman, supra note 92, at 80-81; H. Pollack, supra note 13, at 115. New Haven prosecutors later indicated that they would have acted with or without Morris' complaint. H. Pollack, supra note 13, at 116.

141. N.Y. Times, Nov. 11, 1961, at 25, col. 1. The clinic was open three times a week. Id.

142. N.Y. Times, Nov. 25, 1961, at 25, col. 8.

143. State v. Griswold, 151 Conn. 544, 546, 200 A.2d 479, 480 (1964), rev'd, 381 U.S. 479 (1965). In addition, a detective testified that when he visited the clinic, Griswold explained its functions to him and gave him literature and contraceptives. N.Y. Times, Jan. 3, 1963, at 16 (Nat'l ed.).

144. *Griswold*, 151 Conn. at 545, 200 A.2d at 480; N.Y. Times, Jan. 18, 1963, at 2, col. 1 (Western ed.).

Planned Parenthood attorneys did not expect the state supreme court to overturn the statute on privacy grounds. They hoped that the court would overturn *Tileston* and construe the statute as containing an implied exception when pregnancy jeopardized life. Telephone interview with Catherine Roraback, supra note 82.

145. *Griswold*, 151 Conn. at 546-47, 200 A.2d at 480.

of those objects."[146] Again, deference was appropriate. "The legislature is primarily the judge of the regulations required to that end, and its police statutes may be declared unconstitutional only when they are arbitrary or unreasonable attempts to exercise its authority in the public interest." The legislature had "not recognized that the interest of the general public calls for the repeal or modification of the statute as heretofore construed by us."[147]

Griswold and Buxton would, of course, go on to prevail in the Supreme Court, and *Griswold v. Connecticut* would become a landmark case establishing a constitutional right to privacy.[148] As far as the Connecticut court was concerned, however, the defendants' constitutional rights had not been violated, there was nothing unreasonable about the ban on contraceptives, and if birth control advocates wished to change the law, the proper forum was the legislature. One result, in the words of Dr. Buxton, was that in 1964 "women in Connecticut [were] still unnecessarily dying because of the statute."[149]

VII. Conclusion

Several times between 1940 and 1964 the Connecticut Supreme Court considered the constitutionality of the state ban on contraceptives. Each time the court declined to scrutinize carefully the degree to which the state law served state purposes. The court refused to find state laws unreasonable or fundamental rights impaired when state legislation placed women's lives in jeopardy when they participated in marital sex. The central focus of the court's analysis was always on deference to the state legislature. And, due to decades of legislative gridlock on birth control reform, the court's deference left reproductive rights in Connecticut at a standstill.

The state court's answer to the dilemma Connecticut women found themselves in was that women's due process rights were not violated because of the existence of an alternative: abstinence from sexual intercourse. Many women avoided the harsh choices the court reserved for them by going out-of-state for a diaphragm, seeing a doctor willing to violate the law, or using the condoms and spermicide available over-the-counter. For those women unable to afford private medical care and for whom pregnancy was life-threatening, the success rates of over-the-counter contraceptives were insufficient. Consequently, though some forms of birth control were regularly sold in Connecticut drugstores, they did not work well enough for women who could not risk pregnancy. The result was that the Connecticut laws, and the court's deferential posture, took their toll on the lives of poor women in Connecticut in the form of unintended pregnancies and premature deaths.

Although the Connecticut law had harsh consequences, the courts and legislatures of other states were more permissive toward birth control. As a result, one might argue that the lesson to be learned from the history of

146. Id.
147. Id. at 547, 200 A.2d at 480.
148. *See* Griswold v. Connecticut, 381 U.S. 479 (1965).
149. Buxton, supra note 107, at 583.

state treatment of the right to use birth control is generally positive: overall, states have safeguarded reproductive rights on some level in the past. The contemporary treatment of abortion funding cases by some state courts reinforces this point.[150]

As the Supreme Court cuts back on the federal right to abortion, the state courts and state legislatures will be the only practical alternative. Nevertheless, the history of birth control in Connecticut illustrates the limitations of reliance on state courts for protection of fundamental rights. State courts, less insulated from majoritarian politics, are less willing or able to make unpopular decisions.[151] The Connecticut Supreme Court was unwilling to overturn the legislature when faced with a patently unjust and unreasonable law that was a source of great political controversy. That failure of will, according to Connecticut's leading gynecologist, cost women their lives. The women harmed by the statute were so invisible to the legal system that Justice Frankfurter thought of their concerns as "empty shadows."[152] It will again be these invisible women who will bear the burden of restriction of the federal right to abortion. As did the women in Connecticut, they will bear them on their very real bodies, with their very real lives.

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150. *See* supra note 4.
151. Neuborne, The Myth of Parity, 90 Harv. L. Rev. 1105 (1977).
152. Poe v. Ullman, 367 U.S. 497, 508 (1961).